

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001633-MR

WALTER DURRELL GRAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 03-CR-00934

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING WITH DIRECTIONS

** ** * * * * *

BEFORE: FORMTEXT LAMBERT AND TAYLOR, JUDGES; HENRY,
SENIOR JUDGE.

TAYLOR, JUDGE: Walter Durrell Gray brings this appeal from an August 18,
2008, judgment of the Fayette Circuit Court summarily denying a Kentucky Rules
of Criminal Procedure (RCr) 11.42 motion to vacate judgment entered upon a jury

verdict finding him guilty of murder. We affirm in part, reverse in part, and remand with directions.

Gray was indicted by a Fayette County Grand Jury upon the charge of murder (Kentucky Revised Statutes 507.202) following a shooting that occurred during a drug transaction.¹ The victim drove to the Arbor Grove housing project in Lexington, Kentucky and was attempting to purchase crack cocaine. The victim was shot while in her car. At the time of the shooting, three individuals, Gray, Octavious Eggerson, and Bobby Douglas Faulkner, were in the vicinity of the victim's vehicle. The evidence at trial was conflicting as to the identity of the shooter.

Following the shooting, Gray, Eggerson, and Faulkner entered the apartment of Rose Crutcher. Crutcher, who was admittedly addicted to crack cocaine, often permitted numerous individuals to smoke crack cocaine in her apartment. The events that occurred in Crutcher's apartment just after the shooting are widely disputed and will be developed as necessary to disposition of this appeal.

Following a jury trial, Gray was convicted upon the charge of first-degree murder and was sentenced to forty-five-years' imprisonment. Gray's conviction was affirmed on direct appeal by the Supreme Court of Kentucky in *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006).

¹ Walter Durrell Gray was also indicted upon the charges of trafficking in a controlled substance (first degree) and possession of a handgun by a convicted felon. Both charges were subsequently dismissed.

Gray subsequently filed a *pro se* RCr 11.42 motion to vacate the judgment of conviction. The court appointed counsel, and counsel filed a supplemental memorandum in support of Gray's *pro se* RCr 11.42 motion. The court denied the RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Upon reviewing a denial of an RCr 11.42 motion without an evidentiary hearing, it must be determined whether appellant's allegations are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001); *Hopewell v. Com.*, 687 S.W.2d 153 (Ky. App. 1985). If there are material issues of fact that cannot be refuted upon the face of the record, appellant is entitled to an evidentiary hearing. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001). In order to prevail upon an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel was deficient and that such deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Gray alleges ineffective assistance of trial counsel on three grounds. First, he avers that trial counsel failed to introduce into evidence an audiotaped interview of one of the Commonwealth's key witnesses. Second, he asserts that trial counsel failed to prepare for the penalty phase of trial. And, third, Gray contends that trial counsel failed to bring a proper *Batson* challenge against the Commonwealth's strike of a potential juror. *See Batson v. Kentucky*, 476 U.S. 79 (1986). For the reasons hereinafter stated, we conclude that Gray is entitled to an

evidentiary hearing upon the first two grounds alleging ineffective assistance of trial counsel. However, we view the third ground to be meritless.

Gray initially claims that trial counsel was ineffective for failing to introduce an audiotaped interview of Rose Crutcher, a witness for the Commonwealth, in order to impeach her trial testimony. Trial counsel, along with his investigator, interviewed Crutcher approximately two months prior to trial and audiotaped the interview. While the entirety of the audiotaped recording is not perfectly audible, it is clear that Crutcher stated she believed it was Bobby Faulkner and not Gray who made the statement, “[i]f I can’t make no money, ain’t nobody else going to make no mother-[expletive] money.” When asked if she was sure that it was Faulkner, Crutcher responded confidently remarking that she knew Faulkner’s voice well. Conversely, at trial, Crutcher testified on direct examination that Gray made the statement. This statement was important at trial as it established motive on the part of Gray – presumably, Gray shot the victim because she insisted upon buying her cocaine from Faulkner rather than Gray.

Gray’s trial counsel attempted to play the audiotape during cross-examination of Crutcher; however, the Commonwealth objected on the grounds that the audiotape had not been previously disclosed for review pursuant to the parties’ agreement for reciprocal discovery. The record reflects that at this point trial counsel expressed confusion as to what was subject to reciprocal discovery but conceded quickly to the Commonwealth’s assertion that the audiotaped interview could not be admitted into evidence pursuant to the agreement. The trial

court ruled that the audiotaped interview was inadmissible under the reciprocal discovery agreement.

On direct appeal, the Supreme Court of Kentucky held that the trial court erroneously concluded that the reciprocal discovery agreement barred the admission of the audiotaped interview into evidence. *See Gray*, 203 S.W.3d 679. The Supreme Court determined that the error was harmless because the audiotaped interview should have been excluded as trial counsel failed to lay a proper foundation for admission. *See id.* The Supreme Court specifically referenced the trial court's admonition given to trial counsel that counsel could ask whether Crutcher recalled making statements implicating someone other than Gray. *See id.* Because trial counsel failed to do so, the Supreme Court decided that the issue of whether the trial court erroneously excluded the audiotaped interview from evidence was not preserved for appellate review. *See id.* As such, we conclude that Gray has satisfied the showing of the first *Strickland* requirement – that trial counsel was deficient as to the admission of the audiotaped interview into evidence because he failed to understand the terms of reciprocal discovery agreement and because he failed to lay a proper foundation. *See Strickland*, 466 U.S. 668.

As to the prejudicial requirement of *Strickland*, the circuit court concluded there was no prejudice because Crutcher conceded to most of the points raised in the audiotaped interview during cross-examination. *See id.* However, portions of the audiotaped interview clearly contradicted Crutcher's trial testimony. Although Crutcher stated during cross-examination that she could not

be certain who made the statement “if I can’t make no money” Crutcher ultimately stood by her contention that she believed it to have been Gray. In the audiotaped interview, Crutcher affirmatively stated it was Faulkner and not Gray who made this statement. Further, Crutcher did not detract from her trial testimony on direct examination that she was threatened by Gray, an assertion she plainly denied in her audiotaped interview. Thus, we are unable to conclude that the face of the record refutes Gray’s contention that trial counsel’s failure to introduce these prior inconsistent audiotaped statements of Crutcher was prejudice. Consequently, we conclude that Gray was entitled to an evidentiary hearing upon this issue.

Gray next asserts that trial counsel was ineffective because he was unprepared for the penalty phase of trial. Upon review of the record, we think it plainly reflects that trial counsel was wholly unprepared for the penalty phase of trial. During a bench conference, trial counsel’s own statements make it abundantly clear that he was both unprepared for the penalty phase of trial and was unaware of how to proceed during the penalty phase. After the trial court directed trial counsel to proceed to the penalty phase, trial counsel admitted: “[w]ell, I just can’t handle this thing. And [Gray] needs character witnesses and stuff like that.” Trial counsel even asked the trial court and the Commonwealth: “[w]hat do you normally do at the sentencing?” At this point, trial counsel appeared to accept advice from the Commonwealth as to how to proceed during his client’s penalty phase. Trial counsel also asked the Commonwealth about the advisability of allowing Gray to testify during the penalty phase and decided not to do so per the

Commonwealth's recommendation. The Commonwealth also coached trial counsel on how to address the jury at sentencing and told trial counsel that the jury would probably recommend the minimum sentence of twenty years for Gray.

Upon examination of the record, it is clear that Gray's trial counsel was completely unprepared for the penalty phase of trial. This unpreparedness led to a collapse of the adversarial process altogether. The adversarial component of the criminal trial is a hallmark of the American system of justice, and its preservation essential to Sixth Amendment guarantee of effective representation of trial counsel. Considering the egregious nature of the circumstances surrounding trial counsel's performance at the penalty phase, we believe that trial counsel was deficient and that prejudice cannot be refuted upon the face of the record. As such, we conclude that Gray is entitled to an evidentiary hearing upon this issue.

Lastly, Gray asserts that trial counsel was ineffective for failing to present a proper challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). Unlike Gray's other allegations of ineffective assistance of counsel, we think this allegation is refuted upon the face of the record. In this respect, we agree with and adopt the circuit court's reasoning:

Finally, [Gray] claims his trial counsel was ineffective for failing to properly challenge the Commonwealth's juror strikes under *Batson*. *Id.* However, [Gray's] trial counsel did address the Commonwealth's strike as not being based on a nondiscriminatory reason and the trial court disagreed with [Gray's] counsel and held that the reason provided by the Commonwealth was sufficient. Accordingly,

[Gray] is also not entitled to [RCr] 11.42 relief for this claim.

Thus, we reject Gray's above assertion.

In sum, we hold that Gray is entitled to an evidentiary hearing upon his claims that trial counsel was ineffective for failing to introduce into evidence portions of the audiotape recording of Crutcher's interview and for failing to prepare for the penalty phase of trial. Upon remand, the circuit court shall hold an evidentiary hearing upon these two allegations.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed in part, reversed in part, and this case is remanded with directions to hold an evidentiary hearing upon Gray's RCr 11.42 motion.

ALL CONCUR.

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