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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000524-MR

JONATHAN BROWN — APPELLANT

v. — APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE JOHN CAUDILL, JUDGE
ACTION NO. 07-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: The appellant, Jonathan Brown, appeals an order of the Morgan County Circuit Court denying his request for relief brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and alleging ineffective assistance of counsel. However, Brown received a reasonable plea agreement,

which he accepted, and Brown's attorney was not ineffective for advising him to do so. Accordingly, the decision of the circuit court is affirmed.

On August 27, 2007, Brown was indicted by a Morgan County Grand Jury on one count of capital murder, one count of first-degree robbery, and one count of being a persistent felony offender in the second degree. The charges arose from a series of events that culminated with the murder of Doyle Sweeney on July 17, 2007. On August 20, 2008, the Commonwealth advised they would seek the death penalty in Brown's case.

Jacklyn Ferguson and Michael McDonald were present at the time of the murder and were arrested in conjunction with Sweeney's death. Cassie Kidd, a minor at the time, was also arrested in conjunction with the murder. The three codefendants entered pleas on December 17, 2008, and each agreement set forth that they would testify at Brown's trial.

Brown entered a guilty plea on January 30, 2009. The plea set forth a recommended sentence of fifty years' imprisonment on the murder count and twenty years' imprisonment on the robbery count with the robbery sentence enhanced to twenty-five years as a result of Brown's being a persistent felony offender in the second degree. On February 4, 2009, Brown was sentenced in accordance with the plea agreement. During the plea colloquy, Brown indicated that his attorney fully advised him of applicable defenses and the court determined Brown was competent to enter the plea. During the colloquy, Brown admitted to

striking Sweeney over the head with a baseball bat and robbing Sweeney when he was unconscious.

On January 31, 2012, Brown filed a *pro se* motion to proceed *in forma pauperis*, a motion for the appointment of counsel, as well as an RCr 11.42 motion alleging ineffective assistance of counsel and requesting an evidentiary hearing. Brown's requests were denied by the circuit court on February 6, 2012. While several grounds for relief were set forth in Brown's RCr 11.42 motion, only one argument is raised on appeal.

Brown asserts that his attorney failed to advise him as to the availability of the extreme emotional distress (EED) defense to mitigate the charge of murder. *See* Kentucky Revised Statutes (KRS) 500.070. Brown's original RCr 11.42 motion also alluded to his incompetency and, on appeal, Brown avers that his counsel should have insisted on an evaluation to support the EED defense. In support of his argument, Brown contends that Sweeney was a known pedophile and drug dealer who attempted to prey on someone close to him. With this argument in mind, we turn to the standard of review.

A finding of ineffective assistance of counsel requires that counsel's performance not only fall outside the "wide range of professionally competent assistance[,]" but that it be so deficient it causes the defendant to accept a plea when he otherwise would have insisted on proceeding to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). The circuit court must

only hold a hearing if the motion raises issues not resolved on the face of the record. RCr 11.42.

Brown alleges that his attorney failed to advise him regarding the applicability of a defense to the charge of murder. Therefore, we must determine the likelihood that the defense would have succeeded at trial. *See Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009) ("Where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.").

In order to establish an EED defense, a defendant must have acted under 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." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). A triggering event is required. *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2000). "The event that triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted." *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). If the jury concludes that a defendant acted under EED, they cannot be convicted of murder because EED "mitigates the *mens rea* element of that offense." *Spears v. Commonwealth*, 30 S.W.3d 152, 154 (Ky. 2000); KRS 507.020(1)(a).

Brown contends that his attorney failed to investigate or inform him regarding the EED defense, and that had he known of the defense, he would have proceeded to trial. However, even assuming Brown's counsel was deficient, he has failed to establish prejudice. See *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002) ("To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome."). We believe that it is extremely unlikely that the defense would have succeeded at trial given the strong evidence of guilt and premeditation of the robbery.

We also believe that RCr 11.42(2) has not been complied with by the Appellant. This rule requires the movant to state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such ground. Although Brown argues that Sweeney propositioned "someone close to him" and that Sweeney was a known pedophile and drug dealer, Brown does not indicate why this information was personally upsetting to him. Brown gives us no insight into his relationship with Kidd or why a comment to her would be sufficient to send him into a rage, nor does Brown state why the facts would be supportive of his position at a hearing. This is fatal to his claim because facts establishing ineffective assistance of counsel must be stated. *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993).

Turning to the record on appeal, we find that three witnesses agreed to testify against Brown at trial. The substance of their testimony was revealed before the grand jury and indicates that Brown devised a plan to rob Sweeney prior to the murder. None of the witnesses indicated that Brown was enraged or was acting with uncontrolled emotions. Instead, the record indicates Brown devised a plan to rob Sweeney. Brown does not deny robbing Sweeny. The evidence also indicates that the windows of Sweeney's car were shattered and items were stolen from within. The evidence of premeditation in this case is inconsistent with the EED defense, which requires that the perpetrator act uncontrollably. Given these facts, we find it highly unlikely that the EED defense would have prevailed at trial.

It is also noteworthy that, had Brown proceeded to trial, the Commonwealth planned to seek the death penalty. Even if Brown successfully convinced the jury that he acted under EED, mitigating the charge of murder to manslaughter, he could still have received fifty years to life imprisonment because he was a persistent felony offender in the second degree. *See* KRS 507.030 & 532.080(5). In light of the potential sentences, including the death penalty, and the willingness of three eyewitnesses to testify against Brown, the plea agreement was a reasonable alternative to trial. There is "no ineffective assistance of counsel where defendant was advised to accept a reasonable plea agreement." *Commonwealth v. Elza*, 284 S.W.3d at 122.

For the reasons set forth above, we affirm the decision of the circuit court.

ALL CONCUR.

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