RENDERED: AUGUST 26, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000376-MR

FINLEY PERRY — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 06-CR-00051

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

MOORE, JUDGE: Finley Perry appeals from the denial without a hearing of his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of counsel. After our review, we affirm the judgment and sentence of the McCreary Circuit Court finding Perry received constitutionally sufficient representation.

FACTS

A jury found Finley Perry guilty of murder. In lieu of the sentencing phase of the trial, he agreed to serve a term of 25 years for that crime. Perry appealed that conviction to the Kentucky Supreme Court alleging there was error when the trial court failed to instruct the jury on extreme emotional disturbance and the lesser included offense of manslaughter in the first degree. The judgment and sentence were affirmed. *Perry v. Commonwealth,* 2007-SC-000280-MR, 2009 WL 1110395 (Not To Be Published Opinion Rendered April 23, 2009).

Perry then filed a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel. He argued he was denied effective assistance of counsel because his trial attorneys failed to suppress statements he gave to the police; failed to seek a change of venue; failed to have a mental health evaluation performed on him prior to trial and failed to render effective assistance at every critical phase of his case. The trial court overruled that motion without an evidentiary hearing. Perry appealed that determination.

On October 14, 2010, we ordered the Department of Public Advocacy to review this case pursuant to the guidelines established by Kentucky Revised Statutes (KRS) § 31.110(2)(c) to determine whether the department intended to represent Perry on this appeal The department filed its response on November 29, 2010, indicating that after its review of the record, it was determined that this appeal "is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." *Id*. Perry then continued this appeal *pro se.*

STANDARD OF REVIEW

A hearing on an RCr 11.42 motion is "not necessary when the record in the case refutes the movant's allegations." *Hopewell v. Commonwealth,* 687 S.W.2d 153, 154 (Ky. App. 1985). If a trial court does not conduct an evidentiary hearing on the RCr § 11.42 motion, our review is "confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth,* 411 S.W.2d 321, 322 (Ky. 1967).

When reviewing a claim of ineffective assistance of counsel, we are guided by the two prong test from *Strickland v. Washington,* 466 U.S. 668, 687 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

> Perry maintains the burden to meet this two-part test and overcome the strong presumption that counsel's assistance was constitutionally sufficient. *Moore v. Commonwealth,* 983 S.W.2d 479, 482 (Ky. 1998). He has the "burden to establish convincingly that he was deprived of some fundamental right which would justify

the extraordinary relief" requested. *Haight v. Commonwealth,* 41 S.W.3d 436, 442 (Ky. 2001).

To show any deficiency by counsel resulted in actual prejudice, Perry must present information there was a reasonable probability the outcome would have been different. *Bowling v. Commonwealth,* 80 S.W.3d 405, 411 (Ky. 2002). He fails to meet his burden.

SUPPRESSION OF CONFESSION

Perry first contends counsel failed to seek suppression of his confession to the police on the grounds he was intoxicated and under the influence of alcohol, cocaine and hydrocodone. He now argues that his confession was unknowing and thus involuntary. His argument is that he was so intoxicated that he could not knowingly and intelligently waive his rights and provide a confession. *See Miranda v. Arizona,* 384 U.S. 436, 444 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

The standard for determining the voluntary nature of a confession is the totality of the circumstances. *Allee v. Commonwealth,* 454 S.W.2d 336, 341 (Ky. 1970). The burden of establishing the voluntary nature of a confession is placed on the government, which must show by a preponderance of the evidence that any waiver of rights and subsequent confession was voluntary. *Lego v. Twomey,* 404 U.S. 477, 489, 92 S.Ct. 619, 627, 30 L.Ed.2d 618 (1972).

A friend of Perry's testified that at approximately 6:30 a.m. on the morning of the murder, Perry appeared "normal." But, this witness also testified Perry appeared "drunk" and "high." Perry was arrested at approximately 11:00

a.m. while driving on a suspended operator's license. The arresting officer testified he did not notice anything about Perry's demeanor, appearance or activities that suggested Perry was intoxicated in any manner. Significantly, Perry was arrested for driving on a suspended license, not for being intoxicated or under the influence of drugs.

Perry was interviewed beginning at approximately 4:20 p.m., and that interview was recorded both in audio and video. The detective conducting the interview testified Perry was cooperative, coherent, rational and never stopped the interview. Over five hours elapsed while Perry was in custody before he provided a statement.

Perry's attorney did make a motion to suppress the statement given to the police but not on the grounds Perry was intoxicated or the statement was "unknowing." Clearly, the evidence was insufficient to legitimately make that argument. Counsel's decision to not seek suppression of the statement based on intoxication was not unreasonable under the circumstances; representation was therefore not constitutionally defective. *See Sparks v. Commonwealth,* 721 S.W.2d 726, 728 (Ky. App. 1986).

MENTAL HEALTH EVALUATION

Next Perry presents a two-part contention he was denied effective assistance of counsel when his attorney did not have him evaluated before trial by a mental health professional. Perry has the burden to show some lack of mental capacity in order to succeed on his RCr 11.42 motion. There is nothing in the

record to show Perry did anything to bring any alleged mental defect to the attention of counsel or the trial court. There are no references to any history of mentally-related hospitalizations, treatment or even consultations. There is nothing to indicate a mental evaluation was needed or appropriate. Further, Perry does not show how this failure to have his mental condition evaluated deprived him of a fair trial. It is only when one's mental wellbeing is "seriously in question" that a mental health professional is required to assist with the defense. *Crawford v. Commonwealth,* 824 S.W.2d 847, 850 (Ky. 1992).

Perry then proposes that the failure of the trial court to offer an instruction on extreme emotional disturbance (EED) was the result of ineffective counsel at both the trial and appeal levels. We disagree. Although Perry views this as additional evidence of his mental state, EED is not defined in any manner as being a mental illness. *McClellan v. Commonwealth,* 715 S.W.2d 464, 469 (Ky. 1986.) Trial counsel did in fact offer an instruction encompassing EED that was rejected by the trial court. Counsel also argued EED during motions for a directed verdict. The Supreme Court rejected Perry's direct appeal finding the evidence did not support an instruction on EED. The record defeats Perry's contention that his counsel was deficient in failing to provide an EED instruction for the jury's consideration.

Perry also alleges appellate counsel failed to present the argument that the EED instruction in some manner required a mental health evaluation. We disagree. When reviewing appellate counsel's performance "counsel must have

omitted completely an issue that should have been presented on direct appeal." *Hollon v. Commonwealth.,* 334 S.W.3d 431, 437 (Ky. 2010). The EED issue was argued extensively and rejected by the Kentucky Supreme Court. There was no ineffective assistance of counsel on either the trial level or the appellate level as it relates to the EED instruction or any proposed mental defect requiring a mental health evaluation.

Perry also argues the trial court committed reversible error when it failed to instruct the jury on EED. Although that argument was rejected on direct appeal by the Kentucky Supreme Court, Perry now relies on the holding in *Benjamin v. Commonwealth,* 266 S.W.3d 775 (Ky. 2008). That reliance is misplaced. In *Benjamin,* the Kentucky Supreme Court reversed a murder conviction because the trial court failed to provide an instruction concerning EED. "On appeal, the reviewing court must make a determination as to the sufficiency of the evidence." *Id.* at 781. In order to qualify for an EED instruction,

> [t]here must be evidence that the defendant suffered "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth,* 715 S.W.2d 464, 468-69 (Ky. 1986). "[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted. It is not a mental disease or illness.... Thus, it is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently

> shown." *Foster v. Commonwealth,* 827 S.W.2d 670, 678 (Ky. 1991) (citations omitted).

Greene v. Commonwealth, 197 S.W.3d 76, 81-82 (Ky. 2006).

In *Benjamin*, the defendant

> was confronted with allegations of infidelity as well as the news that his wife had been engaging in an extramarital affair with a family member. The following morning, the victim returned and the argument between the two resumed, this time including assertions that Benjamin would never see his children again. Further, Benjamin claims that he was physically attacked by the victim during this final argument, at which point the altercation turned deadly.

Benjamin, at 783. This contrasts with the facts of Perry's own crime. We find Perry's alleged evidence of EED insufficient to warrant a jury instruction.

CHANGE OF VENUE

Perry next lists as error an argument that he did not receive effective assistance of counsel because counsel did not seek a change of venue. He does not, however, actually address that issue in his brief. Perry's burden was to show "a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced" him. *Bennett v. Commonwealth,* 978 S.W.2d 322, 325 (Ky. 1998). He has offered nothing to support his argument and has not met the burden of showing how counsel's failure to request a change of venue prejudiced him in any manner.

INVESTIGATION OF LAW AND FACTS

Finally, Perry lists an argument that counsel was ineffective at "every critical stage" and failed to properly investigate the facts and law related to the case. Again, this argument appears to be abandoned as it is not developed within his brief except a statement that counsel failed to investigate the "facts and the law of the case (EED and suppression of confession)." We have previously analyzed those two issues as it relates to the effective assistance of counsel and found Perry's arguments lacking. He has the burden to provide specific facts and grounds to establish an ineffective assistance of counsel claim; mere conclusory allegations will not suffice. *Bartley v. Commonwealth,* 463 S.W.2d 321, 322 (Ky. 1971).

Perry is not guaranteed errorless counsel, but counsel likely to render reasonably effective assistance. *Sanborn v. Commonwealth,* 975 S.W.2d 905, 911 (Ky. 1998). He further must show counsel's performance "caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir. 1992). He has not met that burden.

We conclude that there was no error and affirm the judgment of the McCreary Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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