

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000608-MR

RANDALL WAYNE HARPER

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
INDICTMENT NO. 91-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

DYCHE, JUDGE: On December 19, 1990, Randall Wayne Harper strangled his estranged wife, Marlana Lynn Harper, with her brassiere. He put her body in the trunk of his car, and the following day took it to Tennessee and left it in a field, after covering it with a large piece of insulation. Randall then denied any knowledge of Marlana's disappearance and even assisted in neighborhood searches for her. But one month later, while watching an episode of "America's Most Wanted" with his mother, Randall confessed to her that he had killed Marlana. The next day he gave a statement to the police and led them to the victim's body. Randall was charged with murder.

On May 8, 1991, upon the advice of counsel, Randall entered a plea of guilty to murder and received a life sentence. He was formally sentenced on June 14, 1991. In 1993 Randall Harper filed a motion for collateral relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42; he alleged ineffective assistance of counsel. A supplemental memorandum was filed and an evidentiary hearing was held in October 2000. The Logan Circuit Court denied the requested relief, and Harper appeals.

Harper first alleges that his trial counsel was ineffective for failing to insist that a competency hearing pursuant to Kentucky Revised Statute (KRS) 504.100(3) be held prior to entering the guilty plea. Harper was granted leave to file supplemental citation of authority (viz., Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001)), to support the argument that a competency hearing is mandatory when the trial court is sufficiently aware that a defendant's competence to stand trial is questionable.

Here the facts do not arise to that level. Harper emphasizes that the trial court noted that Harper was in need of psychological help. However, he fails to demonstrate now or then that he was incompetent to stand trial. The pretrial evaluation ordered by the court held otherwise. Moreover, Thompson, supra, requires only that a hearing be held on a later motion for RCr 11.42 relief to determine "whether a retrospective competency hearing is warranted." Id. at 410; see also Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001), and Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001). The Logan Circuit Court

found that "there would have been no logical reason for [Harper's] attorney to request a mental health evaluation or a hearing before the court on this issue." The evidence before the circuit court (from the hearing and the record) supports this finding, and we will not disturb it.

Harper secondly contends that trial counsel was ineffective for advising appellant to plead guilty to a recommended sentence of life imprisonment. Harper insists that this was the maximum sentence for murder and that there was no indication that the Commonwealth intended to seek the death penalty. At the evidentiary hearing trial counsel testified that she had knowledge of evidence of possible statutory aggravators (rape, robbery, or kidnaping) that, had there not been a timely plea, could have been used by the Commonwealth to seek a death sentence versus Harper. Moreover, as the trial court found, life was not the maximum sentence at the time of Harper's plea. There was no upper limit on a term of years imposed¹, and any sentence greater than twenty-four years would have resulted in a lengthier sentence than life in terms of parole eligibility.² The evidence against Harper was overwhelming. Counsel was not ineffective for recommending the guilty plea.

Harper's third allegation is that trial counsel failed to investigate, consider, and advise appellant that he had a

¹It is now fifty years under KRS 532.020(2)(a).

²KRS 439.3401, at the time of Harper's plea, allowed persons sentenced to life in prison to meet the parole board after serving twelve years. Other violent offenders had to serve fifty percent of their time before being eligible for parole.

viable defense of extreme emotional disturbance. Again Harper's claim is unsupported. The autopsy report on Marlana Harper revealed no evidence of alcohol, drugs, nor sexual intercourse. Thus Harper's version of the triggering event causing him to murder Marlana (that they had gotten inebriated, had sex, and that afterward she had threatened to kill their son) would not have been tenable given the forensic evidence to the contrary. Trial counsel was not ineffective for failing to pursue this defense.

Harper next argues that the cumulative effect of counsel's errors constituted an outright denial of counsel. We disagree. "In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 913 (1998) (citations omitted).

The fifth issue is whether the trial court erred in labeling counsel's deficiencies as "trial strategy." Again, having found no deficiencies, we cannot accept appellant's argument here. The trial court properly addressed the RCr 11.42 motion in light of federal and state legal precedent.

We lastly consider Harper's argument that the trial court erred in denying a motion for funds to procure a postconviction psychology expert. This issue is moot, as Dr. Eric Drogin assisted and testified *pro bono* on Harper's behalf. Harper fails to allege how expert funding would have resulted in testimony different from Drogin's.

The judgment of the Logan Circuit Court is affirmed.

ALL CONCUR.

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