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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000589-MR

DAVID SCOTT CHISM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CR-000879

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: David Scott Chism (Chism) appeals the trial court's denial of his post-conviction Kentucky Rules of Criminal Procedure (RCr) 11.42 motion and request for an evidentiary hearing. Chism pled guilty to Second Degree Arson and First Degree Wanton Endangerment and was sentenced to a total of ten-years' imprisonment. On appeal, Chism argues that he received ineffective assistance of

counsel and that the trial court erred when it denied his RCr 11.42 motion without an evidentiary hearing. Having reviewed the record and arguments of the parties, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts in this case are not in dispute. On February 14, 2007, the Buechel Fire Department responded to a report of a fire at 4023 Lambert Avenue, a house owned by Chism and his estranged wife, Stephanie. Chism and Stephanie resided in the house, with their four children, until August of 2006, at which point Stephanie and the children moved out due to pending divorce proceedings. Chism, who still lived at the residence, was found at the scene and taken by Louisville EMS to a local hospital where he was treated for burns. It became clear early in the investigation, from the presence of flammable liquid pour patterns and an accompanying odor resembling gasoline, that the fire was the result of arson. Chism was subsequently arrested and later indicted by a Jefferson County Grand Jury for the offenses of Second Degree Arson and First Degree Wanton Endangerment.

Chism has a history of mental illness, including bouts of depression and attention deficit disorder (ADD). Chism also has a history of alcoholism. Through the years, he has reportedly suffered from psychotic episodes as a result of his mental condition. Chism's last psychotic episode occurred weeks prior to the date he set fire to his residence. However, Chism has never disputed the fact that he set fire to the residence, and he has taken full responsibility for his actions.

On September 14, 2007, Chism entered into a guilty plea to both offenses in exchange for the Commonwealth recommending a sentence of ten years for Second Degree Arson and five years for First Degree Wanton Endangerment to run concurrently for a total of ten years. The Commonwealth recommended that Chism be required to serve the full sentence, but agreed that Chism was free to ask the court for probation. The court followed the Commonwealth's recommendation and sentenced Chism to ten-years' imprisonment.

At the sentencing hearing, Dr. Peter Steiner testified regarding the condition of Chism's mental health. Dr. Steiner's testimony indicated that he had diagnosed and was treating Chism for Major Depression and ADD, and that on the day of the fire, Chism was in fact trying to take his own life. He also stated that Chism was successfully being treated for his alcohol addiction, was holding down a job waiting tables at a Chili's restaurant, and was cleared to have unsupervised contact with his children on a regular basis. In Dr. Steiner's opinion, Chism was completely competent to enter the plea, and he even stated that Chism took full responsibility for his actions and never used his mental illness as an excuse for his actions.

Chism timely filed a motion seeking shock probation, which the court denied. Chism then moved for relief under RCr 11.42 which included a motion for an evidentiary hearing. The trial court denied Chism's RCr 11.42 motion without a

hearing, reasoning that the issues could be resolved from the record. Chism now appeals.

STANDARD OF REVIEW

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professional, competent assistance; and (2) that the deficiency was prejudicial because there was a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that, but for the alleged errors of counsel, there is a reasonable probability that he would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986).

ANALYSIS

Chism argues that the Jefferson Circuit Court erred to his substantial prejudice and failed to protect his constitutional right to a fair trial and effective assistance of counsel when it denied his RCr 11.42 motion and ruled that his

defense counsel did render effective assistance. Chism points to five areas in which his counsel provided ineffective assistance: (1) counsel failed in his duty to investigate; (2) counsel failed to properly advise Chism about the necessity of an independent mental health expert and the defense of extreme emotional disturbance; (3) counsel failed to move for a hearing on Chism's competency to stand trial; (4) counsel failed to discuss with Chism the possibility of receiving instructions for and being convicted of a lesser-included offense if he were to stand trial; and (5) that given the totality of the circumstances, Chism's guilty plea was invalid as his attorney was never fully informed or understood the terms of the agreement. These arguments can be condensed into two issues that we will address: (1) whether Chism's counsel adequately presented his mental health history and the impact that history had on his actions and competency to stand trial; and (2) whether Chism's counsel fully advised him about the law, facts, and possible outcomes of the case.

1. MENTAL HEALTH AND COMPETENCY

There is no question that Chism has a history of mental illness. Since the year 2000, he had bouts of major depression, ADD, and had experienced several psychotic episodes as a result of his mental illness. The last of the psychotic episodes reportedly occurred just weeks before he set fire to his house. On this issue, the questions for this Court to decide are whether Chism's counsel adequately investigated his mental health history and effectively presented that

information to the court, and whether further action by his counsel would have led to a different outcome.

The first issue for this Court to determine is Chism's mental status at the time he set fire to his house. Chism's treating psychiatrist, Dr. Steiner, clearly set forth that, at the time Chism set fire to his house, he was trying to take his own life. However, Chism has taken full responsibility for his actions from the time the fire department found him at the scene of the fire. Furthermore, Dr. Steiner testified that, while Chism suffered from a history of mental illness, he never used that as an excuse for his actions. Because Chism has never denied responsibility for his actions and has presented no evidence that insanity would have been an available defense, any failure by his counsel to address that issue is of no consequence.

Chism further argues that his counsel was ineffective for failing to move for an evidentiary hearing on his competency to stand trial. RCr 8.06 states:

> If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined.

The U.S. Supreme Court held in *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966), that where evidence raises a *bona fide* doubt as to a defendant's competence to stand trial, the judge must conduct a sanity hearing to determine competency. Chism argues that he was not competent to stand trial,

triggering the mandatory RCr 8.06 evaluation. We disagree. Chism never gave any indication that he was not competent to stand trial at the time, and he has not presented any such evidence since then. In fact, based on our review of the record and Dr. Steiner's testimony, it is clear that Chism was competent to stand trial.

Chism also argues that his guilty plea was invalid due to his imcompetency. However, during his plea hearing the court thoroughly inquired into Chism's competency to enter the plea. Chism stated that he fully understood the terms of the plea agreement, stated that he had no questions regarding the terms of the agreement, and stated that there was nothing that would hinder his ability to enter into the plea. Also during this hearing, Chism's counsel stated that he had rationally discussed the case on numerous occasions with his client and that Chism's mental health was no obstacle to the plea agreement. In an affidavit filed prior to the sentencing hearing, counsel averred that he had obtained information from Dr. Steiner regarding Chism's mental health and had shared that information with the Commonwealth as part of plea negotiations. Furthermore, after reviewing video of all of the courtroom proceedings, this Court observed that Chism was not only coherent but readily able to and did assist his counsel. Given all of the evidence, we discern no error in the trial court's finding that Chism failed to prove that his counsel was ineffective for failing to investigate his competency to stand trial.

Next, Chism argues that his counsel had a duty to further investigate his mental health history by obtaining the opinion of an independent mental health

expert. This argument is without merit because, as noted above, Chism's counsel had correspondence from Chism's treating psychiatrist giving a detailed account of his mental health history. Chism's counsel stated at the plea hearing that he and his client had discussed at length his mental health history. Furthermore, Dr. Steiner's report, issued prior to the plea hearing, stated that Chism was "compliant with treatment and stable on medication." Dr. Steiner also indicated that Chism was fit to have unsupervised visitation with his children. In light of Dr. Steiner's report and testimony and counsel's statement at the plea hearing that he had discussed Chism's mental status with him, counsel was not required to take further action.

2. FAILURE TO INFORM

Chism also argues that his counsel was ineffective for failing to "give the jury instructions on lesser-included offenses, the impact of extreme emotional disturbance on the offenses charged, and the possibility of his only being convicted of one of those lesser-included offenses if he chose to stand trial by jury." This Court finds these arguments to be without merit.

Chism argues that he should have been informed of the availability of lesser-included offenses. Chism was charged with two offenses, Second Degree Arson and First Degree Wanton Endangerment. The only lesser-included offense for Second Degree Arson is Third Degree Arson. A person is guilty of Second Degree Arson when: "he starts a fire or causes an explosion with the intent to damage or destroy a building . . . ." Kentucky Revised Statute (KRS) 513.030. A

person is guilty of Third Degree Arson if "he wantonly causes destruction or damage to a building of his own or another . . . ." KRS 513.040. The major difference between the two is in the element of intent. An instruction of Third-Degree Arson is appropriate only where there is evidence of a lack of intent to damage the property. *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995). Where an accelerant was used, a claim of lack of intent is "preposterous." *Id*. at 161. Chism admitted that he intended to burn down his house. He went to Target, bought a gas can, obtained gasoline, and set fire to his house. Therefore, given the evidence, Third Degree Arson would be unavailable as a lesser-included offense.

As for the charge of First Degree Wanton Endangerment, the lesser-included offense would be Second Degree Wanton Endangerment. One is guilty of First Degree Wanton Endangerment when "under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060(1). "A person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person." KRS 508.070(1). A jury could not have convicted Chism of Second Degree Wanton Endangerment as that charge is only available when danger to others arises out of one's negligence, not his intentional actions. Furthermore, the differentiation is inconsequential given that the court ran Chism's sentences concurrently, and he received no additional time as a result of the charge of First Degree Wanton Endangerment. The plea allowed

Chism to receive the minimum total sentence that was available to him. Therefore, the trial court's finding regarding counsel's effectiveness with regard to lesser included offenses was not in error.

Chism further argues that his counsel was ineffective for failing to inform him of the possible defense of "Extreme Emotional Distrurbance." This is not a defense that is statutorily available to someone charged with Second Degree Arson. Given that statutorily this defense is unavailable, Chism's counsel had no reason to discuss it with him.

Furthermore, if extreme emotional disturbance were available, Chism has put forth no evidence to support that defense. To establish extreme emotional disturbance, there must be a showing of a temporary state of mind "so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). Taking the evidence in the light most favorable to Chism, he intended to commit suicide and burn down his house. As noted above, he purchased a gas can, bought gas, and set the house on fire. These are not the acts of a person acting uncontrollably and without judgment. Therefore, Chism could not prove that he acted under extreme emotional disturbance and his counsel had no duty to explain this unavailable defense to him.

Given the evidence presented, this Court discerns no error in the trial court's finding that counsel was not ineffective. Furthermore, there is no

indication that, if Chism's counsel had provided further information or taken additional steps, Chism would have chosen to go to trial instead of entering into the plea agreement. Thus, the trial court correctly concluded that counsel was not ineffective with regard to advising Chism about potential defenses and/or lesser included offenses.

3. EVIDENTIARY HEARING

Chism's third argument is that the trial court erred in ruling on his motion without first holding an evidentiary hearing. We disagree. There is no automatic entitlement to an evidentiary hearing with regard to an RCr. 11.42 motion. Rather, a hearing is required only if there is an "issue of fact that cannot be determined on the face of the record." RCr 11.42(5); *Stanford v. Commonwealt,* 854 S.W.2d 742, 743-44 (Ky. 1993). Furthermore, "[w]here the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (*citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)). Our review indicates that the trial court correctly found that Chism's allegations are refuted on the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

CONCLUSION

Based on the record and evidence presented by Chism, we hold that the RCr 11.42 motion was properly denied and that an evidentiary hearing was not necessary to make a decision with regard to the motion. Therefore, we affirm.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

C. Fred Partin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David B. Abner
Frankfort, Kentucky