RENDERED: November 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001849-MR

JAMES RICHARD SEAY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 96-CR-001758

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, and MILLER, Judges.

BARBER, JUDGE. James Richard Seay appeals pro se from an opinion and order of the Jefferson Circuit Court denying his motion to vacate, set aside or amend sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCR) 11.42. Although the circuit court erred in its legal analysis of the issues, we hold that Seay is not entitled to relief and therefore affirm the denial of the motion on different grounds.

On the morning of July 2, 1996, at approximately 7:00 a.m., Louisville police discovered the dead body of Jimmy

Daugherty on the grassy area at 1229 Breckinridge Street just outside the fence surrounding the parking lot of a commercial building. Daugherty had been stabbed numerous times in the upper torso and had several abrasions on his left leg and forehead. Upon surveying the scene, the police noticed a trail of blood leading from the crime scene to the rear of a residence at 948 Vine Street. As part of the investigation, the police collected several samples of blood from the grassy area, a chain link fence near a side door, inside the bathroom at the Vine Street location, and several spots along the blood trail. Several police officers spoke with Pauline Pitt, who lived at the residence. She told them that her brother, James Seay, occasionally stayed at the residence and had been there the night before. While the police were speaking with Ms. Pitt, she received a telephone call from her sister-in-law, Brenda Seay. At that time, the police spoke with Brenda, who told them that James Seay had telephoned her at approximately 4:30 a.m. that morning and said that he had killed two black guys, had changed his clothes after killing them, and that he was going to leave town on a bus.

Approximately four hours after discovering the victim's body, the police received a telephone call from, Marty Gilbert, the son-in-law of Flossie Neff, who stated that Seay had made threatening telephone calls to Ms. Neff that morning. Gilbert said Seay, who had a romantic relationship with Neff, threatened to kill her if she did not allow him to move back into her residence. When the police spoke with Neff, she said Seay called

her around 6:30 a.m. on July 2, 1996, and threatened her. She also indicated that Seay said he had killed two black men, had changed his clothes and was going to leave town on a bus.

At approximately 1:20 p.m. on July 2, 1996, the police received another telephone call from Ms. Neff informing them that Seay was at a public telephone booth at that time speaking with her. Upon arriving at the location, the police found Seay and he consented to an interview. During the interview, Seay denied any involvement in the death of Jimmy Daugherty and denied even knowing him. He stated that he had spent the night and early morning in a park drinking with two other persons. He denied telling anyone that he had killed someone. He said that he was wearing the same clothes he had been wearing since early the day before. Upon further examination, the police saw what appeared to be blood on his shoes, which were then confiscated along with a pocket knife he had in his possession. The police later arrested Seay for violating an Emergency Protective Order taken out previously by Ms. Neff.

An autopsy of the victim indicated that he had died from multiple stab wounds, primarily a 3.5 inch stab wound to his chest. Toxicology tests revealed that Daugherty had a very high blood alcohol concentration of .291%. While several of the blood samples did not contain a sufficient amount of material for adequate testing, several other samples tested positive for the blood of the victim, including the samples from the fence and near the door of the residence at 948 Vine Street, six samples

from along the blood trail from the crime scene to 948 Vine Street, and a sample from Seay's right shoe.

On July 30, 1996, the Jefferson County Grand Jury indicted Seay on one felony count for capital murder (KRS 507.020) and one felony count of being a persistent felony offender in the second degree (PFO II)(KRS 532.080). He had previously served fourteen years in prison on a conviction for murder in 1982, and had been released earlier in 1996. In October 1996, the circuit court granted a motion requesting a mental evaluation of Seay filed by defense counsel.

On April 22, 1997, Seay entered a guilty plea to both offenses pursuant to a plea agreement with the Commonwealth. Under the plea agreement, the Commonwealth recommended a sentence of twenty-four (24) years for murder with no enhancement to the sentence for the PFO II conviction. Seay waived preparation of a presentence investigation report and the circuit court immediately sentenced him to serve twenty-four (24) years in prison for murder and being a PFO II consistent with the Commonwealth's recommendation.

On April 22, 1999, Seay filed an RCR 11.42 motion to vacate or set aside the conviction based on ineffective assistance of counsel. He also requested an evidentiary hearing and appointment of counsel. In the motion, he alleged that defense counsel failed to investigate the charges adequately, to advise him that he could have requested funds to have an expert witness on blood DNA analysis, and to advise him that there was insufficient evidence to convict him. On May 13, 1999, the

circuit court issued an opinion and order denying the motion without a hearing. In its opinion, the court stated that Seay's guilty plea waived all claims of insufficiency of the evidence and that his plea was entered voluntarily without coercion by his attorney. This appeal followed.

Seay argues on appeal that the trial court should have conducted an evidentiary hearing on the motion. He challenges the trial court's analysis of the issues related to his claim of ineffective assistance of counsel. In its opinion the trial court construed Seay's claims of ineffective assistance of counsel as involving coercion to plead guilty by his attorney. It stated, "Rarely should there should (sic) be a claim of ineffective assistance of counsel on a guilty plea. If the plea was constitutionally 'voluntary' under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), ineffective assistance of counsel should theoretically be waived. Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1970). Under this approach, if counsel was somehow deficient, the analysis is whether the plea was rendered 'involuntary' and whether counsel was 'effective'."

The trial court's recharacterization of an ineffective assistance of counsel claim as actually an issue solely of voluntariness with respect to a guilty plea situation is flawed. First, the Boykin requirement that a plea be voluntary is based primarily on due process, while the ineffective assistance of counsel requirement also implicates the Sixth Amendment right to counsel. See, e.g., Centers v. Commonwealth, Ky. App., 799

S.W.2d 51, 55 (1990)(noting Sixth Amendment right to counsel with guilty plea); Taylor v. Commonwealth, Ky., 724 S.W.2d 223, 225-226 (1986). More importantly, analysis of the ineffective assistance of counsel focuses more on counsel's conduct based on the general standards of attorney competence and the effect of counsel's action, while voluntariness concerns primarily the defendant's knowledge and conduct.[1] Boykin established that a guilty plea must be entered voluntarily, knowingly, and intelligently. The adequacy of counsel's assistance affects the requirement that a guilty plea be entered voluntarily and intelligently. Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advise of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'); See also Langford v. Day, 110 F.3d 1380, 1386 (9th Cir. 1996)(a defendant's "plea must be not only voluntary but intelligent . . ., and counsel's advice enters into the determination of intelligence"), cert. denied, 522 U.S. 881, 118 S.Ct. 208, 139 L.Ed.2d 144 (1997). The United States Supreme Court has clearly indicated that a guilty plea represents an admission of the legal and factual elements necessary to sustain a conviction and a waiver of prior constitutional defects, but a defendant does not waive the right to ineffective assistance of counsel by pleading

[1] Admittedly, the prejudice prong of the ineffective assistance of counsel analysis looks at the defendant's knowledge as conduct in relation to counsel's deficient actions.

guilty. Mabry v. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543, 2546-47, 81 L.Ed.2d 437 (1984)("[i]t is well stated that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked"); Tollett v. Henderson, 411 U.S. 266, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973)("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann"). When a defendant raises a collateral challenge to a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989)(emphasis added). In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d. 203 (1985), the Supreme Court held that the standards enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), apply to challenges to guilty pleas based on ineffective assistance of counsel. Kentucky courts have repeatedly applied the Strickland standard to guilty pleas. See, e.g,, Roberson v. Commonwealth, Ky. App., 885 S.W.2d 310 (1994); Centers, supra; Taylor, supra. The circuit courts reliance on Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970), is misplaced because that case was decided

prior to Strickland and Hill. We agree with Seay that the trial court erred by failing to apply the Strickland test to his claims of ineffective assistance of counsel.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, supra; accord Gall v. Commonwealth, 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986); Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860 (1998). Prejudice focuses on whether counsel's deficient performance renders the result of the proceeding unreliable or fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d. 180 (1993); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), 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 going to trial. Hill v. Lockhart, 474 U.S. at 58, 106 S.Ct. at 370; Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S.

at 689, 104 S.Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper v. Commonwealth, 978 S.W.2d 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 537 (1999); Russell, 992 S.W.2d at 875.

Seay argues that defense counsel rendered ineffective assistance of counsel for failing to request funds to hire expert witnesses on blood analysis and stab wounds, failing to request a hearing on appellant's mental competence, and failing to conduct an adequate investigation of the case. In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held in a case involving an insanity defense that the Due Process Clause of the 14th Amendment required a state to provide an indigent defendant the basic tools of an adequate defense including experts to assist in the evaluation, preparation, and presentation of the defense. Id. at 83, 105 S.Ct. at 1093, 1096. See also Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995). The court recognized three factors in determining whether a state should provide a defendant access to expert assistance: (1) the private interest that will be affected by the action of the state; (2) the governmental interest that will be affected if the safeguard is to be provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. Ake, 470 U.S. at 77, 105

S.Ct. at 1093. The state need not provide indigent defendants with all the assistance that a wealthier person might be able to buy, Ross v. Moffitt, 417 U.S. 600, 602, 94 S.Ct. 2437, 2444-45, 41 L.Ed.2d 341 (1974), rather, fundamental fairness requires that the state not deny them "an adequate opportunity to present their claims fairly within the adversary system." Ake, 470 U.S. at 77, 105 S.Ct. at 1094 (quoting Moffitt, 417 U.S. at 612, 94 S.Ct. at 2444). The Court did not create a universal rule that an indigent defendant is entitled to an expert for every scientific procedure. See, e.g., Vickers v. Arizona, 497 U.S. 1033, 1035, 110 S.Ct. 3298, 3299, 111 L.Ed.2d 806 (1990). (Marshall, J., dissenting from denial of writ of certiorari). Ake recognized a due process right "to the assistance of an expert if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." Weeks v. Angelone, 176 F.3d 249, 266 (4th Cir. 1996), aff'd, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court upheld the denial of an indigent defendant's request for appointment of a criminal investigator, a fingerprint-expert, and a ballistics expert because the defendant failed to make a sufficient particularized showing of need. The Court stated that "[t]he defendant's request for a ballistics expert included little more than the 'general statement that the requested expert "would be of great necessarius witness." [P]etitioner offered little more than

undeveloped assertions that the requested assistance would be beneficial. . . ." Id. at 324 n.1, 105 S.Ct. 2637 n.1 (citations omitted).

> Ake and Caldwell, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

Similarly, Kentucky law provides for appointment of expert witnesses upon a particularized showing that assistance is "reasonably necessary." See Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999), cert. denied sub nom Hicks v. Kentucky, ___ U.S. ___, 120 S.Ct. 1186, 145 L.Ed.2d 1092 (2000); Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988), cert. denied, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989); Sommers v. Commonwealth, Ky., 843 S.W.2d 879 (1992); KRS 31.110; KRS 31.185. A court need not provide funds for "fishing expeditions." Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1984), cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984). Whether to grant a request for funds for or appointment of an expert is within the sound discretion of the trial court. Dillingham, 995 S.W.2d at 381; Sommers, 843 S.W.2d at 888.

In the current case, Seay contends that his attorney was ineffective for failing to request funds to hire an expert witnesses involving the blood evidence and the stab wounds. However, he offers no specific facts that expert assistance was necessary to prepare a defense. He states that the DNA testing conducted for the prosecution could have been challenged because a defense expert could have discovered that the blood stains on his shirt and arm were contaminated or that they did not match the DNA of the victim. He also challenges the results of the blood typing tests because they only narrowed the samples to 7% of the population, which he extrapolated to constitute 47,112 people within Jefferson County.

Despite the fact that the DNA testing was conducted on only one of the blood samples that being on Seay's right shoe, he fails to present sufficient facts to support the granting of a request for expert witnesses on the blood evidence. He offers no rationale for how or why the test results would have been invalid due to contamination, or why further testing would have rendered different results. The Kentucky State Police Forensic Laboratory conducted PCR (polymerase chain reaction) and RFLP (resriction fragment length polymorphism) DNA testing and an independent commercial laboratory performed further PCR tests.[2] DNA and blood type analysis have been recognized as reliable and precise scientific methods of identification. See, e.g., Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999); Fugate v. Commonwealth,

[2] The results of the DNA tests indicated a 1 in 1,649,887 chance that the blood on Seay's shoe was not that of the victim.

993 S.W.2d 931 (1999). Although the credibility of specific test results can still be attacked at trial, Seay has not presented facts sufficient to raise a question as to the validity of the blood tests. Other courts have required defendants to show a particularized need for an expert witness involving DNA evidence. See, e.g., Michigan v. Leonard, 224 Mich App. 569, 569 N.W.2d 663 (1997); Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996), cert. denied, 519 U.S. 1154, 117 S.Ct. 1092, 137 L.Ed.2d 225 (1997). But see Dubose v. State, 662 So.2d 1189 (Ala. 1995)(holding that defendant automatically entitled to appointment of expert witness to assist in analysis of DNA testing). Seay has not shown that his attorney was aware of any facts that would have placed her on notice that the assistance of an expert witness on the blood evidence would have been helpful to the defense. Even if counsel should have sought appointment of an expert witness, Seay has not shown a reasonable probability that the trial court would have granted the request or that an expert would have developed evidence beneficial to the defense. As a result, we believe that Seay has not established either deficient performance or actual prejudice on this issue.

Similarly, Seay has not demonstrated ineffective assistance of counsel with respect to counsel's failure to seek a forensic expert on the stab wounds. He points out that the autopsy report indicates that the fatal stab would was 3.5 inches deep while the knife confiscated from him had only a 2 1/4 inch blade. First, it is possible to inflict a wound deeper than the length of a knife blade based on the force of the blow. In any

event, the Commonwealth stated at the guilty plea hearing that it had not established that Seay's knife was the actual murder weapon. Seay has not shown that the Commonwealth would have attempted to offer that particular knife into evidence at a trial. Therefore, he has not demonstrated either deficient performance or prejudice with respect to counsel's failure to seek funds for an expert witness on the stab wounds.

Seay also argues that defense counsel rendered ineffective assistance for failing to request an evidentiary hearing on his competence to stand trial. He states that he informed his attorney that he had been treated for mental illness during his incarceration on the prior murder conviction. In fact, defense counsel filed a motion for a psychiatric evaluation of Seay, which the trial court granted. Although the report is not in the appellate record, the parties acknowledged at the guilty plea hearing that the results of the evaluation indicated that Seay was mentally competent to stand trial. During the guilty plea hearing, Seay stated that he was taking anti-depressant medication but that he understood the proceedings.

In Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), cert. denied, ___ U.S. ____, 120 S.Ct. 1182, 145 L.Ed.2d 1088 (2000), the Kentucky Supreme Court held that after a court orders a psychiatric evaluation of a defendant, a hearing to determine whether the defendant is competent to stand trial is mandatory under KRS 504.100(3). However, it also held that the standard of review of a trial court's failure to conduct a competency hearing is whether a reasonable judge should have experienced doubt about

the defendant's competency to stand trial. Id. at 486. Factors relevant to creating a reasonable doubt about a defendant's mental competency include his irrational behavior, his demeanor in court, and any prior medical opinion on his competence to stand trial. Id. (citing Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)). The court in Mills indicated that although a competency hearing is mandatory under KRS 504.100(3) and cannot be waived by the defendant, a trial court's decision to allow waiver by a defendant is subject to a harmless error analysis.

In the case sub judice, an evaluation of Seay by psychiatric personnel at the Kentucky Correctional Psychiatric Center (KCPC)resulted in a report concluding that he was mentally competent. Seay told the court at the guilty plea hearing that he understood the proceedings and the charges. The judge indicated that he was aware that Seay had been treated for mental problems in the past. Seay was responsive during the hearing and conferred several times with his attorney. The mere fact that Seay had been treated for mental illness in the past is not sufficient to find that the trial court's failure to hold a hearing on his competency was not harmless error. Concomitantly, Seay has not alleged facts that support his claim that defense counsel was deficient in not requesting a competency hearing or that he was prejudiced by the court's failure to conduct a hearing.

Finally, Seay argues that counsel was ineffective for advising him to plead guilty despite an alleged lack of evidence.

First, a reviewing court is to presume that counsel rendered effective assistance and must refrain from second-guessing counsel's actions based on hindsight. The Commonwealth's evidence in this case consisted of DNA and blood typing analysis placing the victim's blood on Seay's clothing and at the residence where Seay was staying, including on the outside wall, in the bathroom, and on the fence. There was a trail of the victim's blood from the victim's body to the house . Seay also made some incriminating statements about killing someone to Flossie Neff and Brenda Seay. Under the circumstances, Seay has not presented sufficient facts to rebut the presumption that defense counsel acted within the wide range of competent assistance in advising him to plead guilty to murder with a twenty-four year sentence, rather than go to trial with a potential life sentence.

In conclusion, we believe that the circuit court's denial of the RCR 11.42 motion should be affirmed for reasons different than those stated by the trial court. See Cooksey Brothers Disposal Co., Inc. v. Boyd Co., Ky. App., 973 S.W.2d 64, 70 (1997), cert. denied, 525 U.S. 930, 119 S.Ct. 338, 142 L.Ed.2d 279 (1998); Bd. of Education of McCreary Co. v. Williams, Ky. App., 806 S.W.2d 649, 650 (1991). Seay has not shown that he received ineffective assistance of counsel in entering his guilty plea.

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

ALL CONCUR.

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