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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001190-MR
&
NO. 2011-CA-000191-MR

BLAKE HADDIX — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 03-CR-00139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND WINE,[1] JUDGES.

ACREE, JUDGE: Blake Haddix appeals the Breathitt Circuit Court's denial of his motion filed pursuant to Kentucky Rule of Criminal Procedure (RCr 11.42) and that portion of an order denying relief under the authority of Kentucky Rule of

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

Civil Procedure (CR) 60.02.[2] Finding merit in one of his arguments, we affirm in part, reverse in part, and remand for additional proceedings.

I. Facts and procedure

Haddix was indicted on October 21, 2003, following a lethal altercation with members of the Mullins family in Breathitt County. Haddix was accused of murdering Woodrow Mullins, assaulting Woodrow's son Estill Mullins with a firearm, and resisting arrest. Following a 2006 jury trial, Haddix was convicted of murder and second-degree assault. He was sentenced to a total of forty years' imprisonment.

Following a series of direct appeals, Haddix undertook a collateral attack of his convictions. To that end, he filed a motion pursuant to RCr 11.42 in which he asserted his trial counsel's performance had been deficient on various bases and also alleged, albeit without specificity, that he had suffered ineffective assistance of appellate counsel. The motion was overruled. Haddix then filed another motion for post-conviction relief, citing CR 60.02, RCr 10.26, and the writ of *coram nobis* in support of his argument. This, too, was denied, and the instant appeal followed. We will describe the various arguments presented on appeal as well as additional facts as they become relevant to our discussion.

II. RCr 11.42 motion

[2] The motion also included a request for relief pursuant to CR 10.26 and the writ of *coram nobis*. The circuit court also denied those forms of relief, but Haddix has not appealed on those bases.

The motion[3] Haddix presented to the circuit court included: (1) an argument that his conviction should be vacated due to ineffective assistance of counsel, (2) a brief reference to a claim of ineffective assistance of appellate counsel, (3) a request to be appointed counsel for purposes of the collateral attack, and (4) a demand that an evidentiary hearing be conducted. On appeal, he has raised only the circuit court's failures to conduct a hearing and to appoint counsel to represent him. He has not asserted that the trial court improperly determined that his counsel's performance was not ineffective on any other grounds. Our inquiry will accordingly be limited to whether the denial without a hearing and without appointment of counsel was proper.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency resulted in prejudice to his case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). "An evidentiary hearing [on an RCr 11.42 motion] is not required when the issues presented may be fully considered by resort to the court record of the proceeding, or where the allegations are insufficient." *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970) (citations omitted); RCr 11.42(5). Further, "[i]f the record refutes the claims of error, there is no basis for granting an RCr 11.42 motion." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993) (citing *Glass v. Commonwealth*,

[3] While we have referred to Haddix's various requests incident to his request for RCr 11.42 relief as a single motion, they were actually contained in a variety of separate motions and memoranda. We address them as a single motion as a matter of convenience.

474 S.W.2d 400, 401 (Ky. 1971)). Where an evidentiary hearing is required, however, an indigent defendant is entitled to appointment of counsel. RCr 11.42(5).

Haddix has raised a relatively large number of instances in which he feels an evidentiary hearing was necessary to determine whether he was inadequately represented by counsel. We have attempted to categorize his arguments by the type of analysis they require, and our discussion will be ordered accordingly. We will address each argument in turn.

A. Grounds for claiming ineffective assistance which were plainly resolvable on the record

Haddix first asserts the circuit court should have conducted a hearing to determine whether the introduction of prejudicial evidence was the product of ineffective assistance of trial counsel.

Haddix's attorney introduced a recording of a radio communication in which a police dispatcher mistakenly reported to responding troopers of the Kentucky State Police that a Wilgus Gray Haddix, whom the Commonwealth describes as "a known cop killer" (Appellee's brief, p. 18), was the suspect in the shootings of Woodrow and Estill. Haddix maintains this evidence caused the jury to think of him as a cop killer and therefore his trial attorney should not have introduced it.

Haddix's trial attorney also failed to object to a statement the Commonwealth's Attorney made to the jury. In that instance, the Commonwealth's Attorney stated that Woodrow was shot in the back, which

Haddix maintains was not supported by the evidence. Haddix believes this, too, caused the jury to view him negatively.

Both matters may be resolved the same way: whether the performance of Haddix's trial counsel was deficient in introducing the dispatch recording or failing to object to the statement of the Commonwealth's Attorney could be conclusively resolved by reviewing the record. Both instances were wholly trial issues, and therefore each event occurred in the courtroom, in front of the judge and jury, and entirely on the record; by reviewing the record, the trial court was able to view the performance and to assess whether any mistake occurred and whether it harmed Haddix.

No additional inquiry was necessary, no additional evidence would have been helpful, and therefore no hearing was required. We affirm the circuit court's denial of Haddix's RCr 11.42 motion on both of these grounds.

B. A ground not properly presented to the circuit court

In *Hollon v. Commonwealth,* the Supreme Court announced for the first time that criminal defendants may collaterally attack their convictions on the grounds that they received ineffective assistance of appellate counsel. 334 S.W.3d 431, 434 (Ky. 2010), *as modified* (April 21, 2011).

Although it is true that Haddix presented to the circuit court his belief that he received ineffective assistance of appellate counsel, he did so only nominally and

provided no argument or explanation in support of that bare assertion. His motion simply states "that he was essentially denied a fair trial, and appeal, as well as sentencing[;]" he did not repeat that position or provide a legal argument or factual basis for it in the memorandum supporting the motion. This matter was not presented to the circuit court in any meaningful manner that would have allowed that court to consider the argument first, and so we will not consider it now.

Where an appellant has presented an argument for the first time on appeal, as here, that argument will not be considered. *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003). "[T]he trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court. Similarly, an issue not properly raised in an intermediate appellate court may not be raised on appeal to the next higher court." *Id.* (footnotes, internal quotation marks, and citations omitted).

C. Remaining matters which require additional analysis

The remaining issues which require our review are numerous. These matters have been presented in a separate category because they require this Court to review the record to determine if that record was adequate for denial of Haddix's motion without an evidentiary hearing.[4]

Jury issues

We first address Haddix's argument that his trial counsel was deficient in failing to obtain a change of venue or sequestration of the jury. Our review of the

[4] In that respect, these issues are unlike the alleged evidentiary errors discussed earlier in this opinion which, nearly by definition, are resolvable upon the record alone.

record reveals, however, that the trial judge and the trial attorneys for both Haddix and the Commonwealth engaged in extensive *voir dire* to ascertain whether the jurors had a connection to any of the parties, witnesses, or attorneys involved in the case. The trial court furthermore inquired regularly of the jurors whether they had discussed the trial with anyone or encountered any news of the trial. These thorough and routine inquiries created a significant record from which the circuit judge could conclusively determine whether Haddix's trial attorney performed inadequately by failing to change the venue or have the jurors sequestered. There was no need for a hearing on this matter.

Jury instructions

Haddix next contends his trial counsel was ineffective in failing to adequately prepare for and seek additional jury instructions on several affirmative defenses and lesser-included offenses. We are not persuaded.

"Kentucky courts are bound to instruct juries on the whole law of the case, . . . including alternative instructions when supported by the evidence . . . ." *Morrow v. Commonwealth*, 286 S.W.3d 206, 213 (Ky. 2009) (internal citations omitted). A defendant may suffer ineffective assistance of counsel if his trial counsel fails to secure or attempt to secure appropriate jury instructions. *See Hatcher v. Commonwealth,* 310 S.W.3d 691, 699 (Ky. App. 2010), *as modified* (Apr. 23, 2010). On the other hand, courts have no duty to instruct the jury on theories which are not supported by the evidence. *Sanders v. Commonwealth*, 301 S.W.3d 497, 500 (Ky. 2010) (citing *Payne v. Commonwealth*, 656 S.W.2d 719,

721 (Ky.1983)). A defense counsel is not ineffective if he fails to urge an instruction that is not supported by the evidence.

Haddix argues his trial attorney should have sought a jury instruction on voluntary intoxication. Voluntary intoxication is a defense to the intent element of murder, and is available when "there is evidence that the defendant was so drunk that he did not know what he was doing, or when the intoxication negatives the existence of an element of the offense." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002) (footnotes, citations, and quotation marks omitted). However, "mere drunkenness does not equate with the Kentucky Penal Code's definition of the "defense" of voluntary intoxication . . . ." *Id.* "If a jury is instructed on voluntary intoxication as a defense to Intentional Murder or First-Degree Manslaughter, it must also be instructed on Second-Degree Manslaughter as a lesser included offense[.]" *Nichols v. Commonwealth,* 142 S.W.3d 683, 689 (Ky. 2004).

We are perplexed by Haddix's argument because our review of the record reveals the jury *was* instructed on voluntary intoxication and second-degree manslaughter.[5] In the definitions provided to the jury, the term *WANTONLY* is defined by the following passage:

[5] The factual statement in *Haddix v. Commonwealth*, No. 2007-SC-000214-MR, 2008 WL 3890352 (Ky. August 21, 2008) says: "Officers . . . discovered Haddix lying in the driveway. Haddix appeared to be very intoxicated[.]" Nothing in the record suggests anything more; specifically, the record does not support Haddix's representation that police officers found him "passed out" at the scene from alcohol intoxication.

> A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature or degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. *A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.*

(Trial record, p. 162) (Emphasis added).

The record therefore refuted Haddix's claim that his trial attorney had failed to secure an instruction on voluntary intoxication, and no hearing was necessary on the matter.[6]

Haddix also protests that his trial attorney failed to seek an instruction on extreme emotional disturbance (EED). The defense of extreme emotional disturbance has been described as follows:

> Extreme emotional disturbance is 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. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986).

[6] If Haddix is concerned with the *adequacy* of this instruction, he does not say so in his brief.

It is Haddix's position on appeal, and was his testimony at trial, that just prior to the shootings, he and Estill Mullins had engaged in an argument regarding a potential job opportunity for Estill. It was also his position at trial, however, that he had shot Woodrow only in self-defense and had no idea how Estill had been shot. There was no factual basis to support an instruction on EED.

Indeed, in Haddix's version of events, he had remained calm even as members of the Mullins family leveled threats toward Haddix's family and Woodrow fired a shot at Haddix. Haddix's own testimony belies the position he takes on appeal, and that is apparent from the record. The circuit court had no need to conduct any additional inquiry on the matter.

Next, Haddix argues his trial counsel unreasonably failed to seek an instruction on fourth-degree assault because, as he puts it, "Estill Mullins walked out of the emergency room the same evening as the incident . . . ." (Appellant's brief, p.12). He provides no further rationale or argument for this position and, indeed, does not state why he believes Estill's recovery has any bearing on the appropriate jury instruction. We would have to speculate that Haddix believes Estill's speedy recovery indicates he suffered only "physical injury," as opposed to "serious physical injury," justifying an instruction on assault in the fourth degree. However, we will not formulate arguments the parties themselves have not presented. *See Hadley v. Citizen Deposit Bank,* 186 S.W.3d 754, 759 (Ky. App. 2005). Haddix has presented no reason to disturb the circuit court's ruling on this matter.

Finally, Haddix argues his trial attorney failed to secure jury instructions on "all degrees of murder." The jury in Haddix's case was instructed on murder, manslaughter in the first degree, manslaughter in the second degree, and reckless homicide. There was also a self-protection instruction. Haddix's brief does not give any specific basis for his position, and once again fails to provide any supporting rationale. We will not reverse the circuit court's order on this basis.

Failure to contact and interview witnesses

It is Haddix's position that his trial attorney should have contacted witnesses who could testify that Woodrow Mullins had a reputation as a violent man. Haddix believes this would have bolstered his argument that in shooting Woodrow, he was merely acting in self-defense. No witnesses testified as to Woodrow's character or propensity for violence.

A criminal defendant may present evidence that his victim had a violent nature in support of a self-protection defense. *Saylor v. Commonwealth*, 144 S.W.3d 812, 815 (Ky. 2004) ("Generally, a homicide defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor. . . . However, such evidence may only be in the form of reputation or opinion, not specific acts of misconduct.") (citations omitted). The record reflects that Haddix's trial attorney did not call any witnesses to testify about Woodrow's allegedly violent nature, but it does not reveal why. There are several possible explanations: perhaps the attorney felt disparaging the decedent would backfire and turn the jury against

Haddix. Perhaps the witnesses Haddix wished to call could present only inadmissible testimony or were not credible. On the other hand, it is possible that the trial attorney simply neglected to investigate this matter thoroughly or was mistaken about the law governing such evidence, and therefore his performance was deficient. At any rate, the answer is not apparent from the record, and the circuit court should have conducted a hearing to resolve the matter.

We reverse on this issue and remand for a hearing. Consequently, counsel must be appointed to represent Haddix at the hearing.

Failure to seek recusal of the trial judge

Haddix contends his trial counsel should have requested recusal of the circuit judge following a conversation between the judge and one Drewy Jones. The brief does not describe this conversation, does not cite to the portion of the record where it may be found, and does not state how it affected Haddix's trial. We will therefore not consider the argument. *See generally* CR 76.12(4)(c).

Failure to obtain independent expert witnesses

Finally, Haddix argues his trial counsel was deficient in failing to retain expert witnesses to testify that he was psychologically unstable at the time of the shootings and therefore not legally culpable. In support of the argument, he contends the report of the Kentucky Correctional Psychiatric Center (KCPC) finding him competent to stand trial is contradicted by the findings of a Social Security Administration consultative exam. Haddix's brief does not cite to the

portion of the record where a record of the Social Security exam may be found, and our review has not revealed it.

We believe, however, the record does reveal an absence of merit in Haddix's argument that his trial counsel improperly failed to seek expert testimony that he was mentally incompetent. First, as the Commonwealth points out, Haddix's trial attorney did initially prepare for a defense of insanity, and filed a notice of his intent to do so. He later withdrew the notice and abandoned the defense.

The abandonment of the defense occurred after the KCPC competency report was filed. That report contains detailed information about Haddix's psychological and physical condition, his personal history, and his intelligence. It concludes with an opinion that Haddix was competent to stand trial.

The record was sufficiently complete for the circuit court to evaluate whether, in light of the KCPC report, trial counsel's decision to withdraw the defense was wise, or whether it was reasonably feasible that a competent attorney could demonstrate that Haddix suffered from a "lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law[.]" KRS 504.060. An evidentiary hearing was not required.

III. Motion for relief pursuant to CR 60.02

In this motion, Haddix simply reargued the matters raised in his RCr 11.42 motion; he presented no other bases of collateral attack of his conviction. It is axiomatic, however, that CR 60.02 relief is not available for that purpose.

> CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or by RCr 11.425 proceedings. The obvious purpose of this principle is to prevent the relitigation of issues which either were, should or could have been litigated in a similar proceeding.

Stoker v. Commonwealth, 289 S.W.3d 592, 597 (Ky. App. 2009) (citations omitted). The circuit court's denial of this motion was therefore proper, and we affirm.

IV. Conclusion

The circuit court's denial of Blake Haddix's CR 60.02 motion is affirmed. The denial of his RCr 11.42 motion is affirmed on all grounds except to the extent it ruled, without a hearing, that trial counsel's failure to call witnesses to testify to the victim's alleged propensity for violence did not constitute ineffective assistance of counsel. On that matter, the order is reversed and remanded. On remand, the circuit court must first appoint counsel to represent Haddix, and then conduct a hearing to determine whether the failure of Haddix's trial counsel to call such witnesses constituted deficient performance and, if so, whether that deficiency was prejudicial to Haddix at trial.

ALL CONCUR.

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