RENDERED: MAY 16, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2006-CA-002650-MR

DAVID NICHOLS APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NOS. 00-CR-00095 & 00-CR-00105

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal arises from a ruling on a motion for post-conviction relief of the Marion Circuit Court denying David Nichols' (Appellant) motion for RCr 11.42 relief. Specifically, Appellant argued that his counsel was ineffective for failing to object to incorrect parole eligibility information presented to the jury, for failing to educate the jury as to the effect of extreme emotional disturbance (EED) on intentional murder during closing arguments, for failing to object to the placement of the

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[1] Senior Judge John W. Graves, 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.

EED instruction, and for failing to raise the issue of inconsistent verdicts in a Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. The Commonwealth argues that the trial court properly denied the 11.42 relief and we agree.

While we need not recount the details of the crimes Appellant was charged with, we do note that there was sufficient evidence that Appellant was suffering from EED at the time of committing the crimes to warrant the instructions given. He was ultimately found guilty by a jury of wanton murder, assault under extreme emotional disturbance, and of being a second degree persistent felon. The jury fixed Appellant's punishment at life in prison for the wanton murder and ten years on the assault under EED, to run concurrently. The trial court sentenced Appellant in accordance with the jury's recommendation.

On direct appeal, the Supreme Court of Kentucky reversed the conviction for assault, but affirmed the wanton murder conviction. The Commonwealth moved to dismiss the assault counts and the trial court did so.

Appellant then filed a *pro se* RCr 11.42 motion, which was later supplemented by appointed counsel. The motion and supplemental memorandum filed by counsel raised the above claims of ineffective assistance of counsel. An evidentiary hearing was held, after which the trial court found Appellant had received effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, Appellant must demonstrate two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

*Id.* at 691-692. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Appellant's first claim of ineffective assistance of counsel concerns trial counsel's failure to object when a probation and parole officer and the Commonwealth Attorney both stated incorrect parole eligibility requirements. When the trial was held, case law interpreted the relevant statutes to provide that a violent offender who was sentenced to life was eligible for parole after 12 years and one who was sentenced to a term of years was eligible for parole after serving 50% of the sentence imposed. This was modified by the Kentucky Supreme Court in *Sanders v. Commonwealth*, 844 S.W.2d 391 (Ky. 1992), which held that a violent offender sentenced to a term of years would be eligible for parole after serving either 50% of the sentence imposed or 12 years, whichever was less.

This violent offender statute, KRS 439.3401, was revised in 1998. It changed the period of parole eligibility for violent offenders who get a life sentence from

12 years to 20 years and the period for an offender receiving a term of years from 50% to 85%. During trial, the parole officer and Commonwealth Attorney both stated that if Appellant was sentenced to a term of years he would have to serve 85% of the sentence before he was eligible for parole and if he was given a life sentence, he would have to serve 20 years before he became eligible for parole.

Approximately seven months after Appellant's trial, the Kentucky Supreme Court considered the issue in *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002), and held that the correct interpretation of the revised statute should be a person receiving a term of years sentence would have to serve 20 years or 85% of the sentence before becoming eligible for parole, whichever was less. The Supreme Court held that the revised statute should be interpreted in the same manner as its predecessor and applied its holding in *Sanders* to the new statute.

Even though the *Hughes* case was not final until after Appellant's case, he nonetheless argues that his counsel should have known that the revised statute would be interpreted the same way as the old one. During the 11.42 hearing, the trial court found that Appellant's counsel was deficient in failing to catch the parole eligibility mistake. The trial court stated that the numbers in the statute might have changed, but the interpretation had not. We agree.

However, the trial court held that even though Appellant had established that his trial counsel's representation was deficient, thereby satisfying the first prong of the *Strickland* test, he failed to show that the error prejudiced his case. We agree. The jury in this case imposed the maximum penalty for the assault conviction, 10 years. At the 11.42 hearing, the trial court found that it was unlikely that the jury which imposed the maximum sentence for the assault conviction would impose a lighter sentence for

the wanton murder conviction. Parole eligibility requirements aside, the jury imposed the harshest sentence for both the assault and wanton murder convictions.

We do not believe that had Appellant's trial counsel objected to the incorrect parole eligibility requirements the outcome would have been different. As stated above, "[t]he defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. Our confidence in the outcome of this case has not been undermined and we find that trial counsel's error did not prejudice Appellant's case.

Appellant's second claim of ineffective assistance of counsel revolves around the EED issue at trial. He argues that counsel's failure to educate the jury on the effects of EED on wanton murder during closing arguments, failure to object to the placement of the EED instruction, and failure to raise the issue of inconsistent verdicts all amount to ineffective assistance of counsel.

We find that trial counsel's handling of the EED issue was proper and effective. First, during closing arguments, trial counsel brought up the issue of EED multiple times. She also told the jury to consider EED as it applied to the different states of mind listed in the jury instructions. Trial counsel covered the EED issue extensively during closing arguments. While trial counsel may not have specifically told the jury that if they believed her client suffered from EED, they should find him guilty of manslaughter, this was not a deficiency as it relates to ineffective assistance of counsel.

As for the placement of the EED instruction, we find trial counsel had no reason to object. The EED instruction as it related to the murder charge was listed in the Presumption of Innocence instruction. This instruction came right from 1 Cooper,

*Kentucky Instructions to Juries (Criminal)* §2.03 (4th ed. 1999). Appellant argues that EED should have been included in the wanton murder instruction. EED, or the lack of EED, is not an element of wanton murder and since the instructions used are similar, if not identical, to those found in Cooper, we do not find that counsel erred in not objecting to the placement.

Finally, Appellant argues that since the jury found he suffered from EED in relation to the assault charge, they should have found it in relation to the murder charge, and as such, trial counsel should have raised the issue of inconsistent verdicts. We do not think counsel's failure to raise this issue was an error amounting to ineffective counsel. The jury was sufficiently informed and instructed about EED and its effects. While both the assault and murder happened during the same time period, the jury could have found that the EED did not apply to the murder.

For the foregoing reasons, we affirm the trial court's denial of Appellant's 11.42 motion and find that he had effective trial counsel.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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