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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002955-MR

SCOTT ETHEREDGE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 97-CR-00976

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, McANULTY and MILLER, Judges.

HUDDLESTON, Judge. Scott Etheredge appeals pro se from an order denying his motion to vacate or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

On July 20, 1997, personnel at the Blackburn Correctional Complex discovered that Etheredge, who was serving a five-year sentence for burglary and theft, was missing when they conducted a routine survey of prisoners. They immediately filed a criminal complaint charging him with unlawful escape, and the district court

issued an arrest warrant. On August 5, 1997, Etheredge was arrested on the warrant. On September 8, 1997, a Fayette County grand jury charged Etheredge in an indictment with escape in the second degree (Escape II)[1] and with being a persistent felony offender in the second degree (PFO II)[2]. On October 31, 1997, Etheredge entered a guilty plea to both counts of the indictment pursuant to an agreement with the Commonwealth, which recommended a sentence of one year for Escape II enhanced to five years for being a PFO II under count two. On December 9, 1997, the circuit court sentenced Etheredge accordingly.

In July 1998, Etheredge filed an RCr 11.42 motion seeking to vacate or set aside his conviction and sentence based on ineffective assistance of counsel. He also filed motions seeking an evidentiary hearing and appointment of counsel. Etheredge alleged that his guilty plea was not valid because counsel allowed him to plead guilty even though he was under the influence of drugs at the time. He asserted that his escape was due to the prison's failure to provide medication for his psychological problems with anxiety which his attorney failed to investigate or seek appointment of an expert witness to evaluate for purposes of developing a defense. The trial court appointed counsel to represent appellant on the RCr 11.42 motion. In a supplemental memorandum, counsel also argued that trial counsel was ineffective for failing to inform Etheredge that he had a viable choice of evils defense to the escape charge based on his anxiety disorder.

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[1] Ky. Rev. Stat. (KRS) 520.030.

[2] KRS 532.080.

Counsel stated that Etheredge left the prison because of a severe panic attack that led him to believe he was going to suffocate.

On November 6, 1998, the trial court denied the motion without a hearing. The court held that Etheredge was competent at the time he entered his guilty plea and that counsel was not ineffective because appellant did not establish that he had a viable choice of evils defense. This appeal followed.

On appeal, Etheredge complains about the trial court's failure to conduct an evidentiary hearing on his motion. Because Etheredge fails to address in his appellate brief the substantive aspects of the issues raised in his RCr 11.42 motion, we are not obligated to review those issues on appeal. Nevertheless, given Etheredge's pro se status, we will address the merits of the issues presented in the original motion.

RCr 11.42 provides persons in custody a procedure for raising collateral challenges to judgment of conviction entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion.[3] An evidentiary hearing is not required on an RCr 11.42 motion when the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction.[4]

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[3] Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999).

[4] Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ___ U.S. ____, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999).

In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding.[5] The major focus is whether the proceeding was fundamentally unfair or unreliable.[6] The defendant bears the burden of establishing ineffective assistance.[7] In an RCr 11.42 proceeding, the defendant "'must do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this post-conviction proceeding.'"[8] When a defendant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,[9] and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on

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[5] Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Harper v. Commonwealth, supra note 2.

[6] Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 842, 112 L. Ed. 2d 180 (1993); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999).

[7] Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026; 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

[8] Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 462 (1999)(quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967)).

[9] McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970).

going to trial.[10] A court must be highly deferential in scrutinizing counsel's performance and avoid second-guessing counsel's actions based on the benefit of hindsight.[11] There is a strong presumption that counsel's conduct fell within the wide range of reasonable assistance that the defendant must overcome.[12] In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[13] '"A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"[14]

Etheredge's primary complaint is that trial counsel failed to inform him that he had a viable choice of evils defense to the escape charge. He alleges that he left the prison because he suffered a severe panic attack. He states that on the night of

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[10] Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994).

[11] Harper, 978 S.W.2d at 315; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 879 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

[12] Strickland, 478 U.S. at 689, 104 S. Ct. at 2065; Bowling, 981 S.W.2d at 551.

[13] Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. See also Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998), cert. denied, ___ U.S. ____, 120 S. Ct. 110, 143 L. Ed. 2d 93 (1999).

[14] Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997)).

the incident, his heart started pounding very fast, he had difficulty breathing and he thought he was going to black out. He felt like he was "going crazy" and that the walls were closing in on him. Etheredge says that he believed if he did not get away from the environment he was in, he would die. He alleges that he does not remember actually escaping and awoke the next morning in a field where he hid for ten days living on scraps of food from a dumpster at a nearby restaurant.

The trial court held that Etheredge did not sufficiently allege that he had a viable choice of evils defense. The choice of evils defense is codified in KRS 503.030(1), which states in relevant part:

> [C]onduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged. . . .

The case law construing this statute is sparse. In Montgomery v. Commonwealth,[15] the defendants attempted to justify their prison escape based on a fear that they would either "kill or be killed" upon release from protective custody into the general prison population because they were suspected of assaulting other inmates earlier. The Court held that the defendants' proof was insufficient to establish injury so imminent to justify a choice of

[15] Ky., 819 S.W.2d 713 (1991).

evils instruction at trial. In Damron v. Commonwealth,[16] the defendant testified that his escape from prison was a "'matter of life or death.'"[17] He also stated that he was ill while in jail, lost weight, suffered severe chest pains and was denied medical attention. Damron testified that he felt that his life was in jeopardy unless he escaped his current environment. The Court held that Damron's situation did not justify a choice of evils instruction because there was not a sufficient showing of a "specific and imminent threat to his person in order to justify giving the instruction."[18] In Senay v. Commonwealth,[19] the Court indicated that the choice of evils defense is available only where the evidence supports a defendant's choice to commit an unlawful act over other lawful means of protecting himself. "[T]he danger presented to the defendant must be compelling and imminent, constituting a set of circumstances which affords him little or no alternative other than commission of the act which otherwise would be unlawful."[20]

We agree with the trial court that Etheredge failed to establish a viable choice of evils defense because his allegations, even if true, do not establish a compelling, imminent threat of physical injury for which there was no alternative to escaping from the prison. While he may have perceived an imminent threat, he did

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[16] Ky., 687 S.W.2d 138 (1985).

[17] Id. at 139.

[18] Id.

[19] Ky., 650 S.W.2d 259 (1983).

[20] Id. at 260.

not explain why he could not have sought assistance or some alternative to escape. As the decision in Damron demonstrates, a mere fear of serious injury or even death is not sufficient. Etheredge's prior history of panic attacks and his successful use of drugs for his condition made him aware that his immediate fears were not necessarily compelling or reliable. Furthermore, the fact that he remained at large for over two weeks and was arrested at a friend's house conflicts with his claim that the escape was justified because of an acute panic attack. Because he has not shown a reasonable probability that he would have been entitled to a choice of evils instruction at a trial or that he would have been successful in convincing a jury that the defense applied, Etheredge has not established actual prejudice in that the outcome of a trial would have led to a different result than the guilty plea.[21] As a result, he has not satisfied his burden of establishing ineffective assistance of counsel. The trial court did not err in denying his RCr 11.42 motion without a hearing.

The Fayette Circuit Court order denying Etheredge's RCr 11.42 motion is affirmed.

ALL CONCUR.

[21] See, e.g., Hill v. Lockhart, 474 U.S. at 59, 106 S. Ct. at 371 (prejudice determined in large part on prediction whether undisclosed defense would have succeeded at trial).

BRIEF FOR APPELLANT:

Scott Etheredge, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General for Kentucky

J. Foster Cutthoff
Assistant Attorney General
Frankfort, Kentucky