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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001091-MR

AARON ALLEN — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 08-CR-00711

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Aaron Allen, *pro se*, appeals from the Kenton Circuit Court's order denying his motion to vacate his conviction and sentence pursuant to RCr[1] 11.42. Allen alleges that he received ineffective assistance of trial and appellate counsel. Further, Allen contends he should have received an evidentiary hearing to resolve at least two of his claims. Because we find there are no issues of material

[1] Kentucky Rules of Criminal Procedure.

fact that cannot be resolved from the record, and the evidence of record shows trial and appellate counsel were not deficient, we affirm.

Background

On September 25, 2008, a Kenton County grand jury indicted Allen for murder. The charges arose from an incident on July 30, 2008, when Allen caused fatal injuries to the four-month old child of his girlfriend, Brandi Cain. The child died of these injuries two days later at Cincinnati Childrens' Hospital in Hamilton, County, Ohio.

Following a trial on November 3-5, 2009, the jury found Allen guilty. Pursuant to the jury's verdict, the court sentenced him to imprisonment for thirty years. The trial court appointed Allen appellate counsel and he appealed his conviction to the Kentucky Supreme Court on the grounds that the trial court erred by rejecting Allen's request for a first-degree manslaughter jury instruction. The Kentucky Supreme Court affirmed Allen's conviction on May 19, 2011. *Allen v. Commonwealth*, 338 S.W.3d 252 (Ky. 2011).

On September 18, 2013, Allen filed a motion to vacate the judgment pursuant to RCr 11.42, arguing that he had been deprived of effective assistance of trial and appellate counsel. The trial court denied Allen's motion on June 18, 2014. Allen now appeals the trial court's order.

Standard of Review and *Strickland*

The United States Supreme Court established the standard for evaluating an ineffective assistance of counsel claim in *Strickland v. Washington*,

466 U.S. 668 (1984). The Kentucky Supreme Court adopted the *Strickland* standard in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under *Strickland*, an ineffective assistance of counsel claim has two components. The defendant must show that (1) "counsel's performance was deficient," and (2) counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 693.

Counsel's performance is deficient when it falls "below the objective standard of reasonableness" given all the circumstances. *Id.* The defendant must overcome the "strong presumption" that counsel's performance was reasonable and "might be considered sound trial strategy." *Id*. at 689. The defendant is prejudiced by counsel's deficiencies when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

At the trial court, the defendant bears the burden of establishing "he was deprived of a substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (quoting *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). 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 (2001). When the trial court does not conduct an evidentiary hearing, our review is limited to "whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Baze v.*

Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000).

Analysis

On appeal, Allen again claims that he received ineffective assistance of trial and appellate counsel. Thus, he contends the trial court erred in denying his RCr 11.42 motion. Allen argues his trial counsel was deficient in failing to move for a directed verdict of acquittal on grounds that the Commonwealth had not proven beyond a reasonable doubt the venue element contained in Jury Instruction No. 5. Further, he argues his appellate counsel was deficient in failing to raise this issue on direct appeal to the Kentucky Supreme Court. Finally, Allen argues his trial counsel was deficient in failing to present evidence of diminished culpability by reason of mental illness or below average intellectual functioning capacity. Allen claims an evidentiary hearing was necessary to resolve his last two claims. We address each of these claims separately.

First, Allen contends his trial counsel was deficient in failing to move for a directed verdict on grounds that the Commonwealth had not proven beyond a reasonable doubt the venue element contained in the jury instruction for the murder offense. Allen claims the Commonwealth failed to prove he caused the death of the victim in Kenton County because the victim undisputedly died in Hamilton County, Ohio. The trial court and the Commonwealth interpreted this claim as a suggestion that Kenton Circuit Court was not the proper venue in which to try Allen. Allen contends he does not take issue with the location of his trial, but instead asserts that an element of the crime contained in the jury instructions was

not proven beyond a reasonable doubt.

Upon review of the Appellant's RCr 11.42 motion and his appellate brief, we submit that both are fair interpretations. However, we reach the same conclusion under either analysis. Allen's counsel was not deficient for failing to move for a directed verdict of acquittal on grounds that the Commonwealth failed to prove Allen caused the death of the victim in Kenton County.

"The performance inquiry" in an ineffective assistance of counsel claim "must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 694. Here, the record shows counsel thoroughly represented Allen throughout all stages of trial. Furthermore, the evidence of record overwhelmingly shows that Allen inflicted injuries upon the baby in Kenton County, Kentucky, and that his acts caused the baby's death.[2]

First, viewing Allen's claim as an assertion that Kenton Circuit Court was not a proper venue in which to try him, we conclude that this argument is refuted by the express language of KRS 452.560. That statute provides that, "Where an injury is inflicted or poison is administered in one county and death

[2] To his credit, Allen quotes the Commonwealth's response to his RCr 11.42 motion stating that "Even if this Court were to assume that the Movant was correct, which he is, in the assertion that the venue element of the crime had not been proven beyond a reasonable doubt…" Allen claims this statement is an admission by the Commonwealth that the venue element was not proven beyond a reasonable doubt. However, from the context surrounding that statement, as well as the Commonwealth's arguments in its responsive and appellate briefs, suggests that the word "not" was unintentionally omitted. We are convinced that the Commonwealth intended the statement to read, "Even if this Court were to assume that the Movant was correct, which he is not, in the assertion that the venue element of the crime had not been proven beyond a reasonable doubt…" Thus, we do not treat the statement as a concession by the Commonwealth. Thus, we proceed to analyze Allen's claim by review of the record.

ensues in another, the trial for the homicide may be in either county." Allen undisputedly injured the child in Kenton County, Kentucky. He admitted that, at his home in Kenton County on July 30, 2008, he "lost control," when his girlfriend's four-month old baby would not stop crying. He confessed that he "grabbed [the baby] up by his leg and pulled him up," and "shook him." He also stated that he lost his grip while shaking the baby and the baby's head hit the floor. Since Allen admittedly inflicted the injuries in Kenton County, the Kenton Circuit Court had jurisdiction to try Allen for the murder.

In the alternative, Allen asserts that the venue element of the crime of murder was not proven beyond a reasonable doubt. Instruction No. 5 charged the jury to find beyond a reasonable doubt "[t]hat in Kenton County on or about July 30, 2008," Allen "caused the death" of the victim. But again, KRS 452.560 allows the element of this offense to be met either by proof of the location where the injuries were inflicted or where the victim died. As discussed above, Allen admited he inflicted injuries upon the baby in Kenton County.

Further, Dr. Greta Stephens, the forensic pathologist and deputy coroner who performed the autopsy, reported the baby's death was caused by a skull fracture, brain injury, and blunt impact injuries to the head—injuries directly consistent with Allen's admitted acts. Given the overwhelming evidence that Allen's acts in Kenton County on July 30, 2008 caused the baby's death, we are convinced that, under either interpretation of Allen's claim, trial counsel acted "within the wide range of reasonable professional assistance" in refraining from

motioning the court for a directed verdict of acquittal based on venue. *Strickland*, 466 U.S. at 689. Because Allen has failed to show that counsel's performance was deficient, this claim fails.

Along similar lines, Allen contends that his appellate counsel was deficient in failing to raise the previous issue on direct appeal to the Kentucky Supreme Court. Allen argues that the lack of proof that he caused the baby's death in Kenton County was a palpable error. Thus, he argues that his appellate counsel should have raised the issue in his direct appeal pursuant to RCr 10.26. Furthermore, Allen contends that the trial court erred in refusing to grant an evidentiary hearing to determine if counsel's performance was deficient in failing raise this issue on appeal.

A defendant is entitled to effective assistance of counsel on his first appeal by right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2013). A defendant's right to effective assistance of appellate counsel does not mean appellate counsel must pursue "every conceivable issue on appeal." *Jones v. Barnes*, 463 U.S. 745, 749 (1983). The role of the advocate "requires that [counsel] support his client's appeal to the best of his ability," which includes examining the record and "selecting the most promising issues for review." *Id*. at 752-53. Appellate counsel is especially not compelled to pursue meritless issues. *Id*. at 749. Since we have found that Allen's trial counsel was not deficient for failing to move for a directed verdict on the venue element of the offense of murder, we cannot find that his appellate counsel was deficient for

failing to raise the issue on direct appeal.

Finally, Allen claims his trial counsel was deficient in failing to present evidence of diminished culpability by reason of mental illness or below average intelligence during the guilt phase of trial. Allen also contends that the trial court erred in refusing to grant an evidentiary hearing to determine if counsel's performance was deficient in failing to present this defense. Because we find there is no issue of material fact that cannot be resolved by examination of the record, we agree with the trial court that an evidentiary hearing is unnecessary to resolve this claim. Further, upon review of the record, we find trial counsel was not deficient for failing to present this defense.

KRS 504.020 provides that a defendant may escape responsibility for criminal conduct if at the time of his criminal conduct, "he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" due to "mental illness or intellectual disability." The record reflects that trial counsel initially contemplated pursuing the defense of diminished culpability by reason of mental illness or intellectual disability, but after investigation abandoned the defense.

On January 21, 2009, trial counsel filed an *ex parte* motion requesting funds for a clinical psychologist to evaluate Allen. The trial court approved funds and Allen was evaluated by licensed clinical psychologist Ed Connor on January 29, 2009 and February 5, 2009. On February 10, 2009, counsel filed notice that Allen intended to introduce evidence of his mental illness or insanity at the time of

the offense.

According to his report, Dr. Conner found Allen had a full scale IQ of 71, placing him in the '"low range' of 'borderline' intellectual capacity." However, he noted that, although Allen functioned "in a very limited level of intelligence" and suffered from "low frustration tolerance," he was "***not*** mentally retarded." Further, Dr. Conner explained Allen did not exhibit characteristics of mood swings indicative of mental illnesses such as Biploar Disorder.

Counsel then moved the trial court for a competency hearing and Allen was sent to Kentucky Correctional Psychiatric Center and evaluated by staff psychiatrist, Dr. Timothy Allen. Like Dr. Conner, Dr. Allen found that Allen functioned at a low level of intelligence. However, Dr. Allen also explicitly reported that Allen "had the capacity to appreciate the criminality of his conduct and had the ability to conform his conduct to the requirements of the law at the time" of the events.

Given the evidence of record, we are convinced Allen's trial counsel was not deficient in abandoning the defense of diminished culpability by reason of mental illness or intellectual disability. Dr. Allen's evaluation explicitly refuted any such defense and nothing in Dr. Conner's evaluation contradicted Dr. Allen's findings. We presume, as *Strickland* prescribes, that Allen's trial counsel's decision to abandon this defense was made "in the exercise of reasonable professional judgment." *Strickland*, 446 U.S. at 690.

Conclusion

Because there is no material issue of fact relating to Allen's claims that cannot be resolved through examination of the record, we agree with the trial court that an evidentiary hearing was unnecessary. Upon review of the record, we further find that Allen has failed to prove that his trial or appellate counsel performed deficiently such that he was deprived of the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Accordingly, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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