

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000103-MR

CALVIN D. HOUSTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HON. JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-01475

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Calvin D. Houston appeals from an order of the Fayette Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues the trial court erred when it denied relief without an evidentiary hearing on his claim of ineffective assistance of counsel based on his request for Kentucky Revised Statutes (KRS) Chapter 31 funds in

preparation for an RCr 11.42 hearing and on counsels' alleged failure to conduct a mitigation investigation. We affirm.

In Houston's direct appeal, *Houston v. Commonwealth*, 2009-CA-001896-MR, 2011 WL 3962511 (Ky.App. 2011) (unpublished), this Court affirmed Houston's conviction for first-degree assault. The facts were set forth as follows:

Zachary Bell was shot and wounded on March 30, 2007. Bell was at the apartment of Rita Smith at the time he was shot. Stephen Morton, a friend of Bell's, was also at the apartment. Bell was standing inside the doorway, having come back into the apartment after going outside to smoke. Bell testified that he had a funny feeling there was someone behind him. When he turned around, he saw a man standing outside the doorway. Bell stated that the man was wearing a black hoodie and had a scarf partially covering his face.

Bell said the man told him to leave his brother alone and then shot him with a shotgun in the face. Morton did not see the shooter. He also testified that he did not recognize the voice he heard. Morton did, however, state that earlier in the evening, he was in Houston's vehicle to go get money from his debit card. He stated that he saw a shotgun in Houston's lap and that he asked to get out of the car because he had recently been released from federal prison and did not want to be in the car with a gun.

Bell asserted that he recognized Houston's eyes and facial features from seeing him around the neighborhood. While Bell stated that he did not know why Houston shot him that night, Bell stated that he did have an altercation with a man later identified as Houston's brother, Andre Houston.

Id. at 1. After Bell identified Calvin Houston as his attacker from a photopack, Houston was indicted for first-degree assault.

Lead counsel was appointed to represent Houston, and did so from arraignment to his jury trial approximately one year later. Second chair counsel became involved in Houston's case approximately three weeks to one month prior to trial. Collectively, we refer to lead counsel and second chair counsel as defense counsel.

The trial strategy of defense counsel was that Bell misidentified Houston. Defense counsel cross-examined Bell and the investigating detectives regarding the identification. Defense counsel also produced an eyewitness identification expert, Dr. Solomon Fulero. Houston's ex-wife, Teresa Houston, provided a timeline of activities involving herself and her husband on the day of the shooting until 8:00 p.m. and described Houston's demeanor when watching a news report of the shooting. After a colloquy with the trial court, Houston elected not to testify during the guilt phase of the trial.

The jury returned a guilty verdict. During the penalty phase, Houston's defense presented mitigation testimony from Teresa. She testified about Houston's involvement as a father and husband, as well as the amount of financial and emotional support he provided to his mother, brother, and nieces. She also testified as to Houston's connection to the community and his propensity for non-violence.

After Teresa's testimony, defense counsel approached the bench and informed the trial court that Houston was undecided as to whether he would testify during the penalty phase. Houston had also "balked" in the doorway, while being led back to holding. After a short recess, second chair counsel informed the court that she had spoken to Teresa regarding Houston's behavior. Teresa indicated Houston's sudden withdrawal from the proceedings was a sign of mental stress and reported mental illness was common in his family.

The bench conference resumed and lead counsel represented to the trial court he had no indication prior to the guilty verdict that there was a possible competency issue in Houston's case. Likewise, the trial court had not seen any signs of competency issues with Houston during its regular status hearings or during the trial. Teresa's testimony was placed in the record by avowal while the jury deliberated Houston's sentence.

The jury recommended a fifteen-year sentence. However, the trial court suspended entry of judgment pending a presentence investigation and a retrospective competency hearing. Houston was evaluated at the Kentucky Correctional Psychiatric Center (KCPC).

Dr. Richard Johnson of the KCPC evaluation team evaluated Houston as did Dr. Martin Smith, an expert retained by defense counsel. Subsequently, a competency hearing was conducted.

Dr. Johnson testified that Houston suffered from anxiety and depression and prescribed medications. However, he found Houston may have exaggerated his symptoms and opined Houston was competent.

Dr. Smith opined Houston may have suffered post-traumatic stress disorder (PTSD) and a mood disorder. He stated it was possible Houston may not have been competent at the time of his trial, as he was not taking psychiatric medications at that time. However, he admitted on cross-examination that PTSD does not render one incompetent and he did not watch the trial videos to observe Houston's behavior.

Lead counsel for Houston also testified at the competency hearing. He testified he often represents those with mental illness, mental disability, and head injuries and requested mental health evaluations when necessary, based on his observation of the individual client. However, in the year he represented Houston prior to trial there was no indication that Houston may have needed such an evaluation. He spoke with Houston regarding his case in person and by telephone and Houston was pleasant and cooperative. The first indication lead counsel had that there was a possible mental health issue was after the guilty verdict.

Second chair counsel testified she was not fully familiar with Houston's background due to her limited time on the case. The only time there was an indicator of a potential mental health issue was after the guilty verdict.

The trial court found Houston was competent to stand trial. It noted that Dr. Johnson opined Houston was competent. The trial court further relied on its observations of Houston.

Houston appeared for final sentencing and was sentenced to fifteen-years' imprisonment. After this Court affirmed and discretionary review was denied by the Kentucky Supreme Court, Houston's judgment of conviction became final on August 21, 2012.

On October 24, 2013, Houston filed an RCr 11.42 motion arguing ineffective assistance of counsel for failure to investigate and call witnesses on his behalf and file a motion to suppress Bell's out-of-court identification of Houston.

The trial court granted Houston an evidentiary hearing on the RCr 11.42 issues, with a hearing set for September 17, 2014. One week before the hearing, Houston filed a motion asking for expert funding to determine competency, criminal responsibility, and for mitigation purposes. Houston also attached an affidavit from second chair counsel stating that defense counsel provided ineffective assistance. She stated defense counsel did not adequately investigate the case, defense counsel should have known about and investigated Houston's mental health issues before trial, and counsel did not conduct a mitigation investigation.

The trial court summarily denied Houston's motion for expert funding, stating that "the opinions of any mental health expert would not assist the court in its consideration of or ruling on" the evidentiary hearing issues. Houston

then moved the court to reconsider and asked for expanded pleadings to include the failure to investigate for and produce mitigation evidence at trial. The trial court denied this motion as well.

After an RCr 11.42 hearing on the remaining issues, Houston's RCr 11.42 motion was denied. Houston appealed.

Houston alleges two errors: the trial court erred in (1) its summary denial of KRS Chapter 31 funds for hiring a mental health expert for the RCr 11.42 evidentiary hearing and (2) in its denial of an evidentiary hearing on counsel's failure to conduct a mitigation investigation.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted in Kentucky in *Gall v. Commonwealth*, 702 S.W. 2d 37 (Ky. 1985). The "performance" prong requires that the movant show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064). The prejudice prong requires that the movant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 169 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

The trial court found “the opinions of any mental health expert would not assist the court in its consideration of or ruling on” the issues in the evidentiary hearing. We agree.

As stated in *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008):

[A] petitioner may be entitled to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner’s case. The trial court still maintains the discretion to deny such funds if it determines that the expert testimony is not reasonably necessary.

The trial court was well within its discretion to find that another expert was unnecessary.

Houston’s mental health status had been assessed by psychiatric evaluators at the KCPC. At Houston’s competency hearing, the trial court heard testimony from KCPC’s Dr. Johnson and testimony from Dr. Smith, who had been retained using KRS Chapter 31 funds. Houston has not alleged how an additional mental health expert would have been helpful at the RCr 11.42 evidentiary hearing and, therefore, has not demonstrated he was prejudiced by the trial court’s denial of his request. “There is no violation of due process in the refusal to provide for expert witnesses where the defendant offers little more than an undeveloped assertion that the requested assistance would be beneficial.” *Simmons v. Commonwealth*, 746 S.W.2d 393, 395 (Ky. 1988). As noted in *Simmons*, a trial court is “not required to provide funds to defense experts for fishing expeditions.”

Id. There was no error in the trial court's denial of the motion for KRS Chapter 31 funds.

Houston also alleges the trial court erred when it denied the RCr 11.42 motion without conducting an evidentiary hearing on Houston's claim that counsel was ineffective for failing to conduct a mitigation investigation. "[An evidentiary] hearing is 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." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Houston's allegations are refuted by the record.

Houston is incorrect that his defense counsel failed to present any witnesses concerning mitigation. Teresa testified for her ex-husband in mitigation, describing Houston's emotional and financial support of his family, his dedication to his mother and brother's welfare, his contributions to the community, and his propensity for non-violence.

Houston relies heavily on second chair counsel's affidavit and testimony in support of the claim that there was no mitigation investigation. Notably, her affidavit and testimony do not fully correspond with statements and actions on the record at trial and at the retrospective competency hearing. While second chair counsel's affidavit states defense counsel "should have known" about Houston's mental health issues during the trial and at the competency hearing, she stated that she had no knowledge prior to trial of any mental health issues and no reason to suspect Houston had a mental health issue. Although Houston asserts

second chair counsel knew he was schizophrenic, there is no evidence that Houston is schizophrenic.

Second chair counsel's affidavit is based on a subjective hindsight analysis of counsel's effectiveness. In *Strickland*, the Court specifically cautioned against assessing counsel's assistance after conviction. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Moreover, the affidavit is not as persuasive as Houston hopes. "[T]he test for effectiveness is not whether counsel could have done more, but rather whether counsel's errors undermined the reliability of the trial." *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky. 2000) (internal citation omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Additionally, lead counsel testified at the competency hearing that prior to the jury's guilty verdict, he had no indication that Houston had any mental health issues. Finally, there is no assertion of what, if any, mitigation evidence would have been uncovered if counsel had investigated Houston's mental health prior to trial. The trial court did not err in denying an evidentiary hearing on the failure to present mitigation evidence.

For the foregoing reasons, order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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