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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000634-MR

SCOT EUGENE GAITHER — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 02-CR-00446

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: Scot Eugene Gaither, hereinafter Appellant, was convicted of first-degree manslaughter, capital kidnapping, theft by unlawful taking of property valued under $300, and tampering with physical evidence. He was sentenced to a term of life imprisonment without the possibility of parole. His conviction was

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

later affirmed on direct appeal to the Kentucky Supreme Court. We now consider his appeal from the denial of his RCr 11.42 motion in which he alleged twenty-five instances of ineffective assistance of counsel. Seventeen of his challenges were dismissed by the circuit court because they either should have been brought on direct appeal or had already been resolved on direct appeal. Appellant argues that the circuit court erred in ruling that these seventeen alleged instances of ineffective assistance of counsel were not properly raised via RCr 11.42. We find that three of these issues were properly raised as ineffective assistance of counsel arguments and should have been analyzed as such by the lower court. Thus, we affirm in part and reverse and remand in part.

On August 30, 2001, James Parson, Sr., was reported missing. The next day, Parson's family received several phone calls claiming that Mr. Parson had been kidnapped. Police surveillance revealed that the phone calls were coming from Owensboro area pay phones. Appellant was eventually observed making one of these calls and arrested.

Mr. Parson's van was located several days later, but his body was not found until early November. Blood was found in and around the van and the van's keys were found in Appellant's possession. Appellant's cell phone was discovered near Mr. Parson's body.

At trial, two inmates testified that Appellant had confessed to killing Mr. Parson, but had initially only intended to kidnap him for ransom. Appellant also testified at trial, stating that Mr. Parson pulled a gun on him and that they

struggled and the gun went off killing Parson. Appellant claimed that when Mr. Parson was accidentally killed, he had a mental breakdown and concocted the kidnapping story as a cover-up. Appellant claimed self-defense and mental illness as defenses.

The jury ultimately found Appellant guilty of first-degree manslaughter, kidnapping, theft by unlawful taking of property under $300, and tampering with physical evidence. He was sentenced to 20 years for the manslaughter, life without the possibility of parole for the kidnapping, 12 months for the theft, and 3 years for tampering with physical evidence. All sentences were ordered to run concurrently.

Appellant then filed a *pro se* appeal to the Kentucky Supreme Court. That Court affirmed the conviction in February of 2006.

On October 30, 2006, Appellant filed a motion pursuant to RCr 11.42 in which he noted twenty-five issues of alleged instances of ineffective assistance of counsel. On December 16, 2006, the trial court denied seventeen of these issues by finding that they had been, or should have been, raised on appeal or that they were otherwise unsuitable for RCr 11.42 review.

To prevail on a claim of ineffective assistance of counsel, Appellant must show 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. Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

Even though Appellant only mentioned some of the seventeen ineffective assistance of counsel allegations in his brief, we will address each one.

First, Appellant claims that his counsel was ineffective when he failed to impeach a key prosecution witness. Patricia Zamorano, the ex-girlfriend of Appellant, testified that Appellant told her vital information regarding the crime while she visited him in jail. She testified that she only visited him once, but defense counsel was aware that she had visited him multiple times and knew there were prison visitor logs that would impeach her testimony. Defense counsel even informed the trial judge that he was going to obtain these records to impeach her. Defense counsel ended up not obtaining the records.

The trial court refused to analyze this issue under RCr 11.42 and stated that evidentiary issues should be brought on direct appeal. While this is correct, Appellant is not arguing an evidentiary issue. He was arguing an ineffective assistance of counsel issue, in that counsel failed to obtain appropriate evidence with which to impeach this witness. This issue may have some merit when analyzed in an ineffective assistance of counsel context. It should not have been summarily dismissed by the trial court by its holding that it was merely an evidentiary issue and should have been brought on direct appeal. While there were some evidentiary aspects to this argument, there was also a case to be made for ineffective assistance of counsel. And since this was a primary witness for the prosecution, the failure to impeach her could have been highly prejudicial to Appellant. We therefore remand this issue to the trial court to analyze this allegation of ineffective assistance of counsel.

The next issue is in regard to defense counsel's failure to object when a copy of a *Miranda* waiver purportedly signed by Appellant was introduced into evidence instead of the original. Appellant points out that a copy is admissible unless a "genuine question is raised as to the authenticity of the original." Kentucky Rules of Evidence (KRE) 1003(1). At trial, Appellant claimed he did not sign the *Miranda* waiver.

The trial court dismissed this RCr 11.42 allegation because it stated it was an evidentiary issue and should have been brought on direct appeal. Even if this were a viable allegation of ineffective assistance of counsel, it would not have met the standard for ineffective assistance of counsel.

While the original waiver would have been preferable as evidence, we do not see that a failure to object to the copy being used would have affected the outcome of the proceedings to such an extent that the outcome would have been different. A suppression hearing was held before trial in which the authenticity of the waiver was questioned. The waiver was not suppressed. Also, there was testimony from police officers who stated they witnessed Appellant sign the waiver. There is plenty of evidence in the record that supports the authenticity of the waiver. This issue does not meet the high standard for ineffective assistance of counsel and therefore we do not believe it needs to be reconsidered by the trial court.

Appellant next argues that counsel was ineffective in failing to object to the kidnapping instruction submitted to the jury during the guilt phase. The

instruction states Appellant can be found guilty of capital kidnapping because "James Parson was not released alive." Appellant claims he should not have been found guilty of capital kidnapping unless he intended to cause the death of Mr. Parson.

The trial court dismissed this 11.42 issue by finding that errors in jury instructions are not reviewable upon an 11.42 motion. *Boles v. Commonwealth*, 406 S.W.2d 853 (Ky. 1966).

Regardless of the *Boles* case, the "not released alive" language comes straight from Kentucky Revised Statute (KRS) 509.040(2). Even if this had been reviewed using the ineffective assistance of counsel standard, defense counsel had no reason to object because this language was part of the statute.

Appellant next argues that his counsel was ineffective for failing to object to the sentencing phase instructions. The instruction stated that when the jury fixed the sentence for kidnapping, it should have considered the aggravating circumstance of "the kidnapping victim was not released alive." Unlike the above discussed jury instruction, this was erroneous.

KRS 532.025(2) and (3) state that when a defendant is convicted of a crime in which the death penalty is authorized, such as capital kidnapping, an aggravating circumstance must be listed in the sentencing instructions and the jury must rely on one of these aggravating circumstances if it sentences the defendant to death or life imprisonment without benefit of probation or parole. If one of the

aggravating circumstances is not found by the jury, these penalties cannot be imposed.

Here, Appellant was sentenced to life without the benefit of parole and the aggravating circumstance the jury relied on was that the victim was not released alive. This is not one of the aggravating circumstances listed in KRS 532.025(2)(a). In fact, the case of *Salinas v. Commonwealth*, 84 S.W.3d 913, 920 (Ky. 2002), states "'that the victim was not released alive' is the element that enhances kidnapping from a Class B felony to a capital offense. However, that fact is not an aggravating circumstance necessary to authorize imposition of capital punishment under KRS 532.025(2)."

The trial court dismissed this issue as it did the one above stating that jury instruction issues are not for 11.42 review and cited to the *Boles* case. While the *Boles* case does hold jury instructions are not reviewable upon an 11.42 motion, ineffective assistance of counsel was not an issue in *Boles*. In fact, in *Commonwealth v. Davis*, 14 S.W.3d 9 (Ky. 1999), the Kentucky Supreme Court ruled on an ineffective assistance of counsel issue in regard to failing to object to improper jury instructions. *See also Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999) (where the failure of counsel to object to a jury instruction can constitute a grave error). We therefore find that this issue should have been analyzed by the trial court using the ineffective assistance of counsel standard and remand to do so. This was not a jury instruction issue that could be dismissed by *Boles*, but an ineffective assistance of counsel issue like that in *Davis*.

Next Appellant claims his counsel was ineffective when he failed to move for a mistrial or admonition when the Commonwealth made inappropriate comments during closing. The Commonwealth stated that if the jury found Appellant guilty, but mentally ill, then he will be given a pill and will walk the next day. Defense counsel made an objection and the trial judge sustained it. However, counsel sought no other relief.

In dismissing this 11.42 argument, the trial court held that this was an issue that should have been brought on appeal. This was an improper comment made by the Commonwealth Attorney and could be seen as trying to enrage the jury so they would convict even if they believed him to be mentally ill.

The issue of improper remarks during closing arguments and the failure to object to them can be raised as an ineffective assistance of counsel argument. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). This was a prejudicial statement that could have affected the outcome of the trial. The trial court should have addressed whether or not counsel was ineffective for not seeking a mistrial or admonition. As such, we remand this issue to the trial court to be analyzed using the ineffective assistance of counsel standard.

Appellant also claims that he had ineffective counsel because he acted in concert with the Commonwealth when he did not object to testimony that was perjured. Jail house informants were used at trial. They testified that Appellant confessed to committing the crime to them. One such informant testified that he did not receive any kind of deal from the Commonwealth. Appellant claims that

this witness did receive a deal for his testimony and that his trial counsel knew about it, but said nothing during cross-examination.

The record shows that defense counsel grilled this witness on the stand. He called him a "rat" and also questioned him extensively about any kind of deal that might have been in place. Counsel was very effective in trying to discredit this witness.

Appellant's final eleven instances of alleged ineffective assistance of counsel were all dismissed as having previously been raised on direct appeal. Even so, we will address each, but only briefly.

Appellant claims that a hearing should have been held when it was disclosed that a witness was heard talking about the case within the presence of a jury member. Specifically, Appellant argues the jury should have been questioned and his defense counsel was ineffective for not requiring this hearing. This does not meet the ineffective assistance of counsel standard because the witness was questioned by the trial court and she stated no juror was near her and no juror informed the court that they had overheard anything improper.

Appellant claims the jury was allowed to take a cassette tape into the jury room for deliberations that had previously been held inadmissible and that his counsel was ineffective for not stopping it. During trial, this tape was admitted into evidence and played, but eventually stopped because parts of it became inaudible. All the tapes put into evidence were then copied onto a single tape which the jury took with them into deliberations. There is no evidence that this

inaudible tape was copied onto the tape provided the jury and, even if it was, the tape had been played for the jury in open court. Supposing counsel should have made sure the inaudible portion was not taken into the jury room, we do not find that this mistake amounts to ineffective assistance of counsel.

Appellant next argues that his counsel was ineffective when he failed to object to the Commonwealth's using peremptory strikes against the jurors who had mental illness or who were familiar with them. There was no need for defense counsel to object because it was not an improper use of peremptory strikes as those familiar with mental illness are not a protected class.

Appellant next argues that counsel was ineffective for not continuously objecting to two juror members not being stricken for cause. One potential juror knew the victim's family and another was acquainted with the Commonwealth Attorney and his staff. Defense counsel moved to strike both for cause. The trial court refused to remove these jury members. Appellant now argues that counsel was ineffective for not continuing to object. This argument is without merit since counsel moved to strike the jurors and the motions were denied.

Appellant claims his counsel was ineffective for not requesting a pre-trial *Daubert*[2] hearing regarding the Commonwealth's expert witness in psychology. While a pre-trial *Daubert* hearing would have been useful, the expert's credentials were never in doubt. He was employed by Kentucky

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Correctional Psychiatric Center and had conducted two evaluations on Appellant. This does not meet the ineffective assistance of counsel standard.

Appellant also claims his counsel was ineffective for not seeking an admonition or mistrial when the Commonwealth badgered a defense witness. The witness was a psychologist called in to rebut the Commonwealth's expert psychology witness. After a review of the trial tape, we do not find that the Commonwealth badgered the witness. The Commonwealth merely engaged in aggressive cross-examination. An admonition might have been granted by the trial court, but failure to request one would not amount to ineffective assistance of counsel.

Appellant also claims his counsel was ineffective for not objecting when the Commonwealth stated the victim had been shot three times when the testimony of the medical examiner was that he was shot twice. This does not meet the standard of ineffective counsel. Failure to object to this misstatement did not result in an unfair trial or one in which the result is unreliable. The evidence was overwhelming that Appellant shot the victim. In fact, the Appellant stated he shot Mr. Parson, albeit in self-defense. Looking at the totality of the evidence, a failure to object to a misstatement regarding the number of shots would not constitute an egregious error.

Appellant argues that his counsel was ineffective because he did not object to perjured testimony from a police officer. The officer stated that the victim's blood was found on Appellant's belt. Appellant claims this was perjured

testimony because a Kentucky State Police DNA specialist testified that she could not tell if there was blood on the belt. Conflicting testimony does not amount to perjured testimony. It is up to the jury to determine whose testimony is most reliable. Trial counsel was not ineffective in this instance.

Appellant also argues that his counsel was ineffective for not objecting to personal comments made by the Commonwealth Attorney during his cross-examination of Appellant.

> Nearly a half century ago this Court counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction...." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed.2d 1314 (1935). The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." *Ibid.* In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." *Ibid.*

U.S. v. Young, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985). Here, the comments did not constitute a foul blow. As such, failure to object to them would not amount to ineffective assistance of counsel.

Appellant claims next that his counsel was ineffective for not objecting to the Commonwealth's humanizing the victim during closing arguments and identifying the jury with the victim's family

> A murder victim can be identified as more than a naked statistic, and statements identifying the victims as individual human beings with personalities and activities does not unduly prejudice the defendant or inflame the jury. Just as the jury visually observed the appellant in the courtroom, the jury may receive an adequate word

> description of the victim as long as the victim is not glorified or enlarged. (Internal citation omitted).

Bowling v. Commonwealth, 942 S.W.2d 293, 302-303 (Ky. 1997). Here, all the Commonwealth did was humanize the victim. There was nothing improper about this and as such, no objection was required of defense counsel.

Finally, Appellant argues that his counsel was ineffective for not objecting to the trial court failing to conduct a capital sentencing hearing before the truth-in-sentencing phase. Here, both were combined. Appellant contends that this denied him the ability to present mitigating evidence. This is without merit. On direct appeal, the Kentucky Supreme Court held that mitigating evidence was presented to the jury. Appellant's parents testified and mitigating circumstances were listed on the jury's sentencing instructions. As such, there was no prejudice to Appellant and therefore no ineffective assistance of counsel.

Appellant also contends that he was improperly denied a hearing on one of the issues the trial court did analyze under ineffective assistance of counsel. As stated above, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d at 743-744.

Appellant argues that he was entitled to a hearing because he raised the issue of dual representation and conflict of interest on behalf of his trial counsel. Appellant claims his trial counsel represented both Appellant and one of the Commonwealth's witnesses. We do not find that there was a conflict here that

adversely affected trial counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). The record shows trial counsel thoroughly cross-examined the witness by questioning his motives for testifying and calling him a rat and thief. The record shows that the cross-examination was strenuous, adversarial, and representing only Appellant's interests. As such, no hearing was required.

For the above reasons, we remand this case in order for the trial court to analyze defense counsel's performance in regards to the Patricia Zamorano impeachment evidence issue, failure to object to the sentencing phase instruction regarding aggravating circumstances, and the failure to object to the improper closing argument statement regarding Appellant "taking a pill and being released the next day." Should the trial court feel it necessary to fully address the issues, it should schedule an evidentiary hearing. The remainder of Appellant's arguments is affirmed.

ALL CONCUR.

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