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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001472-MR

STEWART JOHNSON — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CR-00113

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Stewart Johnson, *pro se*, appeals the denial of his RCr 11.42 motion based upon ineffective assistance of his trial counsel claiming that counsel's errors resulted in his murder conviction. He alleges that his trial counsel was ineffective for the following reasons: 1) counsel failed to investigate evidence held by the Commonwealth related to the victim's, Jerry Dotson's, propensity

towards violence when he was intoxicated; 2) counsel failed to lay a proper foundation under KRE 613 to introduce prior inconsistent statements of Dotson's ex-wife and father to police about how Dotson acted when intoxicated; and 3) counsel failed in not objecting to or tendering instructions on lesser-included offenses and on voluntary intoxication.

At trial, Johnson alleged that Dotson became intoxicated and violent toward him while the two men were drinking alcohol at Dotson's residence. Johnson asserted the violence was unprovoked and that he shot and killed Dotson in self-defense. In support of Johnson's defense, trial counsel attempted to introduce statements made to investigating officers, Veeneman and Gibbs, by Dotson's father and ex-wife that Dotson had a propensity for violence when intoxicated as prior inconsistent statements. The circuit court sustained objections to these statements.

Even though these statements were excluded, the jury still had evidence presented to it to support the inference that Dotson may have been the aggressor based on his propensity for violence when intoxicated. The jury heard a recording of Johnson's interview with the police in which Officer Gibbs stated that according to Dotson's father, Dotson can be a "bully" when intoxicated. Johnson was also permitted to testify that the police told him that Dotson had a propensity for violence when intoxicated. Additionally, trial counsel solicited testimony from an expert concerning the effect of intoxication on Dotson's behavior on the evening of the shooting.

The jury received instructions on wanton murder and self-defense after both the Commonwealth and Johnson's attorney declined instructions on lesser-included offenses. Johnson was convicted and sentenced to twenty-five years of imprisonment.

Johnson filed a direct appeal to the Kentucky Supreme Court alleging, in part, that the trial court improperly limited his self-defense claim by denying him the opportunity to present prior inconsistent statements from two witnesses about Dotson's tendency to be a "mean drunk." *Johnson v. Commonwealth*, 2008 WL 4691694, 1 (Ky. 2008). The Supreme Court affirmed, concluding that Johnson failed to lay a proper foundation for these statements under KRE 613. *Id.* at 4-5, n. 3-5.

Subsequently, Johnson brought an RCr 11.42 motion requesting that the judgment be vacated based upon ineffective assistance of counsel and requesting an evidentiary hearing. The circuit court summarily denied his motion.

In reviewing the circuit court's ruling on an RCr 11.42 motion, where an evidentiary hearing is not held, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). In deciding whether an allegation requires an evidentiary hearing, the trial judge must determine if there is a material issue of fact that cannot be resolved. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

"The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id.* at 452-453.

Johnson had the burden to establish that he was deprived of his constitutional right to counsel in order to be entitled to the extraordinary relief of RCr 11.42. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). On appeal, we examine counsel's performance and any resulting deficiencies *de novo*. *Id*.

The standard for prevailing on a claim of ineffective assistance of counsel requires the following:

> [A] defendant must show that his trial counsel's performance was deficient *and* that such deficiency prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *as adopted by Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). Thus, under *Strickland,* the petitioner must show both incompetence and prejudice. The standard for counsel's competence is whether "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. The standard for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

Hatcher v. Commonwealth, 310 S.W.3d 691, 696 (Ky.App. 2010). This is a heavy burden for a defendant to prove, especially given the presumption that counsel's conduct was reasonable and effective. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 873 (Ky. 1998). Counsel's errors must have prevented the jury from having

reasonable doubt, thus resulting in a defeat when there should have been a victory. *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008).

Thus, Johnson has the burden of:

> 1) identifying specific errors by counsel;
>
> 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial;
>
> 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and
>
> 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Simmons v. Commonwealth, 191 S.W.3d 557, 561-562 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Johnson's first two claims of error are interrelated. Johnson claims that his counsel was deficient by failing to adequately investigate because the Commonwealth had improperly withheld evidence until shortly before trial. He claims that he was prejudiced because his counsel did not fully investigate statements made to the police by Dotson's family members about Dotson's propensity for violence while intoxicated. The record refutes Johnson's allegation.

Johnson's counsel had an obligation to conduct a reasonable investigation under the circumstances. *See Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008). However, it is apparent from the record that counsel investigated and determined that family members made previous statements regarding Dotson's propensity for violence when intoxicated. Trial counsel's entire defense was

premised on Dotson being the aggressor. Although trial counsel was unsuccessful, he attempted to elicit testimony from family members concerning Dotson's propensity for violence while intoxicated. Therefore, if counsel was ineffective, it was because he failed to lay a prior foundation for the prior inconsistent statements.

On direct appeal, the Court ruled that counsel failed to lay a proper foundation under KRE 613 for asking Detective Veeneman about Dotson's ex-wife's and father's previous statements, because counsel failed to establish "time, place, and persons present" before inquiring about the prior inconsistent statements. *Id*. at 4. The Court also determined that counsel failed to identify a particular police officer when questioning the family members about the alleged "mean drunk" statements. *Id*. Therefore these statements were properly excluded for lack of foundation. *Id*. at 5.

While Johnson's counsel erred in not providing a proper foundation, we do not believe that this error satisfies the requirements of *Strickland*. Johnson was able to present his theory of the case through his own testimony, his recorded interview, the questioning of Dotson's family members and through the testimony of an expert witness. Therefore, Johnson failed to establish prejudice.

Johnson's next argument is that his counsel was ineffective because he failed to tender instructions on lesser-included offenses and voluntary intoxication, and did not object to the court's failure to provide such instructions. Johnson contends that he was entitled to such instructions and, if given, he could have been convicted

of a lesser-included offense. The evidence supports Johnson's entitlement to instructions on lesser-included offenses. *See Elliott v. Commonwealth*, 976 S.W. 2d 416, 419 (Ky. 1998); *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). The evidence may have supported an instruction on voluntary intoxication. *See Springer v. Commonwealth*, 998 S.W.2d 439, 451 (Ky. 1999).

The Commonwealth argues that Johnson's counsel failed to obtain such instructions as part of a reasonable trial strategy. *See e.g. McKinney v. Commonwealth*, 60 S.W.3d 499, 507 (Ky. 2001). Johnson implies that his counsel's actions were not the result of trial strategy or, if they were, that such a strategy was inappropriate.[1]

The record indicates that defense counsel neither objected to the circuit court's jury instructions, nor requested instructions on lesser-included offenses. The circuit court inquired as to whether counsel had objections to the tendered instructions, and there were no objections. The circuit court asked about lesser-included offenses:

> BY THE COURT: "No lesser-included offenses requested, correct?"

[1] In Johnson's reply brief, he appears to deny that he is complaining that his counsel failed to request instructions on lesser-included offenses, but claims instead that the jury should have been instructed on extreme emotional distress and voluntary intoxication as elements of murder which they would have to disprove in order to convict him. To the extent that Johnson is attempting to assert a new theory in his reply brief, this is an inappropriate place to do so. *See Milby v. Mears*, 580 S.W.2d 724, 728 (Ky.App. 1979); *Potter v. Bruce Walters Ford Sales, Inc.*, 37 S.W.3d 210, 212 (Ky.App. 2000). Additionally, such an argument is without merit because mitigation defenses such as voluntary intoxication cannot be given in the absence of instructions on included lesser offenses. *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004).

> [COMMONWEALTH ATTORNEY]: "Yes—not by the Commonwealth and not be the defense, right?"
>
> [JOHNSON'S ATTORNEY]: "Right."

While this evidence establishes that there were no objections to the lack of lesser-included instructions and that no one requested them, it does not explain why defense counsel did not want them included. A failure to obtain lesser-included instructions to which a defendant was entitled, in the absence of trial strategy, could constitute ineffective assistance of counsel. *See e.g. Hatcher v. Commonwealth*, 310 S.W.3d 691, 701-702 (Ky.App. 2010). Therefore, Johnson's allegation is sufficiently specific to warrant a hearing because the record does not conclusively resolve whether the failure to request lesser-included instructions was the result of trial strategy. *See Frasier*, 59 S.W.3d at 457-458.

If Johnson's counsel was ineffective, Johnson could demonstrate prejudice because the jury could have had reasonable doubt as to the degree of wantoness required to convict for wanton murder, but could have believed beyond a reasonable doubt that Johnson had the state of mind sufficient to constitute guilt for lesser-included offenses. *See Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003). Therefore, an evidentiary hearing must be conducted to determine whether the instructions were declined as part of a reasonable trial strategy.

Accordingly, we reverse the Powell Circuit Court's order denying Johnson's RCr 11.42 motion as to his claim of ineffective assistance of counsel in not obtaining instructions on the lesser-included offenses and defense of voluntary

intoxication and remand this matter for an evidentiary hearing to determine the reason these instructions were not requested by Johnson's attorney. We affirm the denial of all other claims.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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