

RENDERED: NOVEMBER 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001716-MR

WILLIAM A. YEAGLE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 05-CR-00447

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, William Ashley Yeagle, appeals *pro se* from an order of the Daviess Circuit Court denying him post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In December 2006, Appellant was convicted by a Daviess County jury for the 2003 murder of Carol Hamilton and sentenced to forty-years imprisonment.

¹ Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Appellant's conviction and sentence were affirmed by the Kentucky Supreme Court on direct appeal. *Yeagle v. Commonwealth*, 2007-SC-000106 (November 26, 2008). Subsequently, in June 2009, Appellant filed the instant *pro se* RCr 11.42 motion raising numerous claims of ineffective assistance of counsel. Appellant also filed motions for the appointment of counsel and an evidentiary hearing. On August 7, 2009, the trial court denied all motions. This appeal ensued.

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). An evidentiary hearing is warranted 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, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary 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, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court

conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

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.

Before this Court, Appellant first raises three claims of ineffective assistance of counsel with respect to the jury instructions. Specifically, Appellant contends that trial counsel not only failed to object to the complicity instruction, but also failed to request a facilitation instruction as well as instructions that would have “insured that the jury was presented with the defense theory of the case.”

The jury was instructed as follows:

You will find the defendant, William Ashley Yeagle, guilty of murder under this instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

That in Daviess County, Kentucky, on or about, during or between August 22, 2003, and August 24, 2003, and before the finding of the indictment herein, he alone or in complicity with Rodney Lyle and or Michelle Gaddis Lyle, intentionally killed Carol Hamilton by strangulation.

Appellant’s defense at trial was that he was absolutely innocent of the murder. Appellant admitted that he helped his co-defendants dispose of the victim’s body but that he was not even present at the time the murder took place. Thus, it was trial counsel’s strategy to go with an all-or-nothing defense. If the jury believed that Appellant had only helped cover-up the crime, he would have

gone free under the murder instruction. Certainly, requesting a facilitation instruction would have been incompatible with such a defense. Further, objecting to the complicity component of the instruction would have been futile in that the Commonwealth presented sufficient evidence to warrant the giving of the instruction.

Although Appellant is now dissatisfied with his counsel's strategy, he can neither demonstrate what counsel should have done differently nor point to any manner in which she was ineffective with respect to the instructions. "Effective assistance of counsel does not guarantee error-free representation nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case." *Ramsey v. Commonwealth*, 399 S.W.2d 473, 475 (Ky. 1966), *cert. denied*, 385 U.S. 865 (1966). Appellant cannot overcome the strong presumption that counsel provided reasonably professional representation. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Appellant next asserts that counsel was ineffective for failing to move to suppress his videotaped statement on the grounds that the police promised him that any statements he made would be kept "secret." In fact, a review of the video indicates that at the end of the Appellant's interview, Appellant informed police that he had heard the victim had actually gone to Florida.² The officer then tells Appellant that anything he can find out would be kept between them.

² Hamilton's body was never recovered by authorities.

Appellant's counsel had absolutely no reason to believe that there was an alleged promise of confidentiality as to Appellant's entire statement. Clearly, the police officer did nothing more than offer to keep any further information Appellant provided concerning his claim that the victim went to Florida between them. Accordingly, we cannot conclude that Appellant has satisfied either prong of *Strickland* with respect to this claim.

Finally, Appellant argues that counsel failed to secure his cell phone voicemail log that he maintains would have shown that the victim had repeatedly tried to contact him about their romantic relationship. Appellant believes that this would have bolstered his claim that he had been trying to stay away from the victim and was not involved in her death.

In support of this argument, Appellant tendered a "Verification of Recording(s) by Rev. James Harrison," that purported to be a transcript of several voicemails from the victim on Appellant's cell phone. However, the transcript was made and notarized on February 2, 2009, approximately four months before Appellant filed his RCr 11.42 motion. There is no information as to how the voicemails were obtained seven years after they were allegedly recorded, or even whether the voice was that of the victim. Further, the Commonwealth points out that the Reverend James Harrison is, in fact, a fellow inmate at Eastern Kentucky Correctional Complex who is serving a sentence for murder. As such, not only is the transcript suspect at best, but Appellant fails to demonstrate that his counsel was aware of these voicemails if they even existed at the time of trial.

Accordingly, we cannot find that counsel rendered ineffective assistance in this respect.

For the forgoing reasons, the order of the Daviess Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William Ashley Yeagle, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky