RENDERED: MAY 27, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000167-MR

JASON WILSON — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 06-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Jason Wilson, appeals from an order of the Laurel Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In June 2006, Appellant and his then-fiancé, Amanda Vaughn, were indicted by a Laurel County Grand Jury for murder and first-degree robbery,

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

stemming from the death of Vaughn's father, Tommy Taylor, Jr. Appellant was appointed counsel at his arraignment and the matter was eventually set for trial July 16, 2007. However, in April 2007, the Commonwealth served notice to seek the death penalty. The trial court thereafter granted a continuance and also ordered that Appellant undergo a mental competency evaluation. In addition, the Department of Public Advocacy assigned a capital trial team to defend Appellant.

Appellant was evaluated at the Kentucky Correctional Psychiatric Center ("KCPC") and following a hearing in October 2007, was declared competent to stand trial. However, on the advice of counsel Appellant entered a guilty plea to both charges on February 2008. Pursuant to an agreement with the Commonwealth, Appellant received a sentence of life without the possibility of parole for 25 years on the murder charge and a concurrent twenty year sentence on the first-degree robbery charge.

On March 3, 2009, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel. He also filed motions for an evidentiary hearing and the appointment of counsel. The trial court denied the motions by order entered April 15, 2009. This appeal ensued.

Appellant argues that the trial court erred in denying his motion without an evidentiary hearing because his claims of ineffective assistance of counsel could not be refuted from the face of the record. We disagree.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the

extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (*Quoting Bronk*, 58 S.W.3d at 486. (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-7 (Ky. 1983).

Appellant argues that his counsel rendered ineffective assistance by failing to investigate his mental health records and failing to properly investigate and consider an extreme emotional disturbance defense. Appellant claims that Vaughn told him that Taylor had sexually abused both her and her daughter on a prior occasion. The night after this revelation, Appellant and others had been smoking marijuana and using methamphetamine at Appellant's home. The next morning,

Appellant and Vaughn proceeded to Taylor's home to retrieve some personal belongings. While there, Appellant confronted Taylor about the allegations of abuse. This confrontation led to an altercation which resulted in Taylor's death.

Appellant argues that he informed his counsel that he had also been sexually abused as a child and that his version of events would have supported an EED defense. Yet, he contends that counsel advised him that the Commonwealth had him "pegged" and he needed to plead guilty or risk receiving the death penalty.

"Extreme emotional disturbance" has been defined as:

> A temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in and of itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse there for, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as the defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 469 (Ky. 1986), *cert. denied*, 479 U.S. 1057 (1987). Further, our Supreme Court has emphasized that EED "is established only by a showing of some dramatic event which creates a temporary emotional disturbance" and "[t]here must be a 'triggering event,' which triggers an explosion of violence on the part of the defendant at the time he committed the offense." *Baze v. Commonwealth*, 965 S.W.2d 817, 823 (Ky. 1997), *cert. denied*, 523 U.S. 1083 (1998). Finally, although there need not be a definite time frame between the triggering event and subsequent murder, the EED must be "sudden

and uninterrupted." *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991), *cert. denied*, 506 U.S. 921 (1992).

In determining that Appellant failed to demonstrate that counsel was ineffective with respect to this claim, the trial court noted,

> Here the movant claims his triggering event was the allegation of prior sexual abuse against the victim made by his fiancé. However, several hours passed between this triggering event and the crime, and the movant also states that he spent this time abusing controlled substances with friends and family, rather than festering with uncontrollable rage. The movant points to precedent in making an argument that a triggering event may be a gradual build-up of emotion and need not be a "'flash point' normally associated with the heat of passion." *McClellan*, at 468. However, in a quote the movant includes in his own motion, he notes that "precedents only require the triggering event to be 'sudden and uninterrupted'" *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991) (emphasis added). Given these facts, the Court must, under *Strickland*, avoid the temptation "to second-guess counsel's assistance after a conviction or adverse sentence" and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, at 687-688, 689.

We agree with the trial court that the facts as described by Appellant did not rise to the level of EED. Furthermore, but for counsel's plea negotiation, Appellant was facing a potential death sentence. As our highest court stated in *Glass v. Commonwealth*, 474 S.W.2d 400, 401 (Ky. 1971), "a defendant's plea of guilty motivated by the desire to escape possible greater punishment is not a basis for vacating the judgment and . . . it is not improper for an attorney to influence a client to reach such a decision." There is a strong presumption that counsel rendered effective assistance and, in light of the record before us, we will not

second guess counsel's decisions. We conclude that the trial court properly determined that Appellant's claims were refuted from the face of the record and a hearing was not warranted.

The order of the Laurel Circuit court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Brooke Buchanan
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort Kentucky