RENDERED: DECEMBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002098-MR

BILLY BLACKFORD — APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 99-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Billy Blackford, appeals from an order of the Elliott Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

In 2000, Appellant was convicted in the Elliott Circuit Court of complicity to commit murder. The conviction stems from the March 1999 homicide of Donnie Lake, Jr., who was pushed off of a cliff in Rowan County,

Kentucky and plunged to his death. Appellant and another individual, Jake Nickell, were subsequently indicted for murder. Each man accused the other of pushing Lake off of the cliff in order to collect on a "hit" that was allegedly made on Lake's life. In an agreement with the Commonwealth, Jake eventually pled guilty to facilitation of murder and tampering with physical evidence, and was sentenced to ten years' imprisonment. As part of the plea agreement, Jake also agreed to testify against Appellant.

Following a trial in May 2000, a jury found Appellant guilty of complicity to commit murder and recommended a life sentence. The trial court denied Appellant's motion to modify the sentence to a term more proportional to that of Jake, and sentenced him to life imprisonment on June 19, 2000. In an unpublished opinion, the Kentucky Supreme Court affirmed Appellant's conviction and sentence on direct appeal. *Blackford v. Commonwealth*, 2000-SC-0546-MR (September 27, 2001).

On October 3, 2003, Appellant filed a pro se RCr 11.42 motion. The trial court ultimately appointed counsel and a supplemental motion was filed on December 7, 2004. An evidentiary hearing was held on February 16, 2007, and on August 14, 2008, the trial court rendered a 37-page opinion and order denying Appellant post-conviction relief. This appeal ensued.

As in the trial court, Appellant's arguments center around his belief that trial counsel should have presented an intoxication defense. Specifically, Appellant claims that counsel was ineffective for failing to request a voluntary

intoxication instruction and for failing to investigate and present intoxication evidence during the guilt and penalty phases. Appellant contends that the trial court erroneously found these omissions to be trial strategy rather than ineffective assistance. We disagree.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel 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), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but

counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that 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. at 2065.

Appellant first argues that trial counsel should have requested a voluntary intoxication instruction. During the evidentiary hearing, Appellant presented testimony from Jake and Appellant's ex-wife, Anita Waddell. Jake testified that on the night in question he and Appellant were drinking heavily, smoking marijuana and "eating" Xanax. Jake claimed that Appellant was "highly intoxicated," was slurring his words and appeared to be off balance. Anita, whose testimony was introduced through her affidavit, similarly claimed that Appellant and Jake drank an entire bottle of Wild Turkey, and that Appellant was very intoxicated and having "considerable difficulty walking." Appellant argues that based upon this evidence, he would have been entitled to an instruction on voluntary intoxication.

Kentucky Revised Statutes (KRS) 501.080(1) states that voluntary intoxication is a defense to a criminal charge if it "negatives the existence of an element of the offense." The Kentucky Supreme Court has interpreted the statute to mean that the defense is "justified only where there is evidence reasonably sufficient to prove that the defendant was so drunk that he did not know what he was doing." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002) (quoting

Meadows v. Commonwealth, 550 S.W.2d 511, 513 (Ky. 1977)); *see also Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007). As such, only if a jury could reasonably conclude from the evidence presented that the defendant was so intoxicated that he could not have formed the requisite *mens rea* for the offense is a voluntary intoxication instruction warranted. *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004). *See also Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977). In other words, in order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that he was so drunk he did not know what he was doing. *Springer v. Commonwealth*, 998 S.W.2d 439, 451 (Ky.1999).

We agree with the trial court that the evidence in this case clearly did not support a voluntary intoxication instruction. As the trial court noted in its opinion and order,

> Examining all of this testimony together, no two witnesses tell the same story. Jake testified at the Hearing that he, the Defendant, and Donnie (the victim) drank one-half (1/2) of the bottle of Wild Turkey. Meanwhile, Anita testified through Affidavit that Jake and the Defendant drank the whole bottle of Wild Turkey. Jennifer [Jake's girlfriend] on the other hand, testified at Trial that she could only recall Donnie drinking the Wild Turkey. While the Defendant did testify at Trial to consuming liquor, the exact amount is not known as he testified to the amount using a hand gesture that is not reflected in the written record.
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> Jake testified at the hearing that they also drank beer after they arrived at the Defendant's house (or when they left again with the victim). However, the Defendant testified at Trial that they had beer available in the refrigerator,

but they did not drink it. Again, while Jake testified at the Trial regarding the consumption of marijuana and Wild Turkey at the Defendant's house, he failed to mention beer until the Hearing.

As stated previously, this Court finds Jake's Hearing testimony to be totally lacking in credibility. Certainly, it is interesting that Jake could recall exactly how much Wild Turkey was consumed and exactly how many joints were smoked at the Hearing conducted approximately ***eight years*** after the death of the victim. When asked these questions at the Trial conducted a little more than ***one year*** after the death of the victim, however, Jake responded that he did not know. Furthermore, Jake was able to recall "eating Xanax" and drinking beer from the bootlegger eight years after the fact, yet such details were never mentioned at the Trial when clearly, the subject was raised during his Trial testimony.

While there is no question that the Defendant consumed alcohol on the night in question, the degree of the Defendant's intoxication does not appear to be clear. The Defendant described himself as "pretty drunk" during his testimony. He recalled that he did not want to get a bag of pot because he was "pretty drunk." Anita stated in her Affidavit that the Defendant was "highly intoxicated" and was slurring his words and having difficulty walking at the time he left the house. Of course, Jake also testified at the Hearing that the Defendant was "highly intoxicated."

However, these characterizations appear to be called into question by the fact that the Defendant has a specific recollection of the events of that night, including a specific recollection as to where the three men were going, where they stopped, what happened while they were stopped, what was said when they returned to the truck, and what occurred thereafter. More importantly, the Defendant has a clear recollection of Jake Nickell pushing the victim off of the cliff and can describe the moments leading up to the victim's death with detail.
. . . .

> Certainly, the Defendant's ability to vividly recall the night in question is inconsistent with the argument that he was so drunk that he did not know what he was doing. Considering the fact that the Defendant stated that he was ***standing on the edge of a cliff (with a drop-off of over one hundred (100) feet)*** conducting small talk with the victim at the time the victim was pushed, this Court also finds suspect the testimony elicited from Anita and Jake that the Defendant was having difficulty walking or was otherwise unsteady on his feet. (Emphasis in original).

The trial court also noted that at Trial, Appellant specifically denied any drug use on the night in question.

Appellant never claimed that he had lost his memory or control over his actions. To the contrary, his own testimony confirms that his mental and physical faculties were more than adequate. Thus, there is little reason to believe that his trial counsel, much less the trial court, had reason to suspect that a diminished capacity defense might be appropriate. In short, "[t]hese [were] not the actions of a man so intoxicated that he did not know what he was doing." *Soto v. Commonwealth*, 139 S.W.3d 827, 868 (Ky. 2004), *cert. denied,* 544 U.S. 931 (2005). Clearly, the evidence would not have supported an instruction on voluntary intoxication and, thus, counsel was not ineffective for failing to request such. "It is not ineffective assistance of counsel to fail to perform a futile act." *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002), *cert. denied*, 538 U.S. 931 (2003).

We likewise find no merit in Appellant's claim that counsel rendered ineffective assistance by failing to present evidence of his intoxication during the

guilt and penalty phases. Importantly, throughout the trial, Appellant maintained his absolute innocence and claimed that Jake acted alone in pushing Lake from the cliff. As trial counsel testified during the hearing, it was crucial for the jury to believe that Appellant's recollection of the events was accurate. As such, evidence of intoxication at such a level that Appellant did not know what was going on was a "double-edged sword."

We agree with the trial court that counsel utilized a trial strategy that pitted Appellant's credibility against Jake's credibility:

> Obviously, from the beginning of the Trial, Mr. Ganstine crafted the defense of his client with the understanding that the Defendant had to appear to be credible and fully cognizant of what occurred on top of that hill on the night in question. Jake was, presumably, going to point the finger at the Defendant or at least imply that the Defendant was the culprit. At a minimum, Jake was going to deny that he had anything to do with the victim's fall from the cliff. As a practical matter, therefore, the Defendant had to discredit Jake and point the finger back at him. This is especially true, however, if the Defendant maintained his "absolute innocence" and stated that he witnessed Jake push the victim off of the cliff.
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> Mr. Ganstine made a conscious choice to craft a strategy which was based upon establishing the credibility of the Defendant and attacking the credibility of the Co-Defendant. In the end, such strategy proved to be unsuccessful. However, the fact that the jury did not accept the position of the Defendant does not equate to a finding of ineffective assistance of counsel.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Furthermore, with respect to a claim of ineffective assistance of counsel, a court's review of counsel's performance must be highly deferential, and the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008). The record herein simply does not support a finding that "counsel's performance was deficient and that the defendant was prejudiced by that deficiency." *Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). *See also Strickland*. Therefore, the trial court did not err in concluding that trial counsel did not render ineffective assistance of counsel.

The Opinion and Order of the Elliott Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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