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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001612-MR

STEVEN BERRY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 99-CR-01312

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: This is an appeal from the denial of Steven Berry's Rule of Criminal Procedure (RCr) 11.42 motion by the Fayette Circuit Court. The court denied the motion to vacate, set aside or correct, without conducting an evidentiary hearing. Berry, in essence, puts forth four arguments for our consideration: first, it was an abuse of discretion to deny the RCr 11.42 motion without a hearing;

second, counsel rendered ineffective assistance by failing to seek a jury instruction consistent with the presumption of innocence and the appropriate burden of proof; third, counsel was ineffective by failing to subject the prosecution's case to meaningful adversarial testing; and fourth, Berry was subjected to ineffective appellate counsel when, on appeal, the issue of trial counsel's failure to preserve the issue of the use of a misdemeanor as an aggravator in a death penalty case was not submitted. We affirm the trial court's judgment for the reasons set forth below.

Berry was convicted by a jury of murder, tampering with physical evidence, first-degree stalking, and two counts of violating an emergency protective order (EPO). Berry's defense was that while he did kill the victim, he was acting under an extreme emotional disturbance or EED at that time. Berry was sentenced to life imprisonment without the possibility of parole for twenty-five years for murder, one year each for tampering with physical evidence and stalking, and twelve months for each EPO conviction, with each sentence to run concurrently with the others. The Supreme Court of Kentucky affirmed the trial court in an unpublished opinion: *Berry v. Commonwealth*, 2003 WL 22415627 (Ky. 2003)(2001-SC-000457-MR). We therefore adopt, where pertinent to resolving the issues presented, the facts as written by the Supreme Court:

I. FACTS

> The facts in this case are essentially undisputed. Appellant confessed to killing Patricia Searcy but claimed he did so under the influence of mental illness or extreme emotional disturbance. Sometime during the summer of 1998, Appellant moved into a residence on

the same street where Searcy lived. They became romantically involved, ultimately living together in a third residence with Searcy's daughter. Several months later, the relationship soured.

In April 1999, Searcy and her daughter moved out of the residence and Searcy obtained a fourteen-day emergency protective order from the Fayette District Court. KRS 403.740(4). That order expired without further action. On June 6, 1999, Searcy obtained a second emergency protective order and this time sought more permanent protection. Following a hearing held on June 15, 1999, the district court issued a one-year domestic violence restraining order. KRS 403.750.

On June 23, 1999, a warrant was issued for Appellant's arrest for violating the restraining order. A second warrant was issued on June 26, 1999. Appellant was arrested and jailed later that day, and, on July 7, 1999, he was convicted of violating a protective order, KRS 403.763, and sentenced to time served. Upon his release, the violence escalated. Appellant began repeatedly calling Searcy's residence. He twice slashed the tires on her car. Several new warrants were issued for Appellant's arrest and a "crimestoppers" advertisement featuring Appellant appeared in the Lexington Herald-Leader on July 27, 1999.

Appellant became enraged over the "crimestoppers" advertisement. He knew that Searcy typically worked until 3:00 a.m. Thus, beginning in the evening of July 27, 1999, and into the morning of July 28, 1999, Appellant waited outside Searcy's residence until she returned home. When Searcy arrived, an argument ensued that awoke Searcy's sister and daughter who had been asleep inside the residence. They went to the door and saw Appellant and Searcy arguing near the sidewalk in front of the residence. Searcy's sister picked up the telephone and called "911" for emergency assistance. Before the police could arrive, Appellant shot Searcy several times and killed her. Searcy's daughter and sister witnessed the shooting.

Appellant was arrested on July 29, 1999, and questioned by Detective Billy Richmond of the Lexington Police Department. In a videotaped confession, Appellant admitted to lying in wait for Searcy and then killing her. Appellant explained his reason for the murder as follows:

> I thought I could get her to come with me. But she wouldn't. And so, I said, f it, and I turned around and was getting ready to walk away, because her sister was getting ready to get on the phone. And then I thought about it, and I was like, well hell, you know, this ain't nothing but another charge I'm getting ready to get on myself, so I oughta go on and kill her.

The murder weapon was never recovered.

On September 28, 1999, the Fayette County Grand Jury indicted Appellant for murder in violation of KRS 507.020, tampering with physical evidence in violation of KRS 524.100, first-degree wanton endangerment in violation of KRS 508.060, first-degree stalking in violation of KRS 508.140, three counts of violating a protective order in violation of KRS 403.763, and harassing communications in violation of KRS 525.080. A superseding indictment sought the death penalty and identified the violation of a domestic violence order as the aggravating circumstance. KRS 532.025(2)(a)8. The Commonwealth later dismissed the wanton endangerment count, one of the three counts of violating a protective order, and the harassing communications count.

The first trial began in Fayette Circuit Court on February 5, 2001. On the third day of trial, a prosecution witness testified to evidence that had previously been suppressed by an in limine order. Appellant's motion for a mistrial was granted and the case was reset for trial on March 26, 2001. On March 21, 2001, Appellant petitioned this Court for a writ to prohibit the retrial on double jeopardy grounds and accompanied the petition with a motion for intermediate relief pursuant to CR 76.36. This Court

> denied the motion for intermediate relief and the petition for a writ was later denied as moot.
>
> The second trial began as scheduled on March 26, 2001. On April 5, 2001, the jury returned verdicts of guilty on all counts and sentences of twelve months in jail on the two counts of violating a protective order.[1] Following a sentencing hearing on the murder conviction, the jury recommended a sentence of life imprisonment without the possibility of parole for twenty-five years. Appellant then waived jury sentencing on the tampering and stalking convictions, and, pursuant to the Commonwealth's recommendation, the trial court imposed one year sentences for both of those convictions to run concurrently with the sentence for murder.

II. STANDARD OF REVIEW

In order to prevail on a motion pursuant to RCr 11.42 claiming ineffective assistance of counsel, the movant must show that his counsel's performance was deficient and that the deficiency prejudiced the case. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A court must examine counsel's conduct as to whether it was reasonable based upon professional norms. *Fraser v. Commonwealth,* 59 S.W.3d 448, 452 (Ky. 2001).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34, 102 S.Ct. 1558, 1574-575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the

[1] The case was tried before rendition of *Commonwealth v. Philpott*, 75 S.W.3d 209 (Ky. 2002).

> distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; . . . .

Strickland, 466 U.S. at 689; 104 S. Ct. 2065.

In addition, we may not set aside a trial court's findings in such a proceeding unless they are clearly erroneous. *Lynch v. Commonwealth,* 610 S.W.2d 902 (Ky. App. 1980). *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997).

III. ANALYSIS

Berry claims that the trial court erred when it dismissed his motion as his allegations cannot be refuted merely by referring to the record. A hearing is required, as Berry correctly points out, "If the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5). *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). A hearing is likewise needless where the allegations, even if true, would not be sufficient to invalidate the conviction. *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986); *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

However, "a movant in an RCr 11.42 proceeding is not automatically entitled to an evidentiary hearing, even in death penalty cases." *Skaggs v. Commonwealth,* 803 S.W.2d 573 (Ky. 1990), *cert denied,* 502 U.S. 844, 112 S. Ct. 140, 116 L.Ed.2d 106 (1991); *Stanford v. Commonwealth*, 854 S.W.2d 743, 744

(Ky. 1993). In this instance, Berry argues that because he has alleged that his attorney did not adequately prepare his defense and therefore did not subject the prosecution's case to meaningful adversarial testing, he was entitled to a hearing. We do not agree. The record reflects that his counsel put forth a defense of extreme emotional disturbance. Indeed, the Supreme Court's Opinion in Berry's direct appeal held:

> Appellant admitted to killing Searcy. His defense was that he was acting under the influence of mental illness or extreme emotional disturbance. Accordingly, he filed a pretrial notice of intent to introduce evidence of mental illness or defect. KRS 504.070(1). The trial court ordered him committed to the Kentucky Correctional Psychiatric Center (KCPC) for evaluation. KRS 504.070(3). Dr. Victoria Yunker, a staff psychiatrist at KCPC, testified at trial that even though Appellant may have had an abusive childhood and suffered from alcoholism and other ailments, at the time of the offense he possessed the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Berry v. Commonwealth, 2003 WL 22415627 (Ky. 2003)(2001-SC-000457-MR).

The record further reflects the fact that trial counsel hired and presented testimony from a Dr. Peter Schilling to contradict the Commonwealth's case. Under *Strickland, supra*, and pursuant to our review, the actions of counsel in so doing belies ineffectiveness.

Berry next alleges that his attorney did not interview unnamed witnesses. He does not tell this Court what those witnesses would have said if interviewed and/or testified before the jury. The burden is upon Berry to establish

convincingly that he is entitled to the extraordinary relief available under RCr 11.42. *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 (Ky. 1969). Speculative allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Therefore, we discern no error by the trial court regarding this argument.

Berry next asserts that his attorney should have obtained his telephone records to show the jury how sincerely obsessed Berry had become with the victim in order to substantiate his defense of EED. We remind Berry that he was also charged with first-degree stalking, thus it is apparent that his trial counsel was trying to walk the fine line between illustrating EED and possibly assisting the Commonwealth in proving its stalking case. This conundrum clearly falls under the category of trial strategy, and therefore, this was not ineffective assistance of counsel. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000); *see also Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003). Even in hindsight, this strategy cannot be seen as unwarranted. The strategy employed by Berry's trial counsel was not unreasonable or incompetent, and is not grounds for relief and so does not entitled Berry to an evidentiary hearing.

Berry's next contention is that counsel rendered ineffective assistance by failing to seek a jury instruction consistent with the presumption of innocence

and the appropriate burden of proof. This issue may easily be satisfied without an evidentiary hearing as it is completely contained within the record; specifically in the instructions given to the jury. Berry proposes herein that the instruction should have read, "you will find the defendant not guilty under these instructions unless you believe from the evidence beyond a reasonable doubt that he is guilty of one of the following offenses." He opines that his trial counsel was derelict because she did not fight for this instruction. The court's specific instructions directed the jury, "you shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty." From simply looking at the court's instructions it is clear that this issue is completely without merit. We must also point out that the jury instructions were deemed proper by the Supreme Court of Kentucky in Berry's direct appeal.

Berry's next argument is that trial counsel was ineffective by failing to subject the prosecution's case to meaningful adversarial testing. Within this generalized statement, Berry contends three specific charges: first, that trial counsel did not parlay Berry's knowledge of the location of the murder weapon into a better plea offer; second, that counsel failed to make an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 16 (1986); and third, that the trial judge was asleep during portions of the trial.

The location of the murder weapon was obviously superfluous, as the Supreme Court of Kentucky previously stated in Berry's direct appeal: "[T]he prosecution's case was strong. The jury watched Appellant confess to the murder

and explain his motive in extremely disturbing language: '[T]his ain't nothing but another charge I'm getting ready to get on myself, so I oughta go on and kill her.'" *Berry,* 2003 WL 22415627 at *11. Whether or not this information would have induced the Commonwealth into offering Berry a better plea bargain is extremely doubtful and highly speculative.

Berry's next claim, regarding the absence of a *Batson* challenge to the jury selected, is similarly meritless. One African-American sat on Berry's jury and, while Berry claims that the Commonwealth struck any other African-Americans from the venire, he does not provide any specific facts to support his argument. For example, Berry does not say how many were struck, if any, nor does he allege that there was particularized racial discrimination demonstrated during *voir dire*. From our review of the record, we find no error or discrimination in the selection of the jury who heard Berry's case.

The allegation by Berry that the trial judge was asleep is likewise meritless. Berry does not allege any specifics as to this claim, such as, at which point in the trial the judge slept, whether or not counsel was aware of the judge's alleged slumber, and finally whether or not the judge missed some important matter while he allegedly dozed. Furthermore, our review of the record refutes this allegation entirely and we also note that Berry wrote a letter to the trial judge saying, "I would also like to thank you for being a fair and decent judge during my trial." Presumably, Berry would not have felt that way if the court had indeed been asleep during his trial.

Berry's last issue is that his appellate counsel was ineffective by not raising the issue of the use of a misdemeanor (the violation of a domestic violence protective order) as an aggravator in a death penalty case. Kentucky Revised Statute (KRS) 532.025(2)(a)(8). This issue was preserved by trial counsel, but not presented in Berry's direct appeal to the Supreme Court of Kentucky.

In *Hicks v. Commonwealth,* 825 S.W.2d 280 (Ky. 1992), the Supreme Court of Kentucky held that the remedy for ineffective assistance of appellate counsel, absent factors not present herein, is not through an RCr 11.42 proceeding. The purpose of an RCr 11.42 proceeding is to permit a trial court to examine the "constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself." *Id.* at 281. The proceedings are not designed to permit the trial court to examine the proceedings on appeal. Berry invites us to revisit this holding by the Supreme Court; however, we reject that invitation because we are bound to follow precedent established by the Supreme Court. Rules of the Supreme Court 10.030(8)(a).

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court in its denial of Berry's RCr 11.42 motion.

ALL CONCUR.

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