

RENDERED: JANUARY 28, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-001962-MR

KENNETH JAMES BEDFORD

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 98-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Kenneth James Bedford appeals from an order of the Owen Circuit Court denying his motion for post-conviction relief pursuant to Ky. R. Civ. P. (RCr) 11.42.

Bedford alleges that, for various reasons, he received ineffective assistance of counsel in connection with his murder

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

trial in the death of Jeff Smith. For the reasons stated below, we affirm.

Bedford suspected that Jeff Smith had stolen guns from him. On May 18, 1998, Bedford and his codefendants, Travis Gray and Mike Robinson, detained Smith at gunpoint, took Smith to Bedford's trailer, and interrogated him about the location of the missing guns. Though the evidence does not clearly reveal who fired the fatal shot, Smith was killed on the back deck of Bedford's trailer.

Immediately after the murder, the body was loaded into the victim's vehicle and the codefendants traveled through Kentucky, Tennessee, and Arkansas before reaching the home of Carlton Gray, the brother of Travis Gray. Before arriving at their destination in Arkansas, the codefendants had agreed to dismember and dispose of the victim's body. The codefendants thereafter decapitated and dismembered the body, and dispersed the remains over three counties in Arkansas.

On September 1, 1998, Bedford and his codefendants were indicted for murder, kidnapping, first-degree robbery, and tampering with physical evidence. Prior to trial Gray and Robinson pled guilty to all charges, and Bedford pled guilty to the tampering charge.

Bedford's trial was held on February 7 through February 11, 2000, following which he was convicted of murder,

kidnapping, and first-degree robbery. Bedford was sentenced to life without parole for twenty-five years. On August 22, 2002, the Supreme Court rendered an unpublished opinion affirming Bedford's conviction and sentence. See Bedford v. Commonwealth, Case 2000-SC-0357-MR.

On July 17, 2003, Bedford filed a motion for post-conviction relief pursuant to RCr 11.42 and for a hearing on the issues raised in his motion. On August 13, 2003, the trial court entered an order denying the motions. This appeal followed.

Bedford alleges that, for various reasons, he received ineffective assistance of counsel in connection with his conviction and sentence. In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37, 39-40 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]" Strickland, 104 S.Ct. at 2065. To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome. Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695. It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding. Id.; Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002).

First, Bedford contends that he received ineffective assistance of counsel because trial counsel failed to file a motion for a change of venue. Bedford contends that the pretrial publicity concerning the crime prejudiced the local jury pool. However, the crimes occurred in May 1998 and Bedford's trial was not held until February 2000, and so there was a considerable period for any publicity occurring immediately after the crime to have dissipated. Further, Bedford's contentions concerning pretrial publicity are vague and general, and do not allege specific facts supporting his argument. "In attempting to obtain post-conviction relief, the movant must present facts with sufficient particularity to generate a basis for relief." Foley v. Commonwealth, 17 S.W.3d 878, 890 (Ky. 2000). "RCr 11.42(2) requires that the motion state specific grounds for relief and facts supporting those grounds. Failure to comply warrants summary dismissal." Skaggs v. Commonwealth, 803 S.W.2d 573, 576 (Ky. 1990). In addition, this is an issue involving trial strategy, and we will not

second-guess trial counsel's decision not to request a change in venue. It is not the function of this Court to usurp or second guess counsel's trial strategy. Baze v. Commonwealth, 23 S.W.3d 619, 624 (Ky. 2000).

Next, Bedford contends that he received ineffective assistance of counsel because trial counsel failed to request sequestration of the jury. However, Bedford has not identified with specificity any facts indicating that any of the jurors were exposed to extrajudicial information as a result of their not being sequestered, and he has accordingly failed to demonstrate that he was prejudiced by the nonsequestration of the jury.

Next, Bedford contends that trial counsel provided ineffective assistance by permitting him to waive his right to a speedy trial. However, Bedford alleges no specific facts demonstrating that he was prejudiced by this waiver and, moreover, any waiver of the appellant's right to a speedy trial falls within the scope of legitimate trial strategy. Because of the difficulties inherent in making a fair assessment of attorney performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged

action 'might be considered sound trial strategy.'" Strickland, 466 U .S. at 689, 104 S.Ct. at 2065.

Next, Bedford contends that trial counsel provided ineffective assistance because he failed to retain a "mitigation specialist" and a ballistics expert to aid in his defense. However, Bedford does not allege specific facts illuminating how such experts could have aided in his defense, what their expected testimony would have been, or even if there are any such experts who would have testified favorably to his defense. Bedford has accordingly failed to demonstrate prejudice in trial counsel's failure to retain such experts.

Next, Bedford contends that trial counsel provided ineffective assistance by waiving his right to a competency hearing. However, the appellant has not identified any facts which would indicate that he was incompetent to stand trial. This claim of ineffective counsel does not meet the standards for relief under RCr 11.42. RCr 11.42(2) requires a movant to state specifically the facts upon which he relies in support of grounds to vacate a sentence. This claim of ineffective assistance is not supported by facts, is based on speculation, and is not pled with the degree of particularity required by RCr 11.42(2). Moreover, Bedford has failed to demonstrate any prejudice as a result of trial counsel's alleged waiver of his right to a competency hearing, as Bedford has not demonstrated

that there is a reasonable probability that he would have been found incompetent.

Next, Bedford contends that trial counsel was ineffective for failing to secure his brother Danny Bedford's attendance at trial. Danny Bedford's statement to the police is contained in the record, and our review of same reflects that this witness did not have favorable information which could reasonably be expected to have altered the outcome of the trial. Hence, even if trial counsel was ineffective for failing to obtain Danny's attendance at the trial, Bedford was not prejudiced as a result because even if trial counsel had secured Danny Bedford's testimony there is not a reasonable probability that his testimony would have changed the outcome of the trial.

Next, Bedford contends that trial counsel was ineffective in his cross-examination of June Bedford. However, trial counsel's cross-examination of this witness was within the scope of legitimate trial strategy, and we discern no ineffective assistance in his cross-examination of June Bedford.

Next, Bedford contends that trial counsel provided ineffective assistance during voir dire. Specifically, Bedford contends that trial counsel, though he moved to strike Juror 90 for cause, failed to cite the proper authority; failed to object to the voir dire tactics of the Commonwealth; and did nothing to prevent a witness in the case, Jack McKenzie, from sitting with

the jury pool. The issue of Juror 90 was raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003). Moreover, trial counsel's response to the Commonwealth's tactics in voir dire was within the scope of legitimate trial strategy and, further, Bedford has failed to identify any prejudice resulting from trial counsel's failure to object to the Commonwealth's voir dire tactics.

Next, Bedford contends that trial counsel was ineffective because he failed to bring to the trial court's attention improper contacts between members of the victim's family and members of the jury during trial breaks and recesses. This complaint was supported in the trial court by two affidavits from Bedford's wife and her cousin. However, neither affidavit identified either an individual juror who had been contacted or any family member who supposedly had the improper contact. Again, this argument has not been stated with sufficient specificity to warrant post-conviction relief under RCr 11.42 and amounts to nothing more than a conclusionary allegation. Conclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing

because RCr 11.42 does not require a hearing to serve the function of discovery. Hodge, 116 S.W.3d at 468.

Next, Bedford contends that trial counsel was ineffective in his cross-examination of Candy Robinson; in permitting Robinson to violate the separation of witnesses rule; in his examination of Bedford's wife; in his examination of State Police Firearms Expert Ronnie Freels; in his examination of Bertha Bailey; in his examination of Virgil McAlister; and in his examination of various jail inmates. However, trial counsel's examination of these witnesses was within the wide-range of effective assistance of counsel and within the scope of legitimate trial strategy. Moreover, Bedford has failed to identify how he was prejudiced by Robinson's alleged violation of the separation of witnesses rule. A claim of ineffective assistance fixes the burden on the movant to plead sufficient facts to establish that the conduct of defense counsel was objectively unreasonable and that a reasonable performance by counsel would have created a reasonable probability of a favorable result. Hodge, 116 S.W.3d at 470. Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. Id. Conjecture that a different strategy might have proved beneficial is also not sufficient. Id. "The mere fact that other witnesses might have

been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id.

Next, Bedford contends that trial counsel was ineffective in failing to object to leading questions by the Commonwealth on numerous instances; in failing to object to the Commonwealth's bolstering of Travis Gray's and Mike Robinson's credibility and veracity in opening and closing arguments; in failing to object to the improper hearsay evidence given by Detective Figg concerning DNA reports, reports from an Arkansas forensic anthropologist and blood samples contrary to Kentucky's prohibition of investigative hearsay; by failing to object to the prosecutor's manufacturing of evidence by way of taking pictures of a gun which had nothing to do with the charges against Bedford; and by failing to properly impeach Mike Robinson. We conclude as to each of these contentions that trial counsel either did not provide deficient representation, acted in accordance with legitimate trial strategy, and/or that Bedford was not prejudiced by the alleged deficient performance.

Next, Bedford contends that trial counsel was ineffective in the sentencing phase of the trial because he failed to hire a "mitigation specialist"; by failing to investigate for the penalty phase of the trial; and by failing to call his wife in the sentencing phase of the trial; and by

failing to object to the Commonwealth's closing argument during the penalty phase. These general and vague allegations are not sufficiently specific to satisfy RCr 11.42(2). Moreover, trial counsel's decisions during the penalty phase of the trial were within the scope of legitimate trial strategy.

Next, Bedford contends that he received ineffective assistance of counsel because trial counsel permitted him to enter a "blind" guilty plea to the tampering-with-evidence charge. Bedford contends that he entered the plea because trial counsel told him if he entered the plea then the Commonwealth would not be able to present evidence concerning the disposal of the body in Arkansas and Tennessee, which evidence involved gruesome details and pictures of the deceased. We believe that trial counsel's efforts in this regard amounted to legitimate trial strategy.

Bedford also contends that he is entitled to an evidentiary hearing on his RCr 11.42 motion and appointment of counsel. A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. A hearing is required only if there is a material issue of fact that cannot be conclusively resolved; i.e., conclusively proved or disproved, by an examination of the record. Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. Coles v. Commonwealth, 386 S.W.2d 465 (Ky. 1965). If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record." Fraser at 453.

In this case all allegations can be resolved from the face of the record, and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, the appellant is not entitled to an evidentiary hearing. Moreover, since an evidentiary hearing is unnecessary, the appellant is not entitled to the appointment of counsel.

In summary, let us observe that we have given careful attention to the many allegations raised by the appellant, and we must conclude that his arguments taken either individually or as a whole form no basis for RCr 11.42 relief.

For the foregoing reasons the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

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