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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000936-MR

ANDRE S. SHEPHARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 04-CR-000354 & 04-CR-001044

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

KELLER, JUDGE: Andre S. Shephard (Shephard) appeals, *pro se*, from an order of the Jefferson Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. After careful review, we affirm.

FACTS

In 2002, Shephard assaulted Teandra Brown (Brown) and ultimately pled guilty to fourth-degree assault. As a result of that conviction, a "no unlawful contact" order was put into place. In January 2004, Shephard was in the custody of the Louisville Metro Department of Corrections for an unrelated charge; however, he was granted job search/work release. On January 7, 2004, Shephard signed himself out of the Community Corrections Center, and he failed to return. It was later discovered that between January 7 and January 19 Shephard had returned to Brown's residence despite the no contact order.

On January 19, 2004, Brown's three young children found her dead in her bathroom from multiple stab wounds. Shephard turned himself into the police on January 20, 2004. During his interviews with the police, Shephard admitted to being AWOL and that he had been with Brown the night before her body was found. Shephard also admitted that, during an argument, Brown came at him with a knife and that he and Brown struggled with the knife. However, Shephard stated that the stabbing was accidental, that Brown fell on the knife, and that he panicked and left Brown's residence without seeking medical assistance for her. Additionally, Shephard informed the police as to the location of the knife, which was found in a box underneath some Christmas lights.

On January 24, 2004, the Jefferson County Grand Jury indicted Shephard for Murder (04-CR-000354), and later indicted him for Escape in the Second Degree (04-CR-001044). Thereafter, the Commonwealth filed a Notice of

Aggravating Circumstances noticing its intent to seek enhanced penalties, including the death penalty. Shephard's appointed counsel subsequently filed a Motion to Strike Notice of Aggravating Circumstances and to Exclude Enhanced Penalties, including the death penalty. His counsel also sought to suppress his confession to the police. The trial court denied both motions.

In exchange for his plea of guilty to murder and second-degree escape, the Commonwealth agreed to recommend a sentence of life without parole for twenty-five years. Shephard signed the Commonwealth's formal plea offer and filed a standard motion to enter a guilty plea. At a hearing held on June 22, 2005, the trial court conducted an extensive plea colloquy in which it questioned Shephard as to the voluntariness of his plea. The trial court found that Shephard affirmatively answered all of its questions; that Shephard knowingly, freely, and voluntarily pled guilty, and that he knowingly and intelligently waived his rights. Thus, in accordance with the Commonwealth's recommendation, the trial court sentenced Shephard to life without parole for twenty-five years.

On September 29, 2006, Shephard filed a *pro se* 11.42 motion to vacate his judgment and sentence on grounds of ineffective assistance of counsel. Without conducting an evidentiary hearing, the trial court denied Shephard's motion. This appeal followed.

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 professionally competent assistance; and (2) that the deficiency was prejudicial because there is 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.

When a movant has pled guilty, the *Strickland* test is slightly modified. 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 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, 727-28 (Ky. App. 1986).

We further note that 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. Commonwealth*, 854 S.W.2d 742, 743 (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*, 721 S.W.2d at 727 (Ky. App. 1986) (*citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)).

ANALYSIS

On appeal, Shephard argues that: (1) his guilty plea was the product of ineffective assistance of counsel; (2) his counsel advised him to enter a guilty plea without investigating or advising him of the availability of two defenses; and (3) his counsel was ineffective for failing to move for a mental examination. Shephard also argues that the cumulative effect of these errors resulted in the denial of effective assistance of counsel, and that the trial court erred in denying his RCr 11.42 motion without conducting an evidentiary hearing. We address each issue in turn.

1. Guilty Plea

On appeal, Shephard first contends that his plea was not knowing or voluntary, and that it was the product of ineffective assistance of counsel. Specifically, he contends that, based on representations made by his counsel, he believed the Commonwealth's plea offer was to serve a total of twenty-five years instead of life without parole for twenty-five years. We disagree.

As set forth in *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009), "[w]e determine the voluntariness of the plea from the totality of the circumstances. In doing so, we juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." (Internal quotations and citations omitted).

In this case, the trial court initially determined the voluntariness of Shephard's guilty plea during the thorough colloquy conducted pursuant to *Boykin*

v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). During his plea, Shephard acknowledged that he understood he had a right to a jury trial and appeal and that he knew those rights would be waived if he pled guilty. Shephard stated that his counsel read the Commonwealth's offer to him; that they went over it with him; and that he understood the offer. Further, Shephard stated that he had sufficient time with counsel to discuss the offer and that he accepted the offer, including the recommended sentence. On multiple occasions, the trial court stated that the Commonwealth was recommending a sentence of life without parole for twenty-five years. At no time did Shephard voice an objection to the Commonwealth's recommended sentence.

Furthermore, Shephard signed the motion to enter a guilty plea and indicated that he had read and understood its contents. He acknowledged that his plea of guilty was knowingly and voluntarily made and that his counsel fully explained his constitutional rights, the charges against him, and any defenses to those charges. Moreover, the Commonwealth's written offer clearly states it would recommend a sentence of life without parole for twenty-five years. Based on the preceding, we conclude that Shephard's plea was knowing and voluntary and that he understood that the recommended sentence was life without parole for twenty-five years.

Having found no indication from the plea colloquy to negate the presumption that Shephard's plea was voluntary, we turn to counsel's performance. The Commonwealth notified Shephard prior to the guilty plea of its intention to proceed with the death penalty, citing the aggravator enumerated at

KRS 532.025(2)(a)(8) as a basis.[1] As noted above, Shephard's counsel filed a Motion to Strike Notice of Aggravating Circumstances and to Exclude Enhanced Penalties, including the death penalty. The Commonwealth vigorously opposed the motion, illustrating its intent to seek the death penalty. Thus, by pleading guilty, Shephard avoided the death penalty. Accordingly, the plea accepted by Shephard was reasonable. *See Elza*, 284 S.W.3d at 121-22.

2. Failure to Advise Him of Defenses

Next, Shephard contends that his counsel failed to investigate and advise him of the availability of two defenses, extreme emotional disturbance (EED) and self-defense. He argues that his counsel was ineffective for recommending a plea agreement in light of these sustainable defenses. "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203 (1985). Here, the record offers little indication that the defenses of EED or self-defense would have succeeded.

[1] The aggravating circumstance listed under KRS 532.025(2)(a)(8) provides:

> The offender murdered the victim when an emergency protective order or a domestic violence order was in effect, or when any other order designed to protect the victim from the offender, such as an order issued as a condition of a bond, conditional release, probation, parole, or pretrial diversion, was in effect.

"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." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). There are three requirements that must be met before a defense of EED can be established: (1) there must be a sudden and uninterrupted triggering event; (2) the defendant must be extremely emotionally disturbed as a result; and (3) the defendant must act under the influence of this disturbance. *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2001).

In this case, Shephard has failed to identify a triggering event that would support a defense of EED. Thus, Shephard's vague allegation that counsel failed to investigate and advise him of a defense of EED, without offering specific facts to support what such an investigation would have revealed, is insufficient to support an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) *overruled on other grounds, Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Furthermore, we note that Shephard's assertion that he suffered from EED is inconsistent with his previous statement that the stabbing was an accident. Thus, the record offers little indication that Shephard's defense of EED would have succeeded.

Further, there is little indication that, the defense of self-defense would have succeeded at trial. KRS 503.050 establishes the defense of self-protection:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

During his interview with the police, Shephard stated that he and Brown had an argument, Brown came at him with a knife, there was a struggle with the knife, and he stabbed Brown, but not intentionally. Shephard stated that the stabbing was accidental because Brown fell on the knife. During his plea, Shephard stated that there was a struggle with the knife and that "he didn't get up and stab" Brown. He further stated that it was "not intentional stabbing," and that Brown fell on the knife while they were struggling.

In *Grimes v. McAnulty*, 957 S.W.2d 223, 227 (Ky. 1997), the Supreme Court of Kentucky held that self-defense and accidental killing are mutually exclusive.

> By its very nature, self-defense relates to an intentional or knowing use of force and not an accidental shooting. "In Kentucky we have long recognized as fundamental that when the accused has 'admitted the shooting' and then 'attempted to justify it on the grounds of self protection . . . there is no evidence that his actions were anything other than intentional.'" Pursuant to self-defense the defendant admits, but seeks to justify, the intentional commission of the act, whereas the essence of

> an accident defense is the defendant's contention that he did not intentionally commit the act the state alleges constitutes a crime.

(Citations omitted).

We believe Shephard's description of the events during his plea refutes his claim that he stabbed Brown in self-defense. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) ("Solemn declarations in open court carry a strong presumption of verity.") Thus, based on *Grimes*, Shephard's statements that the stabbing was not intentional and was an accident prevent him from claiming that the stabbing was made in self-defense. Because a self-defense instruction would not likely be permitted at trial, we cannot say that Shephard's counsel erred if they in fact failed to advise him of that defense.

3. Mental Evaluation

Next, Shephard argues that his trial counsel erred by failing to move for a mental examination prior to advising him to enter into a guilty plea. Specifically, Shephard alleges that he had been abused as a child and suffered from severe depression that required medication in the past. Shephard further alleges that he made his counsel aware of his mental health issues.

Although Shephard notes that he has a history of mental health treatment, he has failed to assert specific reasons why his alleged depression and abuse rendered him unable to understand the nature of the proceedings against him. In *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001), the Supreme Court of Kentucky held that "the trial court must evaluate whether errors by trial counsel significantly

influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea."

Shephard has presented nothing specific to support his contention that he failed to understand the nature of the criminal proceedings against him or the consequences of pleading guilty because of his issues with depression. Indeed, a review of the plea colloquy hearing reflects that Shephard was an active participant in that proceeding and clearly understood the nature of the charges against him and the consequences of pleading guilty. Additionally, Shephard signed a motion to enter a guilty plea and indicated that he had read and understood its contents. Accordingly, we cannot say that Shephard's counsel was ineffective for failing to move for a mental examination.

We note that it appears that Shephard also argues that he received ineffective assistance of counsel because his counsel failed to determine whether he had a low I.Q. Because Shephard failed to raise this matter before the trial court, we are precluded from reviewing it on appeal. *See Brooks v. Commonwealth*, 217 S.W.3d 219, 221 (Ky. 2007).

4. Cumulative Errors

Because we can find no error in the trial court's decision to deny the motion for post-judgment relief pursuant to RCr 11.42, there is no basis for Shephard's claim that the cumulative effect of all the errors resulted in a denial of effective assistance of counsel.

5. Evidentiary Hearing

Finally, we conclude that, because the record refutes the allegations raised in Shephard's motion, the trial court did not err when it denied his motion for an evidentiary hearing. RCr 11.42(5); *Stanford v. Commonwealth,* 854 S.W.2d 742, 743-44 (Ky. 1993).

CONCLUSION

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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