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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001956-MR

RAY'MON JA'KEE ROGERS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 07-CR-00251

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

CLAYTON, JUDGE: Ray'mon Ja'kee Rogers, *pro se*, appeals the Hardin Circuit Court's denial of Kentucky Rules of Criminal Procedure (RCr) 11.42 motion and its failure to hold an evidentiary hearing on the matter. After careful consideration, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2007, Rogers was indicted on charges of complicity to commit murder, complicity to criminal attempt to commit murder, and two counts of complicity to commit first-degree robbery. The Commonwealth filed notice that it was seeking the death penalty but later withdrew it. In 2008, following a jury trial, Rogers was convicted of these charges and sentenced to forty years' imprisonment.

At trial, the following evidence was presented. In April 2007, Rogers had just turned eighteen years old. He was friends with James Bryant and Marcus Pratt. Bryant often drove them in a Ford Crown Victoria, which his wife owned. On the evening of April 20, 2007, Rogers borrowed the Crown Victoria and drove to New Albany, Indiana, to pick up Pratt and James Hollister, who was sixteen at the time of the crime. Hollister testified that Pratt had about $800.00 to $1,000.00 in cash that night.

The group left New Albany, crossed the bridge into Louisville, picked up two girls, and then went to a liquor store. Pratt paid for the liquor. From there, they went to a residence where Bryant joined the group. Next, they stopped at another drive-thru liquor store, and Pratt again paid for the liquor. Hollister noticed that Bryant watched Pratt getting out the cash, and thus knew that Bryant was aware that Pratt carried a large amount of money on his person. Then, they went to the girls' apartment where they drank alcohol and smoked marijuana. Hollister also noticed that Pratt had two cell phones.

After a while, Pratt told Rogers and Bryant that he and Hollister wanted to go back to Indiana. Bryant responded there was one more stop to make, and they left the girls' apartment. After getting back into the vehicle, Pratt and Hollister fell asleep. Rogers drove first, but because he was so intoxicated, Bryant took over the driving. Bryant drove the car to Elizabethtown, with Hollister and Pratt asleep in the backseat. Hollister testified he was awakened by the sounds of Rogers and Bryant outside the vehicle yelling at Pratt to give them "everything" he had.

Bryant, then, noticed that Hollister had awakened and pulled him from the vehicle. All four began to fight. Pratt tried to run and as he did, Rogers drew a gun and shot Pratt, killing him. In the meantime, Bryant severely beat Hollister into unconsciousness. In the morning, Hollister woke up and tried to get help at nearby residences. His cell phone and money were missing. He eventually passed out. The next thing he remembered was awakening in the hospital, having suffered a broken nose and other injuries. With regards to Pratt, neither his two cell phones nor his cash were found on his body. In the days following the murder, Rogers was observed with a large amount of cash and a black cell phone that he had not previously been known to have.

Police began to suspect that Rogers and Bryant were involved in the crimes. In an April 23, 2007 interview with Elizabethtown Police, Rogers admitted to being with Bryant the evening of April 20, 2007, but claimed that Bryant alone committed all of the crimes. He contended that he had been asleep

when they arrived at Elizabethtown and was awakened by shots outside the vehicle as Bryant murdered Pratt. Rogers maintained that he pretended to sleep while Bryant pulled Hollister from the vehicle and beat him. Rogers repeated this version of events at trial.

Rogers appealed the jury verdict to the Kentucky Supreme Court[1] and the convictions were affirmed. Next, in May 2013, he made an RCr 11.42 motion alleging ineffective assistance of both trial and appellate counsel on several grounds. Rogers also requested an evidentiary hearing on the motion. On October 22, 2013, the trial court denied both the evidentiary hearing and the RCr 11.42 motion. Rogers appeals from this order.

During the pendency of the appeal, Rogers moved for the appointment of counsel, but the Department of Public Advocacy (DPA), after reviewing the record, determined pursuant to Kentucky Revised Statutes (KRS) 31.110(2)(c) that "post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." Thereafter, our Court denied Rogers's motion for appointment of counsel.

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

As explained in *Brown v. Commonwealth*, 253 S.W.3d 490, 498 (Ky. 2008):

> "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

[1] *Rogers v. Commonwealth*, 315 S.W.3d 303 (Ky. 2010).

> *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). These standards are set forth in *Strickland*. They require the defendant to prove two main elements. First, that his counsel's performance was deficient. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. "This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. Second, that counsel's deficient performance prejudiced the defendant's defense. *Id*. "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." *Id*.

Furthermore, review of counsel's performance is highly deferential. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The *Strickland* standard has been adopted in Kentucky. *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986).

In making an RCr 11.42 motion, a convicted defendant claiming ineffective assistance of counsel "has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561-62 (Ky. 2006)(*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by ... RCr 11.42." *Dorton v. Commonwealth*, 433

S.W.2d 117, 118 (Ky. 1968). However, on appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance. *Brown*, 253 S.W.3d at 500.

With these standards in mind, we turn to the case at hand.

ANALYSIS

Originally, Rogers asserted several grounds supporting his RCr 11.42 motion for ineffective assistance of both trial and appellate counsel. On appeal, besides alleging error on the part of the trial court for not appointing counsel or ordering an evidentiary hearing, Rogers only raises two arguments of ineffective assistance of his trial counsel. First, he maintains that counsel failed to object to the inclusion of a voluntary intoxication instruction in conjunction with the intentional offenses. And second, that counsel failed to request facilitation instructions.

Initially, we address the first argument, that is, whether counsel's assistance was ineffective for failure to object to the lack of a voluntary intoxication instruction regarding the intentional offenses. In fact, the definition of "voluntary intoxication" was included in the definition section of the jury instructions, but Rogers contends that his counsel's failure to request that voluntary intoxication be included in the instructions regarding the intentional offenses supports the inadequacy of counsel's representation. Rogers claims that this instruction should have been used for mitigation purposes. He proffers that this instruction was warranted because some evidence at the trial indicated that he had

been too intoxicated to drive earlier in the evening. However, his argument that this instruction should have been included with the intentional offenses ignores the trial strategy employed by his attorneys and the facts of the case.

During the trial, Rogers's entire defense was based upon the idea that he was not the perpetrator of the crimes but that he was merely present in the vehicle while Bryant committed the crimes. This argument was also consistent with Rogers's statements to the police. Obviously, after Rogers's assertion that he did not participate at all in the crimes and that Bryant was the sole perpetrator, if trial counsel had requested an instruction on voluntary intoxication, the trial strategy would have been compromised. It is illogical to argue that one was completely uninvolved in a crime and also argue that one was so drunk he or she did not know what they were doing.

Under the circumstances, Rogers's attorneys had to either present a defense consistent with his statements or a defense that discredited these statements. Rather than impugning Rogers's credibility, counsel chose a defense consistent with his statements. We concur with the trial court that such a decision on the part of counsel represents sound trial strategy, which appellate courts under the legal standard for consideration of RCr 11.42 challenges do not second-guess.

Because Rogers provides no explanation or evidence that counsel's decision to pursue a claim of innocence was anything but the result of a reasonable trial strategy, he has not demonstrated that counsel was ineffective, and therefore, failed to show that any prejudice resulted. Obviously, Rogers has not shown that

the use of this instruction would have resulted in an acquittal of his charges. Hence, we concur with the trial court and hold that Rogers, with regard to this argument, did not establish that counsel's assistance was deficient or that prejudice resulted.

Next, we address Rogers's argument that trial counsel rendered ineffective assistance when facilitation instructions were not provided. The pertinent section of KRS 502.020(1), which defines complicity, states:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense.

And the facilitation is explained in KRS 506.080(1):

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Our Courts have explained the difference between facilitation and complicity as follows:

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some

> form of assistance. *Skinner v. Commonwealth*, Ky., 864 S.W.2d 290, 298 (1993). "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Commonwealth*, 151 Ky., 916 S.W.2d 148, 160 (1995), cert. denied, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Thompkins v. Commonwealth, 54 S.W.3d 147, 150-51 (Ky. 2001). Accordingly, under both complicity and facilitation, the defendant must act with knowledge that the other person is committing or intends to commit a crime. *Id*.

Although facilitation may be a lesser included offense of complicity, similar to all lesser included offenses, an instruction on the offense is only appropriate if a juror could believe beyond a reasonable doubt that the defendant is guilty of a lesser offense. *Skinner*, 864 S.W.2d at 298. Thus, in the instant matter, no error occurred when counsel did not request an instruction on facilitation since the evidence did not show that Rogers was wholly indifferent to the completion of the robbery. Hollister heard Rogers demand money from Pratt and when Pratt attempted to flee, Rogers shot him. The facts and the evidence are not compatible with the lesser offense of facilitation, and thus, no instruction was appropriate.

As for the offense against Hollister, no evidence was provided from either Hollister's testimony or Rogers's testimony that would cause a juror to believe that Rogers only provided the means or the opportunity to commit the crime (facilitation). Instead, Hollister's testimony provided that Rogers and Bryant were acting to rob Pratt and then Hollister.

Further, Rogers's own statements, while contrary to the proof, provide that he sat in the car, did not participate in the crime, and did nothing to aid Bryant. And he said that he had no knowledge Bryant was going to commit the crimes. Thus, neither his statements (that he was too intoxicated to act) nor the actual evidence (witness' testimony) support the necessity of an instruction on facilitation. Hence, the trial court properly denied Rogers's claims of ineffective assistance of counsel as related to the lack of a facilitation instruction.

Finally, we address Rogers's assertion that the trial court erred when it did not hold an evidentiary hearing or appoint counsel. Under RCr 11.42, an evidentiary hearing on a motion is only required when the issues presented cannot be answered on the face of the record. RCr 11.42(5). Case law corroborates this proposition, too. For example, in *Fraser v. Commonwealth*, the Kentucky Supreme Court held that a trial judge has the discretion to ascertain whether the allegations in an RCr 11.42 motion can be resolved on the face of the record, and if the record is sufficient to resolve the issue, an evidentiary hearing is not required. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Moreover, the Court clarified that a hearing is only required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. *Id*. In the instant case, the record itself refutes all of Rogers's claims; and therefore, the trial court did not err in denying a hearing on his motion.

Rogers not only complains about the trial court's failure to hold a hearing but also its failure to appoint counsel to assist him in preparing his appeal. It is instructive that during the pendency of the appeal, Rogers made a motion to our Court for the appointment of counsel. After we referred this matter to the DPA, following its review of the record, it responded that pursuant to KRS 31.110(2)(c), in this matter a post-conviction proceeding "is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense[.]" Thereafter, we denied Rogers's motion for the appointment of counsel.

In fact, Rogers misstated the holdings of *Fraser* and *Commonwealth v. Ivey*, 599 S.W.2d 456 (Ky. 1980), in his brief. As we have explained, under *Fraser*, a hearing is not required if the record clearly refutes the disputed issues. Furthermore, concerning the appointment of counsel in an RCr 11.42 motion, *Fraser* states that "[t]o the extent that *Commonwealth v. Ivey*, *supra*, holds that KRS 31.110(2)(c) establishes when a judge must appoint counsel for an indigent movant, it is overruled. Since the statute is broader than the rule, we can conceive of no situation where the judge would appoint counsel for an indigent RCr 11.42 movant who would be statutorily ineligible for representation by the DPA." *Fraser*, 59 S.W.3d at 456. Thus, since the statute does not provide for automatic provision of counsel in RCr 11.42 proceedings, discretion is given both to the trial judge and the DPA. Here, since the DPA declined representation of Rogers at the

appellate stage of the proceeding, we can conceive of no error by the trial court in denying the appointment of counsel.

CONCLUSION

Rogers has not provided convincing evidence that his counsel was ineffective at either the trial or appellate level. Trial counsel's decision to forego a voluntary intoxication defense was a trial strategy based authoritatively on Rogers's testimony to police and at trial. And trial counsel's decision to not ask for a facilitation instruction was reasonable because the evidence did not support such an instruction and, it, too, was based on sound trial strategy. Finally, the trial court did not err in denying the appointment of counsel and an evidentiary hearing.

The decision of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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