

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000127-MR

LUTHER CREECH

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 08-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Luther Creech appeals from a December 16, 2010, order of the Garrard Circuit Court denying his motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 without a hearing. We affirm.

On November 26, 2008, Creech beat, stabbed and choked his wife to death. He then jumped or fell from their apartment balcony, fracturing both ankles

and a vertebra. In a police interview two days later, Creech explained that he had assaulted the victim with the stock of a .22 caliber rifle which he then put in the back of a closet at the apartment.

Creech was subsequently indicted for murder. He was found incompetent to stand trial following hearings on May 15, 2009, and October 13, 2009. On his attorney's motion, the trial court ordered an evaluation at the Kentucky Correctional Psychiatric Center (KCPC) to determine whether Creech was competent to stand trial and whether he should be exculpated for his alleged conduct under Kentucky Revised Statutes (KRS) 504.020(1), which at that time provided that "[a] person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." KRS 504.020(1).

At KCPC, Creech was admitted as an inpatient and underwent a physical examination, medical and psychological testing, psychosocial evaluation and psychiatric consultation. He was subject to around-the-clock behavioral monitoring. He told the staff psychiatrist that he had been hospitalized on three prior occasions for psychiatric problems, and that he had suffered from seizures for over twenty years.

The resulting report from KCPC diagnosed Creech as suffering from psychosis, likely secondary to temporal lobe epilepsy. In his assessment of

Creech's criminal responsibility, Dr. Steven J. Simon, a licensed clinical psychologist, opined that:

within a reasonable degree of psychological certainty, . . . Mr. Creech has a basis to assert a mental health type of defense. He does indeed have a mental condition which likely impaired his ability to conform his behavior to within the requirements of the law at the time of the alleged criminal conduct. It is very likely that his judgment, insight, and degree of behavioral control was significantly impaired by his neurological/psychologic dysfunction. Of course, as noted above, the ultimate determination as to whether Mr. Creech meets the statutory requirements for "insanity" is for the trier(s) of fact.

On January 15, 2010, following a hearing, the trial court found Creech competent to stand trial. In accordance with an offer from the Commonwealth, Creech entered a plea of guilty but mentally ill pursuant to KRS 504.130 and was sentenced to serve twenty-four years. Thereafter, proceeding pro se, he filed a motion pursuant to RCr 11.42, alleging ineffective assistance of counsel. He claimed that his guilty plea was unknowingly and involuntarily entered. The trial court denied the motion without a hearing, and this appeal followed.

In an RCr 11.42 proceeding, the movant has the burden "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings[.]" *Dorton v. Com.*, 433 S.W.2d 117, 118 (Ky. 1968).

The test for determining ineffective assistance of counsel on a guilty plea has two components:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Com., 721 S.W.2d 726, 727-728 (Ky. App. 1986).

An evidentiary hearing “is only required when the motion raises ‘an issue of fact that cannot be determined on the face of the record.’ ” *Stanford v. Com.*, 854 S.W.2d 742, 743-744 (Ky. 1993). To do this, the court must “examin[e] whether the record refuted the allegations raised” *Parrish v. Com.*, 272 S.W.3d 161, 166 (Ky. 2008) (citations omitted).

Creech argues that he was entitled to a hearing because his motion alleges facts that cannot be discerned from the record. He claims that his trial counsel misled him by misrepresenting facts about his case, that counsel used tactics such as intimidation to coerce him into accepting the plea offer because she had not prepared for trial, and finally, counsel failed to investigate possible defenses, specifically the viability of an insanity defense.

RCr 11.42 requires that a movant seeking to vacate his conviction must both “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” RCr 11.42(5). The only facts alleged by Creech with the requisite specificity concern a meeting with his defense counsel that occurred on March 19, 2010. He asserts that

it was their first meeting, although the record indicates that they had at least one earlier meeting on February 18, 2010.

According to Creech, after his attorney presented the Commonwealth's offer of a twenty-four year sentence in exchange for a plea of guilty but mentally ill to the charge of murder, Creech responded: "I want to go to trial . . . what do they have against me." His defense counsel replied: "We have enough to convict you anyway." Creech then asked what had happened to the medical reports stating that he had a basis to assert a mental health defense. She replied: "You may or may not win and end up back at Eastern State Hospital for a very long time if you don't take the plea deal."

There is no indication that defense counsel's statements were coercive or misleading. Creech was facing a murder charge with a possible penalty of life in prison without parole. Her warning that he might not win at trial and could face a lengthy sentence, however unwelcome, was precisely the type of advice expected from a competent defense attorney. It is not evidence of intimidation or manipulation for an attorney to inform a client of the consequences of proceeding to trial. "It is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." *Beecham v. Com.*, 657 S.W.2d 234, 236-37 (Ky. 1983). "[A] defendant's plea of guilty motivated by the desire to escape possible greater punishment is not a basis for vacating the judgment and that it is not improper for an attorney to influence a client to reach such a decision." *Glass v. Com.*, 474 S.W.2d 400, 401 (Ky. 1971).

Moreover, Creech's contention that he would have been able to establish that he was not guilty by reason of insanity had he gone to trial, is a dubious claim at best. Although Dr. Simon's opinion certainly strongly supported an insanity defense, there was absolutely no guarantee that a jury would accept this defense and exonerate Creech. In *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010), the defendant, a paranoid schizophrenic, suffered from a delusional disorder and was described as "severely mentally ill." Among other things, he thought that he was God, or Jesus, or at least that he possessed their powers. He suffered from auditory hallucinations. He had recurring delusions that he was being harmed, and ultimately murdered two people he was convinced were trying to poison him. At trial, the jury found him guilty but mentally ill, rejecting his defense of not guilty by reason of insanity. The Kentucky Supreme Court affirmed his conviction, thus illustrating the difficulty of successfully presenting an insanity defense. As the Court stressed in an earlier case, "a mental disease which does not destroy the capacity to appreciate criminality of conduct or to conform one's actions to the requirement of law is simply not a defense at all. It does not relieve one of criminal responsibility." *McClellan v. Com.*, 715 S.W.2d 464, 468 (Ky. 1986). The record is replete with facts that could have been used to undermine Creech's insanity defense, including his admission to police that he had bludgeoned his wife with a rifle which he then hid in the closet, an admission that directly contradicts his claim that he suffered from amnesia.

Additionally, Creech was given ample opportunity during his plea colloquy to inform the court if he had been in any way improperly coerced or intimidated into accepting the plea. Thus, his allegations of intimidation and coercion are refuted by the record, and did not warrant an evidentiary hearing.

As to his allegation that his defense counsel failed to conduct an adequate investigation, the psychological evaluation performed at KCPC is eighteen pages long and condenses detailed interviews with family members, describes Creech's past medical treatment, episodes of aberrant behavior and contains a diagnosis of psychosis. Creech has failed to identify any facts or information that his attorney could possibly have pursued that would have further assisted his case. "Conclusory allegations which are not supported by particular facts do not justify an evidentiary hearing" *Haight v. Com.*, 41 S.W.3d 436, 443 (Ky. 2001), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

For the foregoing reasons, the order denying the motion for post-conviction relief without a hearing is affirmed.

ALL CONCUR.

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