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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000316-MR

GEORGE LEE MILES, III — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 98-CR-00253

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

JOHNSON, JUDGE: George Lee Miles, III has appealed from the order of the Fayette Circuit Court entered on February 3, 2005, which, without holding an evidentiary hearing, denied his pro se motion pursuant to RCr[2] 11.42, to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment. Having concluded that Miles was not entitled to a jury

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Criminal Procedure.

instruction on extreme emotional disturbance and that trial counsel was not ineffective for failing to call an expert witness in the field of ballistics, we affirm on those issues. Having further concluded that Miles may have been entitled to a jury instruction on imperfect self-protection and that trial counsel may have been ineffective for failing to present compelling mitigating evidence during the penalty phase of trial, we vacate and remand for an evidentiary hearing.

Because Miles directly appealed his convictions for manslaughter in the first degree[3] and tampering with physical evidence[4] to the Supreme Court of Kentucky,[5] we quote the pertinent facts of this case from its Opinion as follows:

> On January 6, 1998, [Miles] was a passenger in a car proceeding on Pemberton Street in Lexington when it passed the victim, Corey Wilkerson, who was operating a moped traveling in the opposite direction. Wilkerson thereafter turned his moped around, accelerated, and caught up with the car.
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> The car, which was operated by Maurice Clayborne, stopped at an intersection and Wilkerson pulled his moped alongside the driver's side of the car. Clayborne noticed that Wilkerson was wearing a holster with a gun, so he turned and drove away. Wilkerson followed closely and when Clayborne's car stalled, he pulled up along the right rear

[3] KRS 507.030.

[4] KRS 524.100.

[5] Case Nos. 1999-SC-0197-MR and 1999-SC-0792-MR, rendered May 18, 2000, not-to-be published.

> passenger side of the car where [Miles] was seated.
>
> Clayborne later testified that although he heard gunshots, he did not see Wilkerson draw a gun, implying that [Miles] was the only person who fired his gun. Clayborne, as well as Williams and Andrews, who were also passengers in the car, went to the Lexington Police headquarters the following morning and reported the events of the previous night, claiming [Miles] fired the shots which killed Wilkerson. An autopsy later revealed that Wilkerson died from large caliber gunshot wounds to the left temple, mid-back, and crotch, any one of which would have been fatal.
>
> At trial, [Miles] admitted that he killed Wilkerson in the manner described by the other witnesses, but claimed that he fired his gun in self-protection. According to [Miles], Wilkerson had begun pulling his gun from the holster at the time [Miles] shot him. After the shooting, [Miles] admitted to his former girlfriend, Tameka Cloud, that he shot Wilkerson from inside the car, then got out of the car, and shot him again.

The Supreme Court Opinion became final on June 8, 2000.

On January 4, 2002, Miles filed a pro se motion pursuant to RCr 11.42, to vacate, set aside, or correct his 25-year sentence, as well as a motion for appointment of counsel and a request for an evidentiary hearing. The trial court granted Miles's request for counsel in an order entered on January 9, 2002. On April 5, 2002, counsel filed a motion for extension of time in which to supplement Miles's pro se motion, which was granted by an agreed order entered on April 11, 2002.

On July 10, 2002, counsel filed a second motion for extension of time requesting an additional 90 days to file a supplement. The trial court entered an agreed order on the same day. The supplemental memorandum was filed on October 15, 2002. The Commonwealth filed its objections on November 3, 2003. The trial court denied Miles's RCr 11.42 motion on February 3, 2005,[6] without holding an evidentiary hearing. This appeal followed.

Miles argues on appeal (1) that trial counsel was ineffective for failing to investigate all possible defenses including extreme emotional disturbance and imperfect self-defense; (2) that trial counsel was ineffective for failing to argue for mitigation of punishment; (3) that trial counsel was ineffective for failing to present an expert witness in the field of ballistics; and (4) that the trial court erred by ruling, without holding an evidentiary hearing, that trial counsel's decisions amounted to trial strategy.

To establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally

[6] There is no indication in the record on appeal or in the parties' briefs as to why a 15-month delay occurred before the trial court ruled on the RCr 11.42 motion.

unfair or unreliable.[7] The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."[8] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[9] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[10] "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"[11] In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or

[7] Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

[8] Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998).

[9] Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

[10] Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 470; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

[11] Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

was rendered fundamentally unfair and unreliable.[12] Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.[13] A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record.[14] "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."[15]

Miles's first argument relates to trial counsel's failure to present proof on all defenses to murder, including extreme emotional disturbance, self-defense, and imperfect self-defense. Since the Supreme Court Opinion on Miles's direct appeal addressed the issue of self-defense, we will not revisit that issue. However, the claim concerning a defense of extreme emotional disturbance requires further discussion.

Extreme emotional disturbance (EED) has been defined as "'a temporary state of mind so enraged, inflamed, or

[12] Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002).

[13] Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

[14] Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

[15] Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

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.'"[16] There are three requirements that must be met before a defense of EED can be established: (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.[17]

In the case before us, Miles fails to identify a triggering event that would support a defense of EED. In fact, Miles's defense at trial, and his own testimony, was that he was scared of the victim and feared the victim would have killed him if he had not fatally shot the victim. He fails to reference any trial testimony that identifies a triggering event which occurred prior to the fatal shooting. Moreover, Miles does not claim that he could produce a witness who would have testified at a hearing that a significant event caused him to become extremely emotionally disturbed. Because there is no credible evidence that a triggering event ever occurred, there is no basis for the claim that trial counsel's performance was deficient in not seeking a jury instruction on EED.

[16] Spears v. Commonwealth, 30 S.W.3d 152, 155 (Ky. 2001) (quoting McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986)).

[17] Spears, 30 S.W.3d at 155.

Miles also contends his counsel was ineffective for not seeking a jury instruction based on Miles's claim of imperfect self-protection, which has been recognized by Kentucky courts in Commonwealth v. Higgs,[18] Commonwealth v. Hager,[19] and Elliott v. Commonwealth,[20] and codified at KRS 503.120.[21] The qualification of an erroneous belief does not provide for complete exoneration, but instead allows a jury to convict a defendant for a lesser offense, one for which wantonness or recklessness is the culpable mental state.[22]

In this case the jury was instructed on murder, manslaughter in the first and second degrees, and reckless homicide. Each instruction required the Commonwealth to prove beyond a reasonable doubt that Miles was not privileged to act

[18] 59 S.W.3d 866 (Ky. 2001).

[19] 41 S.W.3d 828 (Ky. 2001).

[20] 976 S.W.2d 416 (Ky. 1998).

[21] KRS 503.120(1) provides as follows:

> When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

[22] Elliott, 976 S.W.2d at 420.

in self-protection, and the trial court submitted a separate instruction which properly explained the basis of this privilege. Even though the jury found Miles guilty of manslaughter in the first degree, it is arguable under Elliott that, based upon the evidence, the jury may have found that Miles had a wanton or reckless belief regarding the need for or degree of protection required, thereby convicting him of either manslaughter in the second degree or reckless homicide.

Miles's proposed jury instructions are not contained in the record on appeal, and the record does not otherwise contain any objection to the instructions that were presented to the jury.[23] We therefore conclude that the lack of explanation as to why counsel may have failed to tender an instruction on imperfect self-protection, or whether counsel objected to the instructions propounded to the jury, negates the trial court's finding on the face of the record that counsel's decision amounted to trial strategy. Therefore, an evidentiary hearing is necessary on this issue.

Miles also claims that he received ineffective assistance because trial counsel failed to present compelling mitigating evidence in the penalty phase of trial. Miles argues that "[trial counsel] could have, (1) offered psychological

[23] The Commonwealth's brief alludes to an alleged in camera hearing that was held concerning the jury instructions. However, we have reviewed the record in its entirety and have not found any such hearing.

proof regarding diminished capacity of youthful offenders, age 16, (2) offered a statement of remorse by [Miles], (3) offered proof by experts of his mental retardation (borderline), [and] (4) offered expert proof explaining the probability of EED or imperfect self-defense." From our review of the record, it is not possible to conclude that trial counsel's failure to present such evidence was reasonable trial strategy. Thus, an evidentiary hearing is required on this issue.

By order of the trial court, Miles was evaluated on June 30, 1998, by Dr. Harwell F. Smith, a psychologist, to determine whether Miles was competent to stand trial. Dr. Smith found that although Miles was not mentally retarded, at the time of the shooting he suffered from mental illness, depression, and a personality disorder. Dr. Smith noted that although Miles was competent to stand trial, if found guilty of the crime, Miles would qualify for a verdict of guilty but mentally ill. He also suggested that it would be in Miles's best interest to receive "intensive, long term individual psychotherapy." Miles was also evaluated by Dr. Peter B. Schilling, psychologist, who found that because Miles was mildly, mentally-retarded and had a history of multiple head trauma his capacity to understand and participate during trial would be significantly reduced. Dr. Schilling also noted other evidence of factors that would affect Miles's competency, including the impact of his mother's recent

death, further evidence of his mental limitations, including a low IQ and several communication disorders, as well as the hardships he suffered as a child.[24]

As our Supreme Court has stated, "'[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.'"[25] The trial court must determine if a reasonable investigation would have uncovered the mitigating evidence and whether trial counsel's failure to present the evidence to the jury was a tactical decision.[26] Although Miles's trial counsel did present some mitigating evidence during the penalty phase, there is a legitimate question as to whether its brief nature and its lack of detail were sufficient. "[B]efore any possible mitigating evidence can be weighed in a meaningful manner, that evidence first must be determined and delineated. This is the proper function of an evidentiary hearing."[27] In this case, it was not enough for the trial court to simply state

[24] Miles alleges in his brief that he had an expert witness, Dr. Eric Drogin, prepared to testify at an evidentiary hearing regarding mitigation and exculpatory proof. However, Miles does not provide any details of Dr. Drogin's possible testimony, nor did he raise the availability of Dr. Drogin to testify in his RCr 11.42 motion or the supplement filed by counsel. In any event, since we are vacating on this issue for an evidentiary hearing, Miles will be allowed to present relevant testimony from Dr. Drogin.

[25] Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2002) (quoting Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)).

[26] See Mills v. Commonwealth, 170 S.W.3d 310, 341 (Ky. 2005) (citing Hodge, 68 S.W.3d at 344).

[27] Hodge, 68 S.W.3d at 345.

that trial counsel's decision not to utilize expert testimony was "trial strategy." An evidentiary hearing must be held to determine "whether the failure to introduce mitigating evidence was trial strategy or 'an abdication of advocacy'" [citation omitted].[28]

Miles next claims that trial counsel was ineffective for failing to call an expert witness in the field of ballistics. In Ake v. Oklahoma,[29] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires 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.[30] The Supreme Court recognized three factors in determining whether a state should provide an indigent 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

[28] Hodge, 68 S.W.3d at 345.

[29] 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[30] Ake, 470 U.S. at 83. See also Binion v. Commonwealth, 891 S.W.2d 383 (Ky. 1995).

safeguards are not provided.[31] The state need not provide indigent defendants with all the assistance that a wealthier person might be able to buy,[32] rather, fundamental fairness requires that the state not deny them "an adequate opportunity to present their claims fairly within the adversary system."[33] While the Supreme Court did not create a universal rule that an indigent defendant is entitled to an expert for every scientific procedure,[34] it 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" [citation omitted].[35]

In Caldwell v. Mississippi,[36] the United States 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 "the defendant's request for a ballistics expert included

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[31] Ake, 470 U.S. at 77.

[32] Ross v. Moffitt, 417 U.S. 600, 602, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

[33] Ake, 470 U.S. at 77 (quoting Ross, 417 U.S. at 612).

[34] See, e.g., Vickers v. Arizona, 497 U.S. 1033, 1035, 110 S.Ct. 3298, 111 L.Ed.2d 806 (1990).

[35] Weeks v. Angelone, 176 F.3d 249, 266 (4th Cir. 1999).

[36] 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

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" [citations omitted][.][37]

> 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 automatically 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 [footnotes omitted].[38]

Courts in Kentucky have required the appointment of expert witnesses upon a particularized showing that assistance is "reasonably necessary."[39] However, a court need not provide funds for "fishing expeditions,"[40] and whether to grant a request for funds for appointment of an expert is within the sound discretion of the trial court.[41]

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[37] Caldwell, 472 U.S. at 323 n.1.

[38] Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987).

[39] See Dillingham v. Commonwealth, 995 S.W.2d 377 (Ky. 1999); Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988); Sommers v. Commonwealth, 843 S.W.2d 879 (Ky. 1992); KRS 31.110; and KRS 31.185.

[40] Hicks v. Commonwealth, 670 S.W.2d 837, 838 (Ky. 1984).

[41] Dillingham, 995 S.W.2d at 381; Sommers, 843 S.W.2d at 888.

We are not persuaded that counsel provided deficient performance in this instance. The allegation that a key issue of Miles's defense involved ballistics is based on speculation. Miles has not shown that his attorney was aware of any facts that would have placed him on notice that the assistance of an expert witness would have been helpful to the defense. Thus, we conclude that on the face of the record there are no grounds to support a finding of ineffective assistance of counsel on this issue.

Therefore, we affirm in part and vacate in part the order of the Fayette Circuit Court and remand this matter for an evidentiary hearing to be held in accordance with this Opinion.

ALL CONCUR.

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