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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000859-MR

ROBERT LOUIS POWELL — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 01-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

COMBS, CHIEF JUDGE: Robert Louis Powell appeals from a judgment of the Oldham Circuit Court denying his motion filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On October 2, 2001, Robert killed his wife, Pamela, a Jefferson County police officer, by shooting her in the head with her police handgun. The shooting occurred at their Oldham County residence. That same month, the

Oldham County Grand Jury indicted him for murder. Robert initially denied any involvement in the shooting and claimed that Pamela had committed suicide.

However, on April 26, 2002, a few days before his trial was scheduled to begin, Robert appeared in open court and entered a guilty plea to the murder charge. During the plea colloquy, he testified that financial pressures had become so unbearable that he and Pamela decided to enter into a suicide pact. Robert indicated that he had helped Pamela shoot herself but that he was then unable to go through with his own suicide. The trial court accepted Robert's guilty plea and sentenced him to life in prison in a judgment entered on June 5, 2002.

Two months later, in August 2002, Robert, *pro se*, moved for post-conviction relief from the judgment pursuant to RCr 11.42. He claimed that his attorney had rendered ineffective assistance of counsel because he had failed to properly consider or to discuss a possible defense of extreme emotional disturbance (EED). Robert's motion was later supplemented with arguments from appointed counsel. On October 20, 2003, the trial court entered an order denying his motion without an evidentiary hearing. He appealed the decision to this court.

On appeal, we vacated the trial court's order and remanded the case for further proceedings. We explained our decision as follows:

> Powell received nothing from the Commonwealth in exchange for his guilty plea. Before the plea and after it, the Commonwealth accused Powell of murder and sought that he be imprisoned for life, as in fact he was. Powell could not have fared worse had he gone to trial. He alleges that trial counsel's advice to enter such a plea was ineffective because counsel did not make a reasonable

> investigation into facts suggesting that Powell killed Pamela while under the influence of extreme emotional disturbance and did not discuss with Powell the possibility of raising an EED defense. We agree with Powell that that possibility should have been explored; if counsel failed to do so, then such failure may constitute serious error as discussed above. Such an error may have been prejudicial because even a tenuous defense is reasonably likely to have been preferred to an open guilty plea, which left Powell exposed to the maximum punishment.
>
> Of course there may be strategic reasons for entering an open plea, such as acceptance of responsibility in order to improve his chances of parole, or reasons having nothing to do with strategy, such as the defendant's remorse or his desire to spare himself or others the ordeal of trial. Counsel's advice, in other words, may well have been reasonable and Powell's plea voluntary. The record, however, does not refute Powell's allegation that the advice to enter a guilty plea was based on counsel's inadequate investigation. This is so notwithstanding Powell's admission during the plea colloquy that he had read and discussed with counsel the murder statute, which refers to extreme emotional disturbance. Powell was entitled to counsel's assistance, including reasonable investigation, regarding a potential EED defense. Without an appropriate investigation, counsel's discussion of that defense may not have been adequate. The reasonableness of an investigation (or lack of one) is to be judged not from hindsight but from the circumstances confronting counsel at the time, including what the defendant has told him. An evidentiary hearing is necessary in this case to make plain what those circumstances were.

On remand, the Oldham Circuit Court held a lengthy evidentiary hearing that involved testimony from a number of witnesses, including Robert and Jerry McGraw, Robert's original trial counsel. Robert testified that at the time of her death, Pamela was under investigation by her employer for appearing on a

pornographic website. He also indicated that he suspected that she had been having an affair because she had taken trips to Las Vegas and to a gambling boat with an older man.

Robert testified that on the night of the murder, he went to bed at approximately 10:30 p.m. after putting his children to bed. He said that Pamela had been drinking beer and was at a neighbor's house until 4:00 a.m. She came home and awakened him at 4:30 a.m. According to Robert, she was intoxicated; she admitted to him that she had been on a pornographic website which contained pictures of her having sex with other men. He called her a "whore," and she hit him in the forehead. He left the room, and she went to wake up the children. Robert testified that he was "pretty upset" at that point. At approximately 5:30 a.m., Pamela came back into the bedroom and told him that she was going to find a new place to live.

The argument resumed at 7:45 a.m. when she told him that she had gambled away their mortgage money. According to Robert, she then told him that she had been having an affair with the man whom she accompanied to Las Vegas and to the gambling boat and that the affair had been going on for some time. She then uttered a number of expletives and told Robert that she was leaving him. Robert testified that at this point, he left the room. He did not remember returning to the room, picking up a gun, or pulling the trigger. However, he subsequently realized that he had shot her and that she was dead. He called 911 and then ran to a neighbor's house, declaring that his wife had shot herself, a statement that he

admitted was a lie. He testified that he was "destroyed" at this point and wanted to kill himself, but he could not bring himself to do it.

Robert also admitted that he had lied to the police when he told them that his wife had committed suicide. He admitted that he lied again when he told the police – as well as the trial court in his previous plea colloquy – that he and his wife had had a suicide pact. He testified that he lied about how his wife had died because he was embarrassed, because he wanted to protect his family's reputation, and because he did not want his children to know that he had killed their mother.

Robert then testified about his conversations with his lawyer, Jerry McGraw. He indicated that McGraw visited him in jail on approximately three to five occasions and never asked him what had actually happened. According to Robert, McGraw told him that anything Robert said in the course of their conversations could be used against him later; therefore, he was better off not telling some things to McGraw. Robert testified that he understood this alleged warning to mean that he should not tell McGraw what had really happened. Robert also testified that McGraw never explained the concept of extreme emotional disturbance to him. He claimed that he was never advised that his wife's confession to him of an affair might serve as the basis of an EED defense.

However, Robert acknowledged that he had lied to McGraw about knowing that his wife had been having an affair. His current counsel is the first person to whom he gave the "true" version of events. He testified that he did not want the truth about his wife's infidelity to come to light and that he thought that a

story about a suicide pact would be less damaging to his family's name. However, Robert testified that if he had known then what he knows now about EED, he would have elected to go to trial instead of pleading guilty.

McGraw testified at the evidentiary hearing that he met with Robert between twelve and fifteen times. Billing sheets reflect that McGraw met with him on twelve occasions. McGraw also testified that Robert was consistent in telling him that he had shot his wife as part of a suicide pact and in telling him his version of what had occurred; however, he gave inconsistent versions of whose finger was on the trigger when his wife was shot. McGraw indicated that he had no reason to disbelieve the suicide pact story.

McGraw also testified that he and Robert had had considerable conversations about a possible EED defense but that he could not find evidence of a "triggering event" that would support one. According to McGraw, Robert told him that he did **not believe** that his wife had been having an affair even though McGraw specifically asked him about it. Consequently, McGraw testified that he did not advise Robert that an affair could form the basis of an EED defense because he did not want to "create in Mr. Powell's mind a concept that was without foundation." McGraw testified that he did not believe that an affair could be used as an EED defense if Robert did not actually believe that his wife had been culpable. McGraw readily acknowledged that an EED defense would have been the strongest defense available under the circumstances of the case.

McGraw further testified that early in his representation, he told Robert not to tell him a version of events that varied from what would be his testimony on the witness stand. He acknowledged that Robert originally interpreted this advice to mean "don't tell me everything" and that Robert had even written him a letter expressing his confusion. However, McGraw testified that he subsequently went to visit Robert in jail to clarify what he meant. McGraw told Robert that he needed to know what had actually happened but that he could not ethically be a participant in perjury. McGraw indicated that he did not advise Robert to plead guilty and take a life sentence. He told Robert that it was his decision. McGraw stated that he first learned that Pamela had been involved in an extramarital affair when he read Robert's RCr 11.42 motion.

After hearing the witnesses' testimony and oral arguments from both parties, the circuit court entered a written order on March 30, 2007, that denied Robert's RCr 11.42 motion. After recapitulating the evidence that had been presented at the evidentiary hearing, the court concluded as follows:

> The Court has reviewed the testimony in detail to demonstrate to any reviewing court that the record after evidentiary hearing on the 11.42 is more than sufficient to establish, and **the Court so finds** that counsel for the Defendant carefully reviewed the case and the defenses, discussed the defense of EED, and investigated the matter fully in representing the Defendant.
>
> The statement of the case given by the Defendant in his 11.42 motion is the third version now being given to the Court. The testimony at the evidentiary hearing in August of 2006 demonstrates, and **the Court so finds** that the Defendant had reasons to follow the strategy he

> pursued in this case. That is he did not wish to embarrass himself or his family; he did not wish to put stress upon his daughter to call upon her to testify. He had numerous opportunities to discuss this case with his lawyer and tell "the truth" as he asserts he is telling the Court in the 11.42 motion but he declined to do so for his personal reasons.
>
> **The Court can find no fault** with the representation of defense counsel and **finds that** the Defendant was given more than ample opportunity to pursue a defense of extreme emotional disturbance had he so desired.
>
> Similarly **the Court does not find** that the new issue raised following the evidentiary hearing, that is that counsel violated standards 4-3.1A and 4-3.2B, apply. **The Court does not find** that Mr. McGraw failed to explain the necessity of all facts known to the client for an effective defense **nor does the Court find** that Mr. McGraw instructed the client or intimated to the client in any way that the client should not be candid in reviewing facts. In fact Mr. McGraw instructed the client to tell him the truth because he would not put up with a change of story at trial.
>
> For the foregoing reasons, **THE COURT OVERRULES** motion pursuant to RCr 11.42.

(Emphasis in original). Robert now appeals from that order.

Robert again argues that his attorney rendered ineffective assistance of counsel by not adequately exploring a possible EED defense. To establish a claim of ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency caused actual prejudice that rendered the proceeding so fundamentally unfair as to produce an unreliable result. *Strickland v. Washington*,

466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

This test is modified somewhat in the context of a case in which a defendant has entered a guilty plea in lieu of proceeding to trial. In order to establish that an attorney failed to assist the defendant in intelligently weighing his legal alternatives when deciding to plead guilty, the defendant must show:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf.*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

In order for a guilty plea to be valid, it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Sparks*, 721 S.W.2d at 727. However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978), *citing Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

In assessing counsel's performance, we must examine whether his conduct was outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *citing United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Counsel is not held to a standard of infallibility. Rather, "[t]he 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." *Id.* In conducting our analysis, we are required to be deferential to counsel's performance, and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003).

Robert acknowledges in his brief that the trial court was correct in finding that he "had valid reasons to plead guilty – embarrassment, his children testifying, a more favorable parole date." However, he argues that "all these reasons would not have mattered one whit if [he] had known he actually had a tenable defense." Robert contends that McGraw was obligated to tell him that he might have had a possible EED defense if he had shot his wife because he learned that she had been having an affair. He complains that McGraw did not sufficiently explain the concept of EED to him and thus never "connected the dots" for him.

Robert also contends that McGraw failed to adequately investigate the rumors of his wife's affair.

As noted above, McGraw testified that he and Robert had had "considerable conversations" about the use of EED as a potential defense. However, McGraw decided not to pursue an EED defense because he could not find evidence of a triggering event[1] – such as a revelation of an affair – that would reasonably support the defense. According to McGraw, during their conversations, Robert **consistently denied** that his wife had been having an affair and never admitted that he believed that she had been having an affair. McGraw testified that after examining the Commonwealth's discovery, he became aware that there were rumors that an extramarital affair had occurred. But every time he brought up the subject of infidelity with Robert, Robert told him that he did not believe any such rumors. Robert even acknowledged at the evidentiary hearing that he never told McGraw that his wife had been having an affair. Robert also never wavered from the "suicide pact" version of events that he later recited to the trial court during his plea colloquy. Consequently, McGraw indicated that he had no reason to disbelieve what Robert had told him.

These facts are of considerable importance. In *Strickland v. Washington*, *supra*, the U.S. Supreme Court placed great emphasis upon the importance of a defendant's own actions in the context of a claim of ineffective assistance of counsel:

[1]"Triggering events" are required elements of an EED defense. *See Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky. 1999).

> **The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.** Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. **And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.** In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691, 104 S.Ct. at 2066 (Emphasis added).

By his own admission, Robert lied to McGraw about his knowledge that his wife had been having an affair. Additionally, McGraw testified that Robert repeatedly stated that he did not believe that his wife had been having an affair. Therefore, McGraw had no reason to discuss an EED defense in the context of an adulterous affair. Accordingly, his performance could not be considered deficient on this issue.

Robert's complaints that his attorney failed to properly investigate an EED defense must fail for similar reasons. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even

harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

Robert also contends that because he was "instructed" by McGraw "not to tell him everything" about the case, he refrained from telling McGraw about his wife's alleged infidelity. McGraw testified that he told Robert that he needed to know what the facts were and that Robert could tell him anything about the case. We note that Robert acknowledged at his plea colloquy that he had told McGraw all of the facts known to him concerning his charges. The trial court's opinion reflects that it believed McGraw's version of events, and we can find no error in its conclusion.

In any RCr 11.42 proceeding, the defendant bears the burden of establishing convincingly that he was deprived of some substantial right that would justify the extraordinary relief that is sought. *Haight*, 41 S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). That burden has not been met in this case.

Therefore, we affirm the denial by Oldham Circuit Court of Robert's motion pursuant to RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David H. Harshaw III
Office of Public Advocacy
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky