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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001130-MR

SCOTTY UPCHURCH — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 04-CR-00148 & 04-CR-00317

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: Scotty Upchurch appeals from an order of the Wayne Circuit Court denying his motion to vacate his judgment and sentence pursuant to CR 60.02(e) and (f) and to be granted a new trial. Upchurch contends that the circuit court erred in failing to hold a competency hearing. He also maintains that his trial counsel provided ineffective assistance in failing to seek a competency hearing. For the reasons stated below, we affirm the order on appeal.

By way of separate indictments handed down on June 24, 2004, and October 19, 2004, the Wayne County grand jury indicted Upchurch with one count each of complicity to commit robbery in the first-degree and complicity to commit capital murder. The charges arose from events occurring on May 15, 2004, when William E. Wells, Sr., age 91, and his son, William E. Wells, Jr., were robbed and beaten in their home. William Wells, Sr. died as a result of his injuries.

A police investigation followed, whereupon evidence was developed that Upchurch and at least two other persons committed or otherwise participated in the robbery and murder. The parties were found to be in possession of forged checks belonging to Wells, and were observed changing their clothes and attempting to dispose of them in a Wal-Mart parking lot.

On September 1, 2006, Upchurch appeared in Wayne Circuit Court and entered a guilty plea to both charges pursuant to a plea agreement with the Commonwealth. In return for the guilty plea, the Commonwealth recommended concurrent sentences of imprisonment totaling 34 years. On September 19, 2006, the guilty plea was accepted and Upchurch was sentenced to 34 years in prison in accordance with the Commonwealth's recommendation.

On February 23, 2007, Upchurch filed *pro se* motions seeking CR 60.02 relief from judgment claiming error in the circuit court's failure to conduct a competency hearing. He also claimed that his counsel was ineffective for failing to seek a competency hearing. A hearing on the motions was conducted, after which the circuit court rendered an order denying the relief

sought. In so doing, the court found that Upchurch did not seek a competency hearing, and that his guilty plea rendered moot any claim of incompetency. This appeal followed.

Upchurch first argues that the circuit court erred in failing to conduct a competency hearing. He contends that in response to a motion of his trial counsel, the circuit court rendered an order to have Upchurch undergo a psychiatric evaluation. According to Upchurch, an independent evaluator conducted the examination and subsequently opined that Upchurch was mildly retarded. Upchurch maintains that this finding of mild retardation was sufficient to cause the court to act *sua sponte* to conduct a competency hearing. The court's failure to do so, he argues, constitutes reversible error. He seeks to have the order vacated and his criminal judgment set aside, so that the matter may be remanded for a competency hearing.

We find no error on this issue. We must first note that Upchurch does not cite to anything in the record in support of his claim that he was found to be mildly retarded, and our cursory examination of the approximately 900 page record has uncovered nothing on that claim. Upchurch does append to his appellate brief a cryptic "Tests of Adult Basic Education" answer sheet completed on November 20, 2006, but it does not reveal his IQ or cognitive ability. Also appended is a "Department of Corrections Resident Record Card" containing the words "mentally ill" but not addressing his IQ.

Assuming, *arguendo*, that Upchurch's IQ is as he claims, we nevertheless find no error in the circuit court's alleged improper failure to conduct a competency hearing. As both the Commonwealth and the circuit court properly note, Upchurch was represented by counsel on the underlying charges, and the issue of Upchurch's competency to stand trial was never raised. Upchurch, through counsel, did seek to challenge the competency of William Wells, Jr. to testify. He also moved for a finding that he was not eligible for the death penalty. At no time, however, was the issue raised regarding his competency to stand trial. To the contrary, at the time of the guilty plea, Upchurch's counsel expressly stated on the video record (09/01/06; 10:03) that while Upchurch had taken medication in the past, he was competent to proceed. The trial court asked Upchurch a number of questions, including whether he was the person named in the indictment, if he was under the influence of drugs or alcohol, and if he understood the guilty plea he was about to enter. After considering counsel's statement and Upchurch's responses, the Special Judge, William Cain, expressly found Upchurch "competent to proceed."

Upchurch cites KRS 504.100 in support of his claim that the court should have acted *sua sponte* to order a competency hearing. That statute, however, which addresses the appointment of a psychologist or psychiatrist, requires such a hearing only if the court is apprised of "reasonable grounds to believe the defendant is incompetent to stand trial . . . ." *Id*. Given the totality of the record, including the fact that counsel never raised the issue of Upchurch's

competency to go to trial or enter a plea, Upchurch's cogent responses to Judge Cain's inquiries, and counsel's assertion on the record of Upchurch's competency to proceed, we find no basis for concluding that the court had reasonable grounds to believe that Upchurch was incompetent to stand trial. Accordingly, we find no error.

Upchurch moved for relief from judgment pursuant to CR 60.02(e) and (f). That rule states that, "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief." Section (e), i.e., that the judgment is void, is not applicable to the facts at bar. Similarly, Upchurch has not satisfied the requirements of section (f) by demonstrating entitlement to relief from judgment for a reason of extraordinary nature.

Upchurch also argues that he received ineffective assistance of counsel arising from counsel's failure to request a competency hearing. He contends that if a hearing had been requested, the court would have learned that he was not competent to enter an intelligent guilty plea. He goes on to argue that his counsel "from day one never attended [sic] to look out for the best interest of her client, she never investigated the case, never interviewed the Appellant's alibi

witnesses, never interviewed the alleged co-defendants to see how they were going to implicate her client, she never showed any interest in her client's innocence or guilt." The corpus of this argument, however, centers on his assertion that but-for counsel's failure to seek a competency hearing, the court would have determined that he was not competent to tender a guilty plea. He seeks an order reversing the judgment and remanding the matter for trial.

In order to prevail on a claim of ineffective assistance of counsel, the movant must show that counsel's performance was deficient to such an extent that the integrity of the trial was impaired. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.

In order to prevail on this claim of error, Upchurch would have to demonstrate that he was not competent during the same timeframe that both he and his counsel stated to the circuit court on the record that he was competent. He would also have to show that but-for counsel's failure to seek a competency hearing, the outcome of the proceeding would have been more favorable than the

plea that he accepted. He has not met this burden. As noted above, Upchurch has cited to nothing in the record supportive of his claim of being mildly retarded and/or having a low IQ. Even if that assertion is accepted, he has not overcome the strong presumption that counsel's strategy was proper. *Strickland*, *supra*; *Sanborn v. Commonwealth,* 975 S.W.2d 905 (Ky. 1998). Proper trial strategy may include pleading guilty. *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970). As there is no basis in the record to support the hypothesis that counsel should have sought a competency hearing nor that such a hearing would have benefited Upchurch, we find no error on this issue.

For the foregoing reason, we affirm the order of the Wayne Circuit Court.

ALL CONCUR.

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