

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001467-MR

DEREK EDMONDS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 04-CR-001179 & 04-CR-002445

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Derek Edmonds appeals *pro se* from the Jefferson Circuit Court's order denying his motion for post-conviction relief. For the following reasons, we affirm.

Following a trial in 2007, a Jefferson County jury convicted co-defendants Edmonds and Tyreese Hall of murder, first-degree robbery, and first-degree

sodomy. Edmonds was sentenced to life without the benefit of parole or probation on the murder count, life without parole on the sodomy count, and twenty years on the robbery count. Hall received a sentence of life without the benefit of parole or probation for twenty-five years on the murder count, twenty-five years on the sodomy count, and twenty years on the robbery count. In a consolidated appeal, Edmonds and Hall directly appealed to the Kentucky Supreme Court, which affirmed in all respects except reversed and remanded for the limited purpose of entry of an amended judgment on Edwards' sodomy conviction to state that he received a sentence of life, and not a sentence of life without parole. *Edmonds v. Commonwealth*, 2007-SC-000350-MR, 2009 WL 4263142 (Ky. Nov. 25, 2009), *as modified* (Dec. 1, 2009). In that opinion, the Kentucky Supreme Court summarized the facts of this case as follows:

Early in the morning of April 6, 2004, Clifton Agnew, a homeless man sleeping outside near the Salvation Army in Louisville, Kentucky, was beaten, hit with a crock pot, stabbed in the leg, and robbed. While unconscious, he was sodomized with a bottle and two sticks, which were shoved up his rectum, into his abdomen, and through his organs. A police officer saw someone flee the scene, but was unable to catch the suspect. Two police officers then discovered the victim bleeding from his head and rectum. He was barely alive, and EMS took him to the hospital, where he remained unresponsive and in a coma until his death.

A twenty-seven-inch stick and a smaller fifteen-inch stick were recovered from the alley where the attack occurred; both sticks were covered in the victim's blood. A broken beer bottle with blood around the neck and a knife were also found, and police recovered a crock pot, which was dented, broken, and bloody.

Both Appellants were arrested that day. Hall had a swollen hand and blood spatters on his pants. Edmonds had blood-soaked pants and boots. DNA from the blood on both Appellants' clothing matched the DNA profile of the victim.

2009 WL 4263142, at *1.

Following the affirmation of his judgment on direct appeal, Edmonds filed a *pro se* motion in the Jefferson Circuit Court to vacate his judgment pursuant to RCr¹ 11.42 and CR² 60.02. The trial court denied his motion, finding that Edmonds received effective assistance of counsel. Edmonds now appeals.³

On appeal, Edmonds raises four claims of ineffective assistance of counsel. Three of those claims were not presented to the trial court for consideration; therefore, we need not consider them on appeal. And, the remaining claim does not warrant post-conviction relief.

Procedurally, “[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02.” *Gross v. Commonwealth*, 648

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

³ The Department of Public Advocacy (DPA) was originally appointed by the trial court to represent Edmonds in this post-conviction proceeding, but was permitted to withdraw as counsel after reviewing the record and determining that the “post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense.” Kentucky Revised Statutes (KRS) 31.110(2). Likewise, on appeal from the trial court’s order denying Edmonds’ motion for post-conviction relief, the DPA was originally appointed and then subsequently relieved from representing Edmonds for the same reason.

S.W.2d 853, 856 (Ky. 1983). Edmonds' *pro se* post-conviction motion requests relief under both RCr 11.42 and CR 60.02, but procedurally his motion is one for RCr 11.42 relief and we will treat it as such.

In order to prove ineffective assistance of counsel for purposes of RCr 11.42 relief, a movant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). Judicial review of performance of defense counsel is deferential to counsel and a strong presumption exists that the conduct of counsel falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

As stated previously, three of Edmonds' four claims fail as being unpreserved; meaning Edmonds did not raise them in his RCr 11.42 motion filed with the trial court. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002) (a specific claim of ineffective assistance of counsel which was not raised in the movant's RCr 11.42 motion will not be considered on appeal). These include his claims that trial counsel rendered ineffective assistance by failing to object to a witness's (Kaye James) trial testimony, failing to argue that a witness's (Larry Mulligan) signature on two photo arrays did not match, and failing to challenge the murder count on double jeopardy grounds. Since he failed to present these claims

to the trial court for consideration, Edmonds is procedurally barred from asserting them now.

That being said, these three claims are substantively without merit as well. First, Edmonds' claim that counsel was ineffective for failing to object to James's testimony is refuted by the record. Edmonds argued on direct appeal that he was prejudiced by James's testimony; in rejecting his argument, the Kentucky Supreme Court noted that trial counsel did in fact object to this testimony, both at trial and pretrial via a motion in limine. 2009 WL 4263142, at *2-3. Therefore, Edmonds' present assertion that counsel failed to object is refuted by the record and lacks merit.

Secondly, Edmonds' claim of an alleged discrepancy in Mulligan's signature likewise fails on the merits since the photo array was never admitted into evidence. Moreover, Mulligan did not testify at trial and the Kentucky Supreme Court noted on direct appeal that any hearsay statements regarding Mulligan's photo identification of Hall as the perpetrator were actually favorable to Edmonds. 2009 WL 4263142, at *6. Accordingly, no prejudice to Edmonds resulted.

Thirdly, Edmonds argues his trial counsel was ineffective for failing to challenge his murder count on double jeopardy grounds. He avers that he could not be convicted of sodomy *and* murder since the sodomy caused Agnew's death and therefore the sodomy and murder counts should have merged. The record refutes this claim. Edmonds' double jeopardy argument is premised on his belief that the sodomy caused Agnew's death. But the doctor who performed Agnew's

autopsy testified at trial that the cause of death was the head injury Agnew sustained when he was assaulted, with a contributing factor being blood loss due to the extensive injuries to his abdomen and chest. Since the record reveals that sodomy was not the cause of Agnew's death, Edmonds' premise is false and his merger argument must fail.

Edmonds' fourth claim is the only claim that, procedurally, is properly before this court for review. He asserts that trial counsel performed ineffectively by failing to file a motion to sever his trial from Hall's. According to Edmonds, his and Hall's antagonistic defenses necessitated separate trials. In reviewing this claimed error, the trial court noted that although Edmonds' counsel did not move for separate trials, Hall's counsel did and the motion for severance was denied. The trial court found that had Edmonds' counsel made a similar motion, it likewise would have been denied. The trial court concluded that counsel cannot be deficient for failing to file a futile motion. We agree, and hold that this claim cannot meet the first prong of *Strickland* requiring a showing of deficient performance, and thus is without merit.

For the foregoing reasons, the Jefferson Circuit Court's order denying Edmonds' motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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