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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001936-MR

JAMES BARNETT — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: James Barnett appeals from the trial court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 ineffective assistance of trial counsel motion. On appeal, Barnett argues the trial court inappropriately denied his motion without a hearing because trial counsel ineffectively: (1) failed to investigate, present evidence of, and request a jury instruction on extreme

emotional disturbance; and (2) advised him to waive jury sentencing in exchange for a maximum sentence of life imprisonment based on a guarantee of a new trial on appeal. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

We take our recitation of the facts from our own Supreme Court's opinion on direct appeal.

> On the morning of June 13, 2007, Jamie Townsend saw [Barnett] driving erratically at a high rate of speed in Clay City, Kentucky. [Barnett] squealed his tires and pulled into a parking lot where Townsend's daughter was riding her bicycle. Witnesses saw [Barnett] drinking something from a bottle. [Barnett] later admitted to using Xanax, cocaine, and possibly Percocet and methadone that morning.
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> After witnessing [Barnett's] erratic driving, Townsend called 911, and Clay City Police Chief Randy Lacy responded. Chief Lacy arrested [Barnett] on suspicion of DUI, handcuffing him with his arms in front of his body. Witnesses testified that [Barnett] and Chief Lacy knew each other, and that [Barnett] was cooperative. Chief Lacy placed [Barnett] in the back of his police cruiser, and then went to speak to Townsend and take photographs of the tire marks [Barnett] left in the parking lot. At some point while [Barnett] was alone in the police cruiser, he reached through an open partition and took a handgun from the front seat.
>
> While Chief Lacy was driving [Barnett] to the Powell County Jail in Stanton, [Barnett] fired a shot from Chief Lacy's gun. The bullet passed through the partition and struck Chief Lacy in the head, killing him. The cruiser went out of control and wrecked. [Barnett] kicked out the back window of the cruiser, but was stopped by witnesses as he left the scene.

> [Barnett] did not deny the underlying facts; his defense was based on intoxication and mental health issues. The Commonwealth sought the death penalty based on the aggravating circumstance of Chief Lacy being a police officer.
>
> . . . .
>
> After a jury trial, [Barnett] was found guilty of wanton murder and theft. The jury found [Barnett] not guilty of escape and intentional murder.

Barnett v. Commonwealth, 317 S.W.3d 49, 53-54 (Ky. 2010).

After the jury returned the verdict, the trial court began hearing testimony in the penalty phase of trial. The victim's widow, brother, and son testified. Following that testimony, counsel advised the court that Barnett had agreed to accept a life sentence without the possibility of parole for twenty years on the murder conviction and a sentence of three years on the theft conviction. His only stipulation was retention of his right to appeal.

Barnett appealed his conviction to the Supreme Court of Kentucky, which affirmed. Thereafter, Barnett filed an RCr 11.42 motion to vacate his conviction, arguing his trial counsel had been ineffective. He also asked the circuit court to hold an evidentiary hearing. The court denied Barnett's motion without conducting a hearing. Barnett raised a number of issues in his motion before the trial court that he does not argue here. We address only the issues he raises on appeal and set forth additional facts as necessary below.

STANDARD OF REVIEW

In considering a claim of ineffective assistance of counsel, the reviewing court must focus on the totality of evidence before the judge or jury. We must assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986); *United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992).

A court is required to hold an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion "cannot be determined on the face of the record." *Parrish v. Commonwealth,* 272 S.W.3d 161, 166 (Ky. 2008).

ANALYSIS

To establish ineffective assistance of counsel, a criminal defendant is required to:

> [S]how that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S. Ct. at 2066.

We first address Barnett's argument that counsel was ineffective for failing to investigate and raise an extreme emotional disturbance defense. There are three requirements a defendant must meet to establish the defense of extreme emotional disturbance: (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 support of his argument that he was acting under extreme emotional disturbance, Barnett states the victim had previously beaten him while he was in jail and had previously broken his jaw. According to Barnett, these encounters left him with a "festering mental state" that led to extreme emotional disturbance. Barnett has not stated when those incidents occurred, and he has not provided any documentation or other evidence to support his allegations.

RCr 11.42(2) provides that a movant must "state specifically the ground on which the sentence is being challenged and the facts on which the movant relies in support of each ground." Barnett's statements that the victim had beaten him and broken his jaw on some prior occasion are not sufficient to meet this burden. Extreme emotional disturbance requires the triggering event be "sudden and uninterrupted." Without some specific facts regarding the alleged prior beatings, it is impossible to determine if those alleged events would have been sufficient to

support the defense of extreme emotional disturbance. Therefore, neither we nor the trial court can determine if counsel's failure to present this alleged evidence was prejudicial.

Furthermore, the defenses of extreme emotional disturbance and intoxication were contradictory in this case. Extreme emotional disturbance is a defense to intentional murder. Kentucky Revised Statute (KRS) 507.020(1)(a). To avail himself of that defense, Barnett would have had to prove that, although he intended to cause Chief Lacy's death, he was "so enraged, inflamed, or disturbed" that he acted "uncontrollably from the impelling force" of the emotion "rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). Intoxication, on the other hand, is a defense that negates intent. *See Foster v. Commonwealth,* 827 S.W.2d 670, 677 (Ky. 1991). Because Barnett could not persuasively argue the contradictory positions that he *did intend* to cause Chief Lacy's death but *was too intoxicated to intend* to cause Chief Lacy's death, his counsel was forced to choose which of those defenses was more viable. Based on the significant evidence regarding Barnett's intoxication and the lack of specific facts regarding the alleged prior beatings, we cannot say that counsel's choice to pursue intoxication as a defense rather than extreme emotional disturbance was unreasonable.

We next address Barnett's argument that based on the evidence counsel should have sought a jury instruction on extreme emotional disturbance. In support of this argument, Barnett cites to three bits of evidence: (1) after he was

placed in Chief Lacy's cruiser, Barnett began yelling and pounding on the window; (2) Chief Lacy told a deputy that he was going to have to make Barnett stop beating on the window, and that he might have to "smack" Barnett to make him stop; and (3) after the shooting, Barnett told a witness that Lacy had been beating him. Barnett admits this is "minimal" evidence of extreme emotional disturbance. However, even if it were not minimal, the fact remains that Barnett could not have effectively asserted both intoxication and extreme emotional disturbance in this case. We discern no error in counsel's decision to not request an extreme emotional disturbance instruction.

Next, we address Barnett's argument that he agreed to accept the maximum available sentence only because counsel guaranteed him and his family members a new trial. During the penalty phase of trial, the Commonwealth introduced evidence of Barnett's prior crimes, called three witnesses who gave testimony: Chief Lacy's widow, his brother, and his son. After a recess, the parties advised the court that Barnett wanted to stop the penalty phase of the trial and that he had agreed to a sentence of life imprisonment. The circuit court then conducted the same colloquy conducted when a defendant enters a guilty plea. In response to the court's questions, Barnett stated that: he understood he was waiving his right to continue with the penalty phase of the trial; no one had forced, coerced, or threatened him to get his agreement; he was not under the influence of any medication that would affect his judgment; he was satisfied with the representation his attorneys provided; he believed his attorneys had done everything in their

power to assist him; he understood that he was agreeing to a life sentence with no eligibility for parole for twenty years, which was the maximum sentence the jury could recommend; he understood that the jury might recommend a lesser sentence; and he understood that he would retain his right to appeal the jury's verdict. Barnett's attorneys advised the court that: they had explained everything to Barnett; he understood what he was doing; and Barnett was following their advice. Based on Barnett's testimony and his attorneys' statements, the court found Barnett had knowingly, voluntarily, and intelligently agreed to the sentence and to waive the remainder of the penalty phase of the trial.

Because Barnett had already been found guilty, his agreement to accept the maximum sentence was not a typical plea agreement. However, the agreement was similar in impact to a plea agreement; therefore, it should be treated accordingly. A plea agreement is valid if a defendant knowingly, freely, and voluntarily enters into it. *See Bronk v. Commonwealth,* 58 S.W.3d 482, 486 (Ky. 2001). When examining a plea agreement, we give a strong presumption of truth to solemn declarations made in open court and summarily dismiss "conclusory allegations unsupported by specifics" and "contentions that in the face of the record are wholly incredible." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) (citing *Blackledge v. Allison,* 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1977)).

The trial court took the necessary steps to ensure that Barnett knowingly, freely, and voluntarily entered into the agreement. Therefore, the agreement is valid.

Next, we note that, although Barnett testified he was not being coerced or otherwise forced into the agreement, he now argues that he only entered into it because of counsel's "guarantee" of a new trial. We are not persuaded by this argument for three reasons. First, although Barnett alleged that counsel made this guarantee to him and his family, he offered no documentation or affidavits from family members to support his allegation. Second, the agreement had no impact on the likelihood that Barnett would succeed on an appeal of his conviction. Third, because the agreement could not have an impact on whether Barnett's appeal would be successful, it could not have been a basis for him to enter into the agreement. Thus, Barnett's allegation that he entered into the agreement only because of counsel's guarantee is not credible.

Finally, as we previously stated, a court is only required to hold an evidentiary hearing regarding an RCr 11.42 motion if the issues raised cannot be resolved from a review of the record. The issues raised by Barnett can be resolved by reviewing the record; therefore, the trial court properly denied his request for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Barnett's RCr 11.42 motion and his motion for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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