RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000428-MR

TERRY WAYNE WHOBREY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 98-CR-001157

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2003-CA-000686-MR

KENNETH DAVIDSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 98-CR-001157

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE, JUDGE; AND EMBERTON, SENIOR JUDGE.[1]

DYCHE, JUDGE: In 2003-CA-000428-MR, Terry Wayne Whobrey appeals from an order of the Jefferson Circuit Court entered on January 15, 2003 in which the trial court denied his motion, pursuant to RCr 11.42, to vacate his criminal conviction. In 2003-CA-000686-MR, Kenneth Davidson appeals from an order of the Jefferson Circuit Court entered on March 11, 2003, in which the trial court denied his *pro se* motion, pursuant to CR 60.02(f), to correct his sentence.

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On appeal, Whobrey argues that his trial counsel rendered ineffective assistance of counsel because he failed to tender instructions regarding Extreme Emotional Disturbance ("EED") and voluntary intoxication. Also, Whobrey argues that the trial court erred when it failed to *sua sponte* instruct the jury on EED and voluntary intoxication. Finally, Whobrey argues the trial court erred when it denied his RCr 11.42 motion without holding an evidentiary hearing since he insists that his allegations cannot be clearly refuted by the record. Finding no

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

error, we affirm the trial court's denial of the RCr 11.42 motion.

On the night of March 23, 1998, Johnnie Hightower and his friend John Rosenbarger went to a local bar, JR's. When the two friends arrived at the bar at approximately 11:30 p.m., they found Terry Whobrey, Gregory Curtis, and Bobby Whobrey already there.

According to the evidence presented at trial, Whobrey approached Rosenbarger. There was a brief exchange between the two in which Whobrey told Rosenbarger that what was to transpire did not concern him. At this point, Davidson struck Hightower with a pool cue. (It is unclear whether Davidson was already at the bar or if he arrived shortly after Hightower and Rosenbarger.) Bobby and Curtis began to strike Hightower with pool cues as well. Hightower fled the bar but the four attackers pursued him. They quickly caught Hightower. While Curtis and Bobby continued to strike Hightower with pool cues, Whobrey stabbed Hightower multiple times. Davidson either helped Whobrey stab Hightower or continued to strike Hightower; regardless, they continued the assault. After the attack, Hightower was transported to a local hospital where he died the next day from multiple stab wounds.

Whobrey was indicted on one count of capital murder, KRS 507.020, and one count of being a persistent felony offender

in the second degree, KRS 532.080. Curtis, Davidson, and Bobby were indicted as Whobrey's co-defendants. The four proceeded to a jury trial which lasted from January 12 to January 21, 1999. At trial, Whobrey and his co-defendants claimed that they had acted in self-defense. The jury convicted Whobrey of intentional murder and of being a persistent felony offender in the second degree.

Whobrey appealed his conviction, but the Supreme Court of Kentucky affirmed his conviction in 1999-SC-0396-MR. On April 9, 2001, Whobrey filed a *pro se* motion, pursuant to RCr 11.42, to vacate his conviction. The trial court appointed counsel for Whobrey and gave his counsel an opportunity to supplement the *pro se* motion. On October 2, 2002, Whobrey's appointed counsel filed a supplemental memorandum and argued that Whobrey's trial counsel was ineffective since he failed to tender jury instructions regarding EED and voluntary intoxication. Whobrey's appointed counsel also argued that the trial court should have instructed the jury on both EED and voluntary intoxication given the evidence which came to light at trial. The trial court denied Whobrey's RCr 11.42 motion and Whobrey appealed to this Court.

On appeal, Whobrey, through appointed counsel, argues that his trial counsel rendered ineffective assistance of counsel because he failed to tender jury instructions regarding

EED and voluntary intoxication. Whobrey argues that facts surrounding the attack on Hightower would have justified both an EED instruction and a voluntary intoxication instruction.

Whobrey argues that his trial counsel's failure to tender the proper instructions cannot be considered the result of legitimate trial strategy, although he fails to explain why. Furthermore, he argues that his trial counsel's failure to tender these instructions clearly prejudiced his defense because the jury was not allowed to consider all legal options.

Whobrey also argues that the Jefferson Circuit Court erred when it failed to instruct the jury on EED and on voluntary intoxication. Whobrey cites Spears v. Commonwealth, Ky., 30 S.W.3d 152 (2000), for the proposition that the triggering event for EED need only be sudden and uninterrupted, and the time between the triggering event and the killing can be any length of time as long as the EED is not interrupted. Whobrey argues that the trial court should have instructed the jury on EED and voluntary intoxication.

Finally, Whobrey argues that his allegations were not refuted by the record; thus, the trial court erred when it denied his RCr 11.42 motion without holding an evidentiary hearing.

According to Strickland v. Washington, 466 U.S. 668 (1984), a petitioner who has alleged ineffective assistance of

counsel must show: (1) trial counsel's performance was deficient, and (2) counsel's deficient performance actually prejudiced the petitioner and rendered his trial fundamentally unfair. Id. at 687.

In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court re-affirmed its holding in Strickland that the petitioner must show that his trial counsel's errors prejudiced the defense. The petitioner must show with a reasonable probability that but for counsel's errors the results of his trial would have been different. Wiggins, 539 U.S. at ____. The Supreme Court has defined reasonable probability as a probability sufficient to undermine confidence in the outcome. Id., quoting Strickland, 466 U.S. at 692.

The Supreme Court of Kentucky defined EED as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." McClellan v. Commmonwealth, Ky., 715 S.W.2d 464, 468-9 (1986). There are three requirements for EED: (1) there must be a sudden and uninterrupted triggering event; (2) the defendant must be extremely emotionally disturbed as a result; and (3) the defendant must act under the influence of this disturbance. Spears v. Commonwealth, supra at 155.

In the instant case, Whobrey claims that he believed that either Hightower or one of his acquaintances (but not Rosenbarger) "snitched" on his brother, Keith Whobrey. Keith Whobrey was convicted on federal drug charges and, on the day of the attack, had been sentenced to five years. In light of these facts, Whobrey argues that the triggering event for EED occurred when Hightower said to him, "What the fuck are you looking at, punk? What's your problem? I heard you been talking trash." However, Whobrey does not cite to the record and does not point to any witness who testified at trial that Hightower ever said these triggering words. Moreover, Whobrey does not claim that he could produce a witness who would have testified at a hearing that Hightower spoke the triggering words. The only evidence that Whobrey presented to the trial court that this triggering event occurred was his own self-serving statement.

At trial, Rosenbarger testified that while he sat at the bar, he heard someone behind him state, "Kill the rat motherfucker." According to Rosenbarger, he turned around and saw Whobrey standing behind him with a knife. Rosenbarger testified that he said to Whobrey, "What the fuck is wrong with you?" These words are strikingly similar to those allegedly spoken by Hightower. According to Rosenbarger, Whobrey then stated, "This doesn't concern you." (Tape 0, 01/13/1999,

11:26:23 to 11:33:33). The record refutes Whobrey's assertion that Hightower uttered the alleged triggering words.

Furthermore, Whobrey alleges that because of Hightower's statement he became so enraged that he struck Hightower with a pool cue. However, the record clearly shows that Kenneth Davidson, not Whobrey, initially struck Hightower with a pool cue, after Rosenbarger, not Hightower, directed profanity toward Whobrey. The record clearly refutes Whobrey's allegation that he was acting under the influence of EED.

Whobrey fails to produce any credible evidence that a triggering event actually occurred. He fails to produce any credible evidence that he was extremely emotionally disturbed. And he fails to produce any credible evidence that he acted under the influence of such a disturbance. Not only has Whobrey failed to show that his trial counsel's performance was deficient, but he also failed to show with any degree of probability that his trial counsel's alleged deficient performance undermined the confidence in the outcome of his trial. Thus, Whobrey has failed to satisfy either the first or second prong of Strickland.

To justify an instruction for voluntary intoxication, there must be evidence not only that the defendant was intoxicated but also evidence that the defendant was so intoxicated that he or she did not know what he or she was

doing. Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 118 (1990); see also Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977). In the instant case, the fact that Whobrey may have consumed four drinks fails to show that he was so intoxicated that he did not know what he was doing. Moreover, the fact that Hightower's blood alcohol level was .205 at the time Whobrey killed him is completely irrelevant.

Whobrey has simply failed to allege specific facts that would have supported a voluntary intoxication instruction. While the record discloses that Whobrey may have been drinking, it also shows that he was aware of his actions when he attacked Hightower; thus, he has failed to show that his trial counsel's performance was deficient.

Whobrey's allegation that the trial court erred by not tendering instructions on EED and voluntary intoxication should have been raised by direct appeal. RCr 11.42 cannot be used to present issues that should have been presented on direct appeal. Baze v. Commonwealth, Ky., 23 S.W. 3d 619, 626 (2000). However, even if his allegations were properly raised, the trial court did not err since the evidence presented at trial did not support instructions on either EED or voluntary intoxication.

It is well settled that an evidentiary hearing is not required where the allegations raised pursuant to RCr 11.42 are refuted by the record. Hodge v. Commonwealth, Ky., 116 S.W.3d

463, 468 (2003). Since the record soundly refuted Whobrey's claims, the trial court did not err when it denied Whobrey's claims without holding an evidentiary hearing.

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Davidson was indicted on one count of capital murder, KRS 507.020, and one count of being a persistent felony offender in the first degree, KRS 532.080. Davidson was convicted of facilitation to murder and of being a persistent felony offender in the first degree. He was sentenced to five years for facilitation but his conviction for PFO I enhanced his sentence to twenty years.

On December 10, 2002, Davidson filed a *pro se* motion, pursuant to CR 60.02, to correct his sentence. The trial court denied Davidson's *pro se* motion, and he appealed to this Court.

On appeal, Davidson avers that the Commonwealth used two of Davidson's prior felony convictions, one from 1978 and the other from 1996, as predicates for the PFO I charge. In 1978, Davidson was convicted for receiving stolen property over $100.00 and was sentenced to two years probated for five years. In 1996, Davidson was convicted on four counts of wanton endangerment in the first degree and was sentenced to a total of four years.

Davidson argues, as he argued before the trial court, that he completed service of the sentence on his 1978 conviction

more than five years before the commission of the instant offense. He contends that when the Commonwealth used his 1978 conviction as one of the predicates for the current PFO I charge, it violated the five-year look-back rule set forth in KRS 532.080. Because the Commonwealth violated KRS 532.080, he concludes that he should have only been convicted as being a persistent felony offender in the second degree.

He also argues that CR 60.02(f) is the appropriate means to address this issue. Furthermore, he insists that his trial counsel was ineffective for not explaining to him ramifications of the PFO statute.

The case of Howard v. Commonwealth, Ky. App., 608 S.W.2d 62 (1980), is directly on point. In Howard, appellant was convicted of felony theft by unlawful taking and of being a persistent felony offender in the first degree. On appeal, he argued that the jury instructions were erroneous because they allowed him to be convicted as being PFO when the service of the sentence on one of his prior felony convictions had occurred more than five years prior to the commission of the instant offense. This Court held:

> The statute, KRS 532.080(2)(c), only requires that completion of service of sentence or discharge from probation or parole on any, not each, of the prior convictions shall have occurred within five years of the commission of the instant offense. As we read the plain language of

> the persistent felony offender statute it is only necessary that the Commonwealth establish that as to any one of the previous felonies the defendant has completed service of sentence or has been discharged from parole within the past five years or has not yet completed his sentence or has not yet been discharged from probation or parole.

Id. at 64. According to the holding in Howard, the Commonwealth was not required to establish that Davidson had completed the sentences in all of his prior felony convictions within five years of the commission of the instant offense. All the Commonwealth had to establish to convict Davidson of PFO I was that he had two prior felony convictions and that he had completed the service of the sentence of one of his prior felony convictions within the five year look-back rule set forth in KRS 532.080. The Commonwealth established, at trial, that Davidson had completed the sentence for his 1996 conviction within five years of the commission of the instant offense. In the instant case, Davidson was properly convicted of PFO I. Thus, the trial court did not abuse its discretion when it denied his CR 60.02 motion.

CONCLUSION

In 2003-CA-000428-MR, this Court affirms the Jefferson Circuit Court's denial of Terry Whobrey's RCr 11.42 motion to vacate his conviction. In 2003-CA-000686-MR, this Court affirms

the Jefferson Circuit Court's denial of Kenneth Davidson's CR 60.02 motion to correct his sentence.

ALL CONCUR.

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