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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003359-MR

RICKY LEE HOBBS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 90-CR-136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Ricky Lee Hobbs (Hobbs) appeals from a judgment entered by the Hopkins Circuit Court on December 6, 1996, which denied Hobbs relief pursuant to a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct his prison sentence. While Hobbs' RCr 11.42 motion made numerous allegations of ineffective assistance of counsel, he limits his arguments on appeal to two issues: (1) "defense counsel's unauthorized waiver of the defendant's presence at the competency hearing amounted to ineffective assistance of counsel as the

defendant was denied his constitutional right to confrontation at a critical stage of the proceeding"; and (2) "failure of the defense counsel to prepare properly for the sentencing phase of the defendant's capital murder conviction amounted to ineffective assistance of counsel resulting in prejudice to the defendant". Finding no error, we affirm.

The standard which must be met in order to prevail under an ineffective assistance of counsel claim is well established. First, a defendant must show that his counsel's performance was deficient and that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to defendant by the Sixth Amendment. Strickland v. Washington, Ky., 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the defendant must show that the deficient performance prejudiced his defense so as to deprive him of a fair trial. Id. As was noted by the Supreme Court of Kentucky in Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878-79 (1992):

A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms,

is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable judgment. [Strickland] 466 U.S. at 690, 104 S.Ct. at 2066. Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. [Id.] 466 U.S. at 692, 104 S.Ct. at 2067.

Hobbs was indicted on November 9, 1990, for the November 1, 1990, murder of Jane Ann Robinson. In March 1992, Hobbs was convicted by a jury of murder. On May 11, 1992, the trial court followed the recommendation of the jury and sentenced Hobbs to prison for life without the benefit of probation or parole for twenty-five years. Hobbs appealed directly to the Supreme Court, case number 92-SC-362-MR, alleging several errors, but the Supreme Court affirmed his conviction.

We adopt the Supreme Court's brief statement of the facts of the case as our own:

The victim was a 56-year-old white female who was in the city park in Madisonville just prior to Noon [sic] when she was beaten, robbed and stabbed to death. The accused was a mentally retarded man with an I.Q. of 63. He was examined at the Kentucky Correctional Psychiatric Center [KCPC]¹ and the report indicated that his score was within the mild mental retardation range. The report gave the opinion that Hobbs was competent to stand trial and there was no further hearing on the question of his

¹ The record indicates that Hobbs was actually evaluated by the Pennyroyal Comprehensive Care Center at the request of the KCPC.

competency to stand trial. This appeal followed his conviction.

When Hobbs was first questioned by police, he gave several conflicting statements. Initially, he denied ever being in the park but later, through a series of statements, admitted that he was in the park on the day of the murder but he accused another person of being the killer. The defendant's version of where different things occurred changed as the police informed him that his story was inconsistent with what their investigation had already developed. Hobbs testified at trial and denied the killing and accused another person of the crime.

Hobbs filed a pro se RCr 11.42 motion on May 26, 1995, and a supplemental motion by counsel was filed later. We will first address Hobbs' claim that he received ineffective assistance of counsel because his counsel failed to provide for his presence at an alleged competency hearing. While trial counsel did file a motion on January 16, 1992, asking that a psychiatric examination be performed on Hobbs, a competency hearing was never held. Rather, on January 21, 1992, the trial court ordered that Hobbs undergo a psychiatric examination by the KCPC. The psychological evaluation report revealed that Hobbs had an I.Q. of 63.² Thus, on March 9, 1992, counsel filed a motion pursuant to Kentucky Revised Statutes (KRS) 532.140 to

² The Supreme Court noted that "[t]he report also concluded that Hobbs seemed to be quite capable of participating constructively in his defense and that he understood the charges against him and appreciated the gravity of those charges."

exclude the death penalty as a sentencing option.³ After the trial court conducted hearings on March 10 and 12, it entered an order on March 12, 1992, that based upon the psychological evaluation, granted the motion to exclude the death penalty.

While Hobbs continues to claim that he was denied his right to confront witnesses at his competency hearing, the fact remains that a competency hearing was never held. Trial counsel never requested a competency hearing and the trial court did not sua sponte order one. In fact, in his direct appeal Hobbs raised the issue of whether the trial court erred in not holding a competency hearing. In affirming the trial court, the Supreme Court stated as follows:

Here the initial examination by the psychologist found Hobbs was competent to stand trial. The trial judge had ample opportunity to observe Hobbs during the trial and apparently he found no reason from his observation to require further investigation. There was no evidence produced by Hobbs during the trial which demonstrated that he was unable to appreciate the nature and consequences of the proceedings or to participate rationally in them.

A complete hearing for the purpose of determining mental capacity is necessary only when there are reasonable grounds to believe the defendant is not mentally competent or that there may be reasonable grounds for such belief which must be called to the attention of the trial judge by the defendant or must be so obvious that the trial judge cannot

³ Subsection (1) of the statute states as follows: "KRS 532.010, 532.025, and 532.030 to the contrary notwithstanding, no offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution."

fail to observe them. Pate v. Commonwealth, Ky., 769 S.W.2d 46 (1989).

The trial judge must have wide latitude to determine in the first instance whether to require the accused to be examined. Cf. Conley v. Commonwealth, Ky.App., 569 S.W.2d 682 (1978).

United States v. Day, 949 F.2d 973 (8th Cir. 1991), noted in part that when there is a sufficient doubt about the defendant's competency, a trial judge must either on motion or sua sponte conduct a hearing to determine whether the defendant is capable of proceeding. The key words are "sufficient doubt." In this case, there was no doubt in the mind of the trial judge relative to the defendant's competency to stand trial.

Conley v. Commonwealth, supra, was decided before the enactment of K.R.S. 504.100. An earlier version of RCr 8.06, as well as Conley, uses the word "sanity" as distinguished from "competency." This Court fully recognizes the difference between insanity as defined by K.R.S. 504.060 and incompetency to stand trial as defined by K.R.S. 504.070. Clearly these concepts are not interchangeable. They are separate and applicable to different circumstances.

However, the rationale of Conley is still valid. There is no need for a full evidentiary hearing to be held in every case where a defendant has been examined by a psychologist on the ability to stand trial especially when the result of the examination is negative and no additional request is made for further examination and no additional request is made for a hearing.

The failure of the trial court to conduct an evidentiary hearing into the competency of Hobbs to stand trial after the filing of a negative report was not reversible error.

Following a hearing on October 28, 1996, on Hobbs' RCr 11.42 motion, the trial court on December 6, 1996, entered an

order with extensive findings that denied the motion. The trial court stated, in pertinent part, as follows:

At the evidentiary hearing, Hobbs protested his attorney's waiver of his presence at a hearing on a motion to exclude the death penalty as a sentence in Hobbs' case. Perhaps in retrospect it would have been good for the Defendant to have been at the hearing, although counsel have given reasons why they didn't want Hobbs there, such as the possibility of him being disruptive, or perhaps hurting his case for exclusion of the death penalty. (TH 9:47-9:51). Whether these reasons are valid or not, this Court does not know. As the Commonwealth has pointed out, the Defendant won that motion. The Court granted the Defendant the relief that he sought. Therefore, his not being there did not hurt him in any way.

Hobbs' present counsel has attempted to say that the hearing was really a hearing on competency. This Court does not agree. The Supreme Court opinion in this case shows that no competency hearing was ever held, as it was argued in that Court that the trial [c]ourt should have ordered a competency hearing. 92-SC-362MR at 3-5. The Supreme Court of Kentucky found that the lack of a competency hearing was not error.

Hobbs' arguments on appeal (1) that trial counsel was ineffective when he allowed the competency hearing to be conducted without him being present; (2) that he was unable to dispute the psychologist's findings; and (3) that his right to confront witnesses at a critical proceeding was violated, are all without merit. The Supreme Court's basic underlying presumption in its Opinion was that no competency hearing was held. The trial court in its order denying the RCr 11.42 motion also concluded that the hearing at issue was a hearing on the exclusion of the

death penalty and not a competency hearing. Our review of the record supports these conclusions, i.e., that there was no competency hearing. Obviously, Hobbs cannot show that he suffered prejudice from not attending a competency hearing which was never held. Additionally, trial counsel testified at the RCr 11.42 hearing that he had discussed the death penalty hearing with Hobbs prior to that hearing and that Hobbs did not want to be present for a discussion of his lack of intelligence. Furthermore, trial counsel testified that there were no adverse witnesses at the death penalty hearing. Thus, there were no adverse witnesses for Hobbs to confront. Furthermore, since the trial court granted Hobbs' motion to exclude the death penalty, Hobbs' absence at that hearing obviously did not prejudice his defense.

Hobbs second claim of ineffective assistance is that his trial counsel failed to introduce any mitigating evidence during the penalty phase of the trial. The trial court found that this claim lacked merit, and stated as follows:

Hobbs claims that Counsel were wholly unprepared for this sentencing phase, as they presented no mitigating evidence on Hobbs' behalf. This case is similar in many respects to Strickland v. Washington [citation omitted], in Washington alleged that his counsel was ineffective at his capital sentencing phase. Washington's counsel presented no mitigating evidence at this phase. The murders in that case were particularly gruesome in nature. Washington asserted that his attorney should have presented the sentencer in that case with psychological evidence as to his state of mind at the time of the crimes, as well as

other testimony from his family, friends and co-workers to the effect that Washington was a good person and did not deserve the death penalty. The United States Supreme Court found that none of this evidence would have been reasonably likely to change the outcome of his sentence.

One important distinction between this case and Strickland is that in the present case Hobbs has presented no testimony of any witness who would have testified on Hobbs behalf at the sentencing phase. Although there may have been some family members, teachers, churchmembers [sic], or anyone else, who may have testified as to Hobbs' good character, Hobbs has not produced any of them for this proceeding. Without this evidence, Hobbs can not show that he was prejudiced in any way by his counsel's failure to present any mitigating evidence during the sentencing phase of his trial.

Hobbs also has not shown that his counsel were unreasonable in their decision not to present mitigating evidence and instead rely on the "lingering doubt" defense. Hobbs' counsel as this phase did not wish to maintain a separate defense at the sentencing phase after they had maintained that Hobbs did not commit the murder. (TH 11:25:30, 11:19:50). Mr. Ruschell also felt that they would be compromising Hobbs' chances if they went into any other are than lingering doubt. (TH 11:30:55). Defense Counsel could see Hobbs['] background as harmful, and thus the jury could treat Hobbs more severely than it might otherwise. No one really knows that.

The presentation of the lingering doubt defense was a tactical decision that trial counsel made. The record is not clear that they actually had a lot of mitigating evidence to present. Perhaps there was some psychological evidence, or evidence of mental retardation, or of Hobbs' level of education. However, there was evidence in opposition to that which would have adversely affected the defendant, such as conversations he had in the jail before trial concerning plans for

robbing middle-aged women. (TH 11:22:00)
The whole prospect of getting less than the maximum was a long-shot due to the facts of the case.

In his brief, Hobbs states that "[t]he appellant had a severely substandard I.Q. of 63 which placed him in the retarded range. The Defense Counsel had such evidence readily available for the sentencing phase, as it had already been entered into evidence during the guilt phase of the trial." The record of Hobbs' murder trial was not made part of this record, therefore, we can only assume that Hobbs is correct in stating that evidence of his low I.Q. had been admitted during the guilt phase. Since the jury was instructed in the penalty phase to consider any evidence which had been admitted during the guilt phase, if such evidence had been presented a second time in the penalty phase, it would only have been cumulative evidence. Also, when Hobbs was asked by trial counsel to name any witnesses who would have testified in mitigation, he failed to do so.

In his brief, Hobbs again fails to name any potential mitigation witnesses or indicate what their testimony would have been. An allegation of ineffective assistance of counsel does not state grounds for relief under a RCr 11.42 motion unless the petition alleges sufficient facts to show that counsel's representation was inadequate. Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Evans v. Commonweatlh, Ky., 453 S.W.2d 601 (1970); McCarthy v. Commonwealth, Ky., 432 S.W.2d 50 (1968).

Furthermore, Hobbs' theory of the case was that another

person committed the murder. Trial counsel testified that in an effort to get a lighter sentence, he decided at the penalty phase to stay with Hobbs' defense from the guilt phase that Hobbs did not commit the murder. He testified that he hoped that any juror who still had any "lingering doubt" as to the identity of the killer might have favored a lesser sentence. "Effective assistance of counsel does not guarantee error-free representation, nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case."

Ramsey v. Commonwealth, Ky., 399 S.W.2d 473, 475 (1966).

For the foregoing reasons, we affirm the order of the Hopkins Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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