

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000730-MR

CHARLES SHEPHERD

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE JAMES E. BONDURANT, JUDGE
ACTION NO. 00-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE AND WINE, JUDGES, BUCKINGHAM,¹ SENIOR JUDGE.

MOORE, JUDGE: Charles Shepherd appeals the Hart Circuit Court's order denying his RCr² 11.42 motion to alter, amend, or vacate his sentence. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jessica Miller was strangled to death. During the investigation into her death, the police questioned Charles Shepherd, who ran the "escort service"³ where

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 KRS 21.580.

² Kentucky Rule of Criminal Procedure.

³ Shepherd refers to his business as an "escort service," but the Commonwealth implies that it was a prostitution ring, referring to Shepherd as an "apparent pimp" in its appellate brief.

Jessica Miller was employed. The police believed that Shepherd was the last person to see Ms. Miller alive. Upon the advice of his attorney, Shepherd gave a statement to police and inculpated himself while doing so.⁴

Shepherd moved for a psychiatric evaluation because he is a Gulf War Veteran who had previously been diagnosed as suffering from post-traumatic stress disorder (“PTSD”) due to combat engagements. His motion was granted, and he was evaluated at the Kentucky Correctional Psychiatric Center (KCPC), by a licensed psychologist who evaluated Shepherd and wrote a report of the evaluation. The psychologist opined that Shepherd was competent to stand trial because Shepherd did not appear to suffer from any mental problems that would impair his ability to appreciate the nature and the consequences of the proceedings against him or to participate rationally in his defense. The licensed psychologist further opined that Shepherd had no “grounds to argue an inability to bear criminal responsibility” because Shepherd’s “capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were not impaired by mental retardation nor by brain damage nor by psychosis.”

According to a motion to suppress filed by Shepherd, he gave his statement to the Kentucky State Police (KSP) after being assured that prosecutors “were willing to make a deal to break the case.” (T.R. at p. 55) (internal quotation marks omitted). Shepherd was allegedly told that if he had relevant knowledge of Miller’s death, the KSP detective “would get the prosecutor on the phone to make an agreement.” (T.R. at p. 55).

⁴ Apparently, Shepherd’s statement amounted to a full confession of the crime, although we were unable to find a copy of this confession in the record. This statement was given to police before Shepherd was indicted.

In his motion to suppress the statement he had given to police, Shepherd contended that he had struck a bargain with the prosecutor “whereby [Shepherd] would submit to a polygraph examination and, if it was indicated that [he] had answered truthfully, the prosecutor . . . agreed to ‘fit him in to the appropriate statute.’” (T.R. at p. 55). The polygrapher allegedly concluded that Shepherd had answered truthfully during the polygraph examination. Shepherd asserted in his motion to suppress that both his answers to the polygraph and his statement to police were consistent with his allegation that he killed Miller in the “heat of passion,” in reaction to “verbal abuse and a physical attack by the victim.” (T.R. at p. 55). Shepherd argued that he therefore should have been charged with manslaughter in the first degree or manslaughter in the second degree, rather than murder, because he had acted pursuant to an extreme emotional disturbance. (T.R. at pp. 55-56).

In support of Shepherd’s motion to suppress, his counsel filed his own affidavit stating that he had spoken with KSP Detective Eldon Isenberg over the telephone. During that conversation, Detective Isenberg told counsel

that the authorities in Kentucky believed that Mr. Shepherd had some involvement but the extent was not known. [Counsel] was told that the prosecutors in Kentucky were will[ing] to make a deal with the Defendant “in order to break the case.” [Counsel] was told that if the Defendant has relevant information . . . the Commonwealth prosecutor would be contacted by phone and that [counsel] would be allowed to speak with him.

(T.R. at p. 58). Counsel continued, attesting that “[d]uring plea negotiations in this case, [he] was told by [the] Commonwealth prosecutor . . . that if the Defendant submitted to a polygraph examination and it was determined that he had told the truth, that, based

upon his statements, the prosecutor would ‘try to fit him into the statutes.’” (T.R. at p. 58).

The circuit court held a hearing on Shepherd’s motion to suppress. Detective Isenberg testified that he remembered telling Shepherd’s counsel that the prosecutor said if Shepherd cooperated with the investigation, the prosecutor would be willing to talk to Shepherd’s counsel about getting the case closed. Detective Isenberg attested that he remembered telling Shepherd’s counsel that the prosecutor was willing to make a deal to break the case. During the hearing, Shepherd’s counsel argued that Shepherd’s confession should either be suppressed, or the Commonwealth should be required to keep its bargain, because the Commonwealth had benefited from Shepherd keeping his bargain by giving the statement and truthfully answering questions during a polygraph. The court ultimately denied Shepherd’s motion to suppress.

The Commonwealth made an offer on a plea of guilty, offering to recommend a sentence of thirty-two years of imprisonment if Shepherd pled guilty to murder. Shepherd thereafter moved to enter a guilty plea to the murder charge. A plea hearing was held, in which the court reviewed with Shepherd the charge against him, as well as the sentence range of twenty to fifty years or life imprisonment. During the hearing, Shepherd’s counsel conceded that Shepherd was competent to plead guilty, and the court found Shepherd to be competent. The court reviewed with Shepherd the rights he was waiving by pleading guilty, and Shepherd testified that he understood he was waiving those rights. Shepherd pled guilty, and the court found his guilty plea to be voluntarily, intelligently, and knowingly made. Shepherd was ultimately sentenced to serve thirty-two years of imprisonment.

Subsequently, Shepherd filed his RCr 11.42 motion to alter, amend, or vacate his sentence. In that motion, Shepherd argued, *inter alia*, that he had received the ineffective assistance of trial counsel when counsel advised him to give a statement to police that was, in turn, used to charge him with murder. Shepherd also contended that his counsel rendered ineffective assistance by advising him to plead guilty without first requesting a competency hearing, as well as by failing to investigate the facts and advise him of the defense of extreme emotional disturbance.

A hearing was held on Shepherd's RCr 11.42 motion, in which Shepherd's trial counsel testified. Trial counsel attested that he told Shepherd he would get a plea deal if he made a statement to police, based on counsel's understanding that the Commonwealth was offering Shepherd the opportunity to plead to manslaughter, rather than be charged with murder.

Trial counsel testified during the RCr 11.42 hearing that Shepherd told him that: when the murder occurred, Shepherd was driving Miller to Bowling Green to meet with a client. Miller was complaining because she was tired and did not want to go. Shepherd told his counsel that Miller attacked him, so he lost his temper, attacked her, and strangled her. Counsel attested that after Shepherd gave his confession to the police, he was arrested and indicted on the murder charge.

Trial counsel further testified that, although Shepherd's medical records indicated that Shepherd had been treated for PTSD, he believed he would have difficulty proving to a jury that Shepherd suffered from this disorder. Counsel thought that Miller's homicide qualified as manslaughter due to Shepherd's alleged extreme emotional disturbance.

The circuit court denied Shepherd's RCr 11.42 motion. In doing so, the court reviewed the plea hearing and noted that the court went over the plea agreement with Shepherd during that hearing and that Shepherd was advised of the rights he was waiving by pleading guilty.

Shepherd now appeals, raising the following claims: (1) he received the ineffective assistance of counsel when counsel accepted an empty promise from the Commonwealth in return for Shepherd's confession to murder; (2) the Commonwealth failed to uphold its end of the bargain in violation of Shepherd's due process rights; (3) trial counsel rendered ineffective assistance when counsel failed to investigate the facts, circumstances, and applicable case law surrounding Shepherd's charge and advise him of the viable defense of extreme emotional disturbance; (4) his defense counsel rendered ineffective assistance and his due process rights were violated when counsel failed to demand that a competency hearing be held prior to Shepherd waiving his right to a jury trial and entering a guilty plea to murder; (5) trial counsel rendered ineffective assistance when counsel permitted Shepherd to plead guilty to murder without first ensuring that a competency hearing was held; and (6) the trial court denied Shepherd due process of law by failing to hold a competency hearing.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id.* "The movant has the burden of establishing convincingly that he or she

was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Id.* (citations omitted).

III. ANALYSIS

A. CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ACCEPTING AN “EMPTY PROMISE” FROM THE COMMONWEALTH

In his first claim on appeal, Shepherd contends that he received the ineffective assistance of counsel when counsel accepted an “empty promise” from the Commonwealth in return for Shepherd’s confession to murder. To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Shepherd must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

“A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged.” *McMann v. Richardson*, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763 (1970). “When the defendant voluntarily enters a plea of guilty, he waives his right to challenge the admissibility of [his] confession.” *Wheeler v. Commonwealth*, 462 S.W.2d 921, 922 (Ky. 1971). “A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.” *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990).

In support of this claim, Shepherd alleges that his counsel advised him to give a statement to police, in exchange for the Commonwealth's empty promise, and that the statement eventually led him to plead guilty to murder because without the confession, the police would not have had sufficient evidence to charge him with murder. However, Shepherd cannot challenge the admissibility of the confession itself because he pled guilty, even if the confession somehow led him to plead guilty. See *Wheeler*, 462 S.W.2d at 922. His conviction was based on the fact that, during his plea hearing, Shepherd admitted he committed murder. See *McMann*, 397 U.S. at 766, 90 S.Ct. at 1446. Furthermore, Shepherd does not assert that his guilty plea was entered involuntarily, unknowingly, and/or unintelligently.

Although we certainly do not condone counsel's advice for Shepherd to confess to the police before he was arrested or indicted, and without first obtaining the Commonwealth's offer concerning the manslaughter charge in writing, we do not find that counsel rendered ineffective assistance. Shepherd contends that, without his counseled confession, he would not have pled guilty because there would have been insufficient evidence to convict him without it. However, his claim is misplaced. As noted by the circuit court,

[t]he victim worked as a prostitute for [Shepherd's] escort business, he was the last person seen with her, [the Commonwealth] had a recording of a phone conversation where Shepherd and the victim had a serious argument and a search warrant had been obtained for the search of Shepherd's van. Shepherd advised [his defense counsel] that they would find the victim's blood in his van. At that point Shepherd and his attorney made a judgment call to give a statement to the detectives hoping that Shepherd's cooperation would grant him some leniency from the Commonwealth's Attorney.

(T.R. at pp.255-56). Thus, even if Shepherd had not confessed pursuant to counsel's advice, the Commonwealth could have obtained an indictment against him based on the aforementioned evidence.⁵ Therefore, even if we were to assume, for the sake of argument, that counsel rendered deficient performance by advising Shepherd to confess, Shepherd cannot show that he would not have been charged with murder but for that deficient performance. Consequently, this ineffective assistance of counsel claim lacks merit.⁶ See *Strickland*, 466 U.S. at 687, 689, 104 S.Ct. 2052.

B. CLAIM THAT THE COMMONWEALTH FAILED TO UPHOLD ITS END OF THE BARGAIN

Shepherd next alleges that the Commonwealth failed to uphold its end of the bargain in violation of Shepherd's due process rights. However, as previously noted, because Shepherd pled guilty, he cannot "raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea." *Centers*, 799 S.W.2d at 55. Therefore, this claim fails.

Regardless, even if Shepherd could assert this claim, the claim lacks merit because he relies on the case of *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979), in support of this argument. In *Bush v. Commonwealth*, 702 S.W.2d 46 (Ky. 1986), the Kentucky Supreme Court noted that in *Workman*, "the Commonwealth

⁵ We note that, during the RCr 11.42 evidentiary hearing, Shepherd's trial counsel testified that Shepherd told him the police would find Miller's blood in the van, and specifically, on the seat, on the armrest, and in the back of the van. Counsel attested that Shepherd told him the blood was there because Miller was menstruating at the time and she was not wearing any undergarments. However, counsel also testified that Shepherd told him that Shepherd had strangled Miller to death.

⁶ We note that Shepherd's defense counsel challenged the admissibility of the confession by moving to suppress the confession and by litigating the matter during a suppression hearing. Defense counsel called witnesses during the suppression hearing and questioned them extensively about the alleged promise made by the Commonwealth in exchange for the confession.

[agreed to] dismiss the charge if Workman would submit to, and successfully pass, a polygraph examination.” *Bush*, 702 S.W.2d at 48. In *Bush*, the Court held that, because “*Workman* did not involve the entry of a plea of guilty,” but was instead a case that went to trial, *Workman* was “not dispositive” in Bush’s case because Bush pled guilty, and “[a] plea of guilty waives all defenses except that the indictment does not charge a public offense.” *Id.* Furthermore, the Court in *Bush* noted that Bush did not claim that his plea was involuntarily entered.

In the present case, as in *Bush*, Shepherd pled guilty, rather than going to trial, and Shepherd does not allege that his plea was involuntary, unknowing, or unintelligent. Therefore, Shepherd’s reliance on *Workman* is misplaced, and this claim lacks merit.

C. CLAIM THAT COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO INVESTIGATE THE CHARGE AND ADVISE SHEPHERD OF DEFENSE

Shepherd next claims that trial counsel rendered ineffective assistance when counsel failed to investigate the facts, circumstances, and applicable case law surrounding Shepherd’s charge and advise him of the viable defense of extreme emotional disturbance (“EED”). Specifically, Shepherd contends that Miller first attacked him and, as a Gulf War Veteran, he suffers from PTSD. Thus, he alleges that Miller’s attack “was the ‘provocation’ and ‘triggering’ event” which, when coupled with his “mental illness, . . . clearly supported the viable defense of ‘EED.’”

In the KCPC psychologist’s evaluation report, Shepherd’s criminal responsibility was discussed. The psychologist reported Shepherd told him during the evaluation that Miller had attacked him with a saw from inside the van and Shepherd “blacked out” at that point. Shepherd purportedly “came to” later, noticed that “the van

was stopped on a country road,” and removed Miller’s body from the van and left it on the side of the road, then went home.

After conducting tests, the psychologist opined as follows:

The results of psychological testing show that Mr. Shepherd is not mentally retarded. The results of medical examination, medical testing, and psychological testing suggest that Mr. Shepherd does not suffer from an organic impairment or brain damage. The results of the total evaluation at KCPC suggest that Mr. Shepherd does not suffer from a thought disorder or psychotic dysfunction.

As Mr. Shepherd’s capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were not impaired by mental retardation nor do they appear to have been impaired by brain damage nor by psychosis, it does not appear to the evaluator that Mr. Shepherd has grounds to argue an inability to bear criminal responsibility.

Additionally, the KCPC psychologist reported that, in the past, Shepherd had “considerable contact with mental health professionals” at a Veteran’s Administration hospital. And, “sometimes been diagnosed as having PTSD, and at other times not.”

Because the KCPC psychologist’s report opined that Shepherd could not show that he lacked criminal responsibility at the time that he committed the murder, Shepherd cannot prove that counsel rendered ineffective assistance by failing to further investigate his mental health history. This is because Shepherd cannot demonstrate that counsel’s performance was deficient by failing to conduct this mental health investigation or that his defense was prejudiced to the extent that the result of the trial court’s proceedings would have been different if counsel had conducted this

investigation. See *Strickland*, 466 U.S. at 687, 689, 104 S.Ct. 2052. Therefore, this claim lacks merit.

Furthermore, to the extent that Shepherd argues his counsel rendered ineffective assistance when counsel failed to advise him of the defense of EED, the claim lacks merit because Shepherd has failed to show that he qualified for the defense of EED, other than his own unsubstantiated and self-serving allegations.⁷ Shepherd alleges that his PTSD, when combined with Miller's alleged attack, qualify him for the EED defense. However, after testing Shepherd, the KCPC psychologist reported that he did not "suffer from a thought disorder or psychotic function," and that there was no reason to believe that Shepherd was unable "to appreciate the criminality of his conduct and to conform his conduct to the requirements of law." Therefore, without evidence that Shepherd qualified for this defense, Shepherd cannot show that his counsel performed deficiently by failing to advise him of this defense or that he would not have pled guilty but for counsel's allegedly deficient performance. See *Strickland*, 466 U.S. at 687, 689, 104 S.Ct. 2052. Consequently, this claim lacks merit.

D. CLAIMS THAT COUNSEL WAS INEFFECTIVE WHEN COUNSEL FAILED TO DEMAND A COMPETENCY HEARING

⁷ The Kentucky Supreme Court has stated that EED is:
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. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986).

In his fourth and fifth claims, Shepherd asserts that his defense counsel rendered ineffective assistance and his due process rights were violated when counsel allowed him to plead guilty without first demanding that a competency hearing be held. We will address these claims together.

Because the KCPC psychologist's evaluation report provided that Shepherd was competent, and Shepherd fails to allege that he lacked the capacity "to appreciate the nature and consequences of the proceedings against [him] or to participate rationally in [his] own defense," as required by KRS 504.060(4) to be deemed incompetent, he cannot show that his counsel performed deficiently by failing to request a full competency hearing. Furthermore, even if we were to assume that his counsel's performance was deficient by failing to challenge the KCPC psychologist's competency determination, Shepherd cannot show that he would not have pled guilty but for that deficient performance because the court may have nevertheless found Shepherd competent to plead guilty based on the psychologist's report. Therefore, this ineffective assistance of counsel claim lacks merit. *See Strickland*, 466 U.S. at 687, 689, 104 S.Ct. 2052.

E. CLAIM THAT THE TRIAL COURT VIOLATED SHEPHERD'S DUE PROCESS RIGHTS BY FAILING TO HOLD A COMPETENCY HEARING

Finally, Shepherd contends that the trial court denied him due process of law by failing to hold a competency hearing. As an initial matter, because Shepherd pled guilty, he cannot now challenge the court's failure to hold a competency hearing prior to the entry of his guilty plea. *See Centers*, 799 S.W.2d at 55 ("A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise

independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.”).

Nevertheless, even if Shepherd could assert this claim at this time, the claim lacks merit. Pursuant to KRS 504.100, once a court orders a competency evaluation to be conducted, as occurred in the present case, the court must hold a competency hearing after the evaluation report is filed with the court. “The hearing need not be complex, but the Commonwealth and the defendant must be given an opportunity to present evidence on the issue of competency and an opportunity to cross-examine the psychologist or psychiatrist who prepared the report.” *Gibbs v. Commonwealth*, 208 S.W.3d 848, 853 (Ky. 2006).

In the present case, during Shepherd’s suppression hearing, the court noted that the KCPC psychologist’s report had been filed with the court and that the report stated that Shepherd was competent. The court asked Shepherd’s counsel if he wanted a hearing to present evidence to contradict the competency findings of the KCPC’s psychologist. The court informed counsel that if counsel did not request such a hearing and present such evidence, then the court would accept the competency report as the court’s finding on the issue of Shepherd’s competency. Shepherd’s counsel responded by telling the court that he was not certain whether he would be able to provide evidence to refute the KCPC psychologist’s competency finding, but that if he was able to, he would file a motion with the court requesting a full competency hearing.

Therefore, because (1) the court reviewed the competency evaluation report and noted during the suppression hearing that the report stated Shepherd was

competent, and (2) Shepherd was given the opportunity to present evidence on the issue of competency, but his counsel declined, we find no error.

Moreover, we note that during Shepherd's plea hearing, his counsel conceded that Shepherd was competent to plead guilty. The court then made a finding that Shepherd was competent to plead guilty based on the court's observation of Shepherd, his answers to the court's questions, and the statements of Shepherd's counsel. Therefore, this claim lacks merit.

IV. CONCLUSION

After a review of all the issues, we cannot say that the *Strickland* standard has been met. Accordingly, the order of the Hart Circuit Court is affirmed.

ALL CONCUR.

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