RENDERED: SEPTEMBER 20, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001937-MR

ROSS STEPHENSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 96-CR-01053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Ross Stephenson appeals from orders of the Fayette Circuit Court denying his motion for relief pursuant to RCr 11.42. Having reviewed the record and the applicable law, we affirm.

On October 29, 1996, appellant was indicted by the Fayette County Grand Jury on one count of capital murder, one count of first-degree assault, and one count of first-degree burglary. The indictment arose from events occurring on August 17, 1996, in which appellant shot and seriously injured Scott Thompson, and shot and killed Earl Griffin. Prior to trial, the Fayette Circuit Court ruled that the case was to

proceed as a non-capital murder case. A jury trial commenced on December 1, 1997.

Testimony at trial included that of Thompson and appellant. Thompson testified, by video deposition, that on the night at issue, he, Griffin, and another man, Al Dailey, were at Griffin's residence. Appellant showed up later, and they were all drinking beer and liquor. Although Dailey claimed Thompson gave him a ride home, Thompson didn't remember doing so. According to Thompson, at some point appellant left Griffin's residence and returned less than an hour later. When appellant came back, he stood behind Thompson, and when Thompson turned around, appellant shot him. Thompson heard two more shots, and saw appellant leave.

Appellant testified to a different version of events, summarized as follows. Appellant testified that he was eighteen years old at the time of the shootings, and that his mother had taken him out of school after the seventh grade because a lot of the kids made fun of him for being overweight. According to appellant, on the night at issue he had drunk a lot of beer and smoked some marijuana, and that at about 2:30 in the morning he decided to go over to Griffin's to see what he was doing and maybe buy some marijuana from him. Appellant testified that he had his gun in his jacket pocket, and that he had taken the gun with him so that in case the subject of guns came up he could show it to Griffin and Griffin would think he was cooler than he actually was. When he arrived at Griffin's residence, Griffin, Thompson, and Dailey were there drinking beer and whiskey.

Appellant joined the men in drinking and smoking pot, and everybody was drunk and high. Thompson and Griffin were rowdy and loud. Thompson left to take Dailey home, during which time appellant and Griffin watched TV and talked, and then Thompson returned to Griffin's. When Thompson came back, he was drunk and loud and hollering. Thompson handed a whisky bottle to appellant and told him to take a drink. Appellant took a little sip, and Thompson called him a "pussy" and told him to take a real drink. Appellant tried to take a bigger drink, and then Thompson took the bottle away from him and called him a "fat pussy." Thompson and Griffin started laughing at him. Appellant felt sick and went to the bathroom to throw up and heard Thompson and Griffin laughing. Appellant decided to go home. As he headed for the door, Thompson jumped up, grabbed his arm, and shouted "where are you going, fat boy, we're not done drinking yet" and then said "let me show you something" and looked at Griffin. Griffin then shouted, "No rules," a couple of times. Thompson then whirled around and hit appellant in the jaw with his elbow. Appellant testified that the next thing he knew his ears were ringing from a gunshot and that he had his gun in his hand. He turned around to look at Griffin. Appellant testified that Griffin was hollering something and started to come after him, and without realizing what he was doing, he shot Griffin. Appellant testified that he shot Griffin because he was scared, wanted to get away, and was afraid of what Griffin would do if he got hold of him. Appellant testified that he never meant to shoot or kill anyone.

The jury found appellant guilty of first-degree manslaughter of Griffin and of first-degree assault of Thompson. Appellant was sentenced to twenty years' imprisonment on each count, with the sentences to run consecutively for a total of forty years. Appellant's convictions were affirmed by the Kentucky Supreme Court in Case No. 98-SC-0020-MR.

On May 30, 2000, appellant, pro se, filed a motion to vacate or set aside judgment pursuant to RCr 11.42. On February 7, 2001, appointed counsel filed a supplemental memorandum. On July 16, 2001, the trial court denied appellant's motion without a hearing. On July 25, 2001, appellant filed a motion to vacate the July 16, 2001 order. On August 13, 2001, the trial court denied appellant's motion to vacate, in which order the court further stated that more specific findings were not necessary. Appellant appeals from the July 16, 2001, and August 13, 2001 orders.

On appeal, appellant contends that 1) the trial court erred by overruling his RCr 11.42 motion without a hearing, 2) he was denied due process by the trial court's failure to inquire whether he voluntarily and intelligently consented to defense counsel's arguments admitting guilt to the alleged crimes, and 3) he was denied the effective assistance of counsel by counsel's reliance on a multiple theory defense, which included conflicting defenses.

We first address appellant's argument regarding the trial court's failure to inquire whether he voluntarily consented to defense counsel's arguments admitting guilt to the crimes.

Appellant argues that statements made by counsel in his opening and closing arguments were admissions of guilt, and therefore, as with a guilty plea, the trial court was required to query appellant to ensure the admissions were made with his voluntary and intelligent consent.

The statements with which appellant takes issue include counsel's remarks that he was not going to ask the jury to find appellant not guilty of everything, that the evidence would not excuse what appellant did that night, and that he would not ask them to let appellant walk out a free man, as well as counsel's admissions that appellant was guilty of assault under extreme emotional disturbance for the shooting of Thompson, and that appellant was guilty of the misperceived need for self-defense with regard to the shooting of Griffin.

We believe that the case of Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977), is dispositive of appellant's argument. In Meadows, the appellant, on trial for murder, similarly argued that statements made by his counsel in his closing argument amounted to a plea of guilty, and therefore that his conviction should be set aside under the principles of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), because there had been no hearing to determine whether he had voluntarily and intelligently acquiesced to counsel's statements. Id. at 512. The Kentucky Supreme Court stated:

> We think, however, that this particular approach to the jury by counsel, seeking more to save his client's life than his liberty, was not a plea, but a ploy. It entreated the jury to find Meadows not guilty of the most serious offense covered by instructions, even

> if the price of its so doing were to find him guilty under one of the other instructions. A lawyer's role in trying a case is much like that of a military commander on the field of battle. His decisions to advance, retreat or stand fast cannot always be plotted in advance or be laid before headquarters before taken. The action of trial counsel in this particular instance may have amounted to a tactical retreat, but certainly it did not surrender the cause. We therefore need not pass on the question whether the Boykin principle would apply to a de facto guilty plea made, for example, in the form of a lawyer's admitting his client's guilt and pitching his case on the mercy of the jury.

Id. In the present case, we similarly conclude that counsel's statements "[were] not a plea, but a ploy." Id. As in Meadows, it is clear that counsel's statements were a strategic attempt to avoid conviction of the most serious offenses, murder as to Griffin and first-degree assault as to Thompson, by conceding to the jury that appellant was guilty of lesser offenses. Id. In fact, on appeal, appellant agrees that "[i]t seems likely that defense counsel's actions were chosen in an effort to avoid a conviction for murder." Accordingly, we conclude that counsel's statements did not constitute a "de facto guilty plea," id., and, per Meadows, under these circumstances no inquiry by the trial court was required.

We next address appellant's argument regarding ineffective assistance of counsel. Appellant contends that, rather than developing one theory of the case, counsel presented several, and conflicting, defenses - extreme emotional disturbance, intoxication, and self defense - and that this failure to rationally select a defense, or protect a chosen defense, constituted ineffective assistance.

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 resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden is on the movant to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969). There is a presumption that the challenged actions of counsel might be considered sound trial strategy. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Whether an attorney has rendered ineffective assistance is an issue of fact to be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous. Ivey v. Commonwealth, Ky. App., 655 S.W.2d 506, 509 (1983).

Our review of the record indicates that defense counsel's strategy, in light of appellant's admission to the shootings, was to portray appellant as a peaceful young man who never meant to hurt anyone, but who, as a result of his intoxication and sensitivity to teasing, overreacted when he was taunted and frightened by Thompson and Griffin. Counsel was defending appellant against charges concerning both Griffin and Thompson, each of whom appellant himself advanced a different explanation for shooting. Further, the defenses asserted by counsel, extreme emotional disturbance, a misperceived need for self-defense, and intoxication were consistent with the testimony

given by appellant himself as well as other evidence presented at trial.

Effective assistance of counsel does not deny counsel the freedom of discretion in determining the means of presenting his client's case. Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642 (1978). Having reviewed the record, we conclude that appellant has failed to overcome the presumption that counsel's actions were other than sound trial strategy. Accordingly, the trial court did not err in rejecting appellant's claim of ineffective assistance.

Finally, as the issues raised by appellant are resolvable from the record, no evidentiary hearing was required. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573, 576 (1990), cert. denied, 502 U.S. 844, 112 S. Ct. 140, 116 L. Ed. 2d 106 (1991).

For the aforementioned reasons, the orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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