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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000025-MR

TONY C. HODGE — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 06-CR-00158

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: On January 29, 2006, Tony C. Hodge killed Margaret Jackson and shot and stabbed Mitchell Turner in Madison County, Kentucky. He was arrested for these crimes in May of 2006 and two months later was indicted for

murder,[1] attempted murder,[2] robbery in the first degree,[3] and burglary in the first degree.[4] The Commonwealth gave notice of its intent to seek the death penalty, Hodge pled guilty, and was sentenced to life on the murder charge and twenty years on each of the three other charges, all to be served concurrently. Two years after final sentencing, Hodge filed an RCr[5] 11.42 motion[6] alleging his defense team was inexperienced in capital litigation and ineffective. The trial court denied relief without convening a hearing. Hodge now challenges the trial court's denial of relief and claims he should be permitted to withdraw his guilty plea and stand trial. Having reviewed the briefs, the law and the record, we affirm.

FACTS AND PROCEDURAL BACKGROUND

According to Hodge's explanation of the crimes at his guilty plea colloquy, co-defendant Doug Hall knew Jackson and Turner and convinced them he would come to their home and sell them drugs. This was a ruse to ensure Jackson and Turner had money because Hall had no pills and no intention of selling anything; he had enlisted Hodge to accompany him to rob Jackson and

[1] Kentucky Revised Statutes (KRS) 507.020, a Capital offense.

[2] KRS 507.020 and KRS 506.010, a Class B felony.

[3] KRS 515.020 and KRS 502.020, a Class B felony.

[4] KRS 511.020 and KR 502.020, a Class B felony.

[5] Kentucky Rules of Criminal Procedure.

[6] Hodge filed a *pro se* motion that was supplemented by counsel.

Turner. En route from Laurel County to the buy/robbery in Madison County, Hodge and Hall got "real high" and as Hodge entered the home, "things went wrong" and he "made a bad judgment call." A short time later, Jackson was dead; Turner was alive, but had been shot and stabbed; and Hodge had committed a burglary and a robbery. In a single indictment, Hodge was charged as the principal and Hall was named as his complicitor. Hodge was also charged with a separate murder in Laurel County.

Two attorneys, Hon. Valetta Browne and Hon. Sam Cox of the Department of Public Advocacy (DPA), were assigned to represent Hodge at arraignment on July 31, 2006, and all future court appearances. Trial was set for October 23, 2006. A few weeks before trial was to occur, Cox and Browne sought a continuance to allow them to completely investigate the case and stated Hodge had agreed to waive his right to a speedy trial to allow time for adequate trial preparation. The Commonwealth did not oppose the delay and the court rescheduled trial for February 26, 2007.

On December 7, 2006, the Commonwealth filed its notice of intent to seek the death penalty against both Hodge and Hall. At a hearing held the next day, the court granted separate trials after reviewing taped statements[7] given by both Hodge and Hall.

[7] At this hearing, counsel for Hall stated each defendant had given two statements. None of these statements is in the appellate record.

On February 19, 2007, Browne and Cox filed two *ex parte* motions on Hodge's behalf—one seeking funds to hire a private investigator and the other seeking funds to hire a mental health expert. The motions stated individuals were needed to prepare a defense, collect mitigation evidence, investigate Hodge's background to prepare for a possible penalty phase, and determine Hodge's competency.[8]

At a hearing on February 26, 2007, Cox and Browne advised the court that DPA requires at least one attorney on a capital defense team to have prior capital litigation experience and in light of that requirement, another attorney would be joining the team. A private attorney had met with Hodge and was deciding whether to accept the case. Cox stated Hodge understood death was a potential penalty in the case and reiterated he had waived his right to a speedy trial. The trial court mentioned *ex parte* motions had been filed, but did not hear them at that time.

On April 2, 2007, Hon. Jerry W. Gilbert, an experienced capital litigator, entered an appearance and formally joined Hodge's defense team. On April 26, 2007, the court set trial for October 8, 2007. Thereafter, it heard the *ex parte* motions that had been filed in February. First, Cox asked that he be allowed to

[8] These motions are filed in the record under seal; they have been reviewed for the preparation of this Opinion.

orally amend the written motion for an investigator to request not only an investigator, but also a mitigation specialist. Second, the court received an affidavit from Lynda Campbell, Directing Attorney of DPA's Richmond office, stating DPA "has adopted the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases";[9] those guidelines recommend that each defense team have one investigator and one mitigation specialist; the lone staff investigator assigned to the Richmond office was unable to work Hodge's case due to existing caseload; the Richmond office does not have a mitigation specialist at all; and therefore, funds were needed to secure an outside investigator and a mitigation specialist to properly prepare Hodge's case. Third, Gilbert's addition to the defense team was noted. Following argument, the trial court sustained the requests for a private investigator and a mental health expert. The court reserved on the newly added request for a mitigation specialist (described as a social worker with advanced training); the court stated it was not inclined to approve such funding, but gave counsel leave to file a written motion. No written motion was filed.

Hodge entered his guilty plea on September 7, 2007. During his guilty plea colloquy, the court confirmed with Hodge that he understood the nature and seriousness of the charges against him, his rights and all defenses. Hodge

[9] These guidelines are not law and have no binding effect on Kentucky courts. Furthermore, they merely recommend actions a lawyer "should" take, not things he must do.

expressed his desire to plead guilty, acknowledged he had executed a written waiver of further proceedings with petition to enter plea of guilty, and assured the court the information contained in the waiver and petition was true and correct. After the court explained to Hodge his constitutional rights, Hodge told the court he was not ill, impaired or under the influence of any substance, had never been treated for mental illness, and had never been confined to a mental health facility. Hodge said he understood the Commonwealth was going to recommend he receive a sentence of life for Jackson's murder and twenty years on each of the three other charges, all terms to run concurrently. He stated no promises or guarantees had been made in return for his guilty plea; he was satisfied with the advice of his attorneys; and he had no complaints about his defense team's representation. He went on to say he needed no additional time to discuss the matter and had no questions about the charges to which he was pleading guilty or anything else.

When the court asked Hodge to explain the actions that resulted in the charges, Hodge confirmed he had intentionally caused Jackson's death; shot and stabbed Turner with the intent to cause his death; robbed Jackson; and burglarized the home while armed with a pistol and a knife. In describing the crimes, Hodge stated Hall had asked him to help rob Jackson and Turner; Hodge and Hall got "real high" while driving to Madison County; "things went wrong" when Hodge entered the home; and Hodge ended up making "a bad judgment call" and committed the crimes with which he was charged. It was also noted Hodge had

been charged with another murder in Laurel County. Finding the plea was being made freely, intelligently and voluntarily, the court accepted it and ultimately sentenced Hodge in conformity with the Commonwealth's recommendation.

On March 13, 2009, Hodge tendered a *pro se* RCr 11.42 motion supported by a separate memorandum arguing his attorneys were ineffective, the trial court was biased, and the Commonwealth had engaged in prosecutorial misconduct—mostly because no psychological exam or competency evaluation had been requested or ordered.[10] Hodge alleged his defense team did not investigate the case to learn he was highly intoxicated at the time of the crimes and when he spoke to police. The motion was filed on March 19, 2009. Hodge requested an evidentiary hearing, but never alleged he would have demanded trial but for counsel's alleged ineffectiveness.

On June 6, 2011, Hon. Linda Bullock filed a supplemental RCr 11.42 motion arguing Cox's and Browne's lack of capital trial experience prejudiced the defense in that a full team was not assembled for nine months. Counsel echoed Hodge's request for an evidentiary hearing.

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[10] Under KRS 504.100(1), "[i]f upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." No such showing is alleged in the case *sub judice.* A "defendant's irrational behavior, his demeanor in court, and any prior medical opinion on competence to stand trial are all relevant facts for a court to consider" in determining competency. *Mills v. Commonwealth,* 996 S.W.2d 473, 486 (Ky. 1999). No such conduct was alleged in this case or visible during the recorded proceedings.

On November 4, 2011, the trial court entered a lengthy order denying the motion to alter, amend or vacate Hodge's guilty plea and sentence. Hodge now appeals the denial of relief and claims he should have received an evidentiary hearing. We affirm.

ANALYSIS

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty 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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf.*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986). Furthermore,

> [w]here, as here, the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited 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,* Ky., 411 S.W.2d 321, 322 (1967). Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required.

> *Hopewell v. Commonwealth*, Ky. App., 687 S.W.2d 153, 154 (1985).

Id. With these standards in mind, we consider Hodge's claims.

The record in this case is sparse—just 51 pages of written record pertaining to the underlying charges and guilty plea—another 104 pages dealing with a post-conviction *pro se* motion for discovery that was filed and quickly withdrawn, the *pro se* RCr 11.42 motion and supplement filed by counsel, and this appeal. There are several recorded hearings best described as brief in duration. Not included in the record are the two recorded statements Hodge made to police —at least one of which is referred to as a confession. Had Hodge wanted us to review his statements, it was his responsibility to designate them for inclusion in the appellate record. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (appellant responsible for providing complete record on appeal; appellate court presumes incomplete record supports trial court's ruling). Counsel intimates such a small record cannot possibly refute Hodge's allegations. We disagree and affirm.

There is no requirement that a record be of a particular length, even in a capital case. Papering a record with extraneous motions does not constitute good lawyering. A record of more than 1,000 pages would not automatically mean an attorney had provided effective representation. Without resorting to extrinsic

evidence, the trial court reviewed the record, resolved Hodge's claims, and properly denied relief.

Hodge's first claim is that his defense team was ineffective because they did not investigate the case and learn Hodge was intoxicated when he committed the crimes and spoke to police. Paragraph seven of the waiver Hodge executed states:

> **I have told my attorney all the facts and surrounding circumstances** as known to me concerning the matters mentioned in the Indictment/Information and **believe that my attorney is fully informed** as to all such matters. **My attorney has** since informed me and has **counseled and advised with me at length as to** the **nature and cause of each accusation against me** as set forth in the Indictment/Information **and as to any possible defenses I might have** in this case.

(Emphasis added.) Based on Hodge's own words, he told his attorneys he was intoxicated when he committed the murder, attempted murder, robbery and burglary, and based on those conversations, counsel "advised [him] at length" about his options and defenses. Moreover, defense counsel would have heard the recorded statements[11] Hodge gave to police. Without hearing those statements ourselves, we are confident Hodge's defense team would have noticed any slurring of speech or incoherence if Hodge were under the influence of drugs. While the

[11] The statements were mentioned during the hearing on December 8, 2006, but they were not included in the record. The timing of Hodge's statements is unclear. While he may have spoken to police soon after the crimes occurred on January 29, 2006, he was not arrested until May 11, 2006, three months later. The statements may be in the record of the Laurel County murder.

record does not reveal how defense counsel used the information Hodge provided, based upon the contents of the *ex parte* motions for an investigator and a mental health expert, we know they weighed potential defenses, evaluated their client's competency, and developed mitigating evidence—the very actions expected of a reasonable attorney. In denying the RCr 11.42 motion, the trial court focused on Hodge's confirmation of his intoxication during his guilty plea colloquy, but clearly that was not the first time defense counsel heard the circumstances of the crimes.

Based on the record we have reviewed, we cannot say counsel did not reasonably investigate the case. A seasoned capital attorney may have done things more expeditiously, but Hodge has failed to identify any time-sensitive matter left undone or performed in an untimely manner, nor anything counsel otherwise failed to do that would equate to ineffectiveness or incompetence. In our view, Hodge has not satisfied the first prong of *Hill,* 474 U.S. at 59, 106 S.Ct. at 370, requiring a showing of attorney incompetence.

Next, Hodge suggests he would have been entitled to an involuntary intoxication instruction had he gone to trial. In his *pro se* RCr 11.42 motion and memorandum, Hodge alleged his attorneys were ineffective, but never personally claimed he would have gone to trial but for their ineffectiveness as required for relief under the second prong of *Hill,* 474 U.S. at 59-60, 106 S.Ct. at 370-71. In

the supplemental RCr 11.42 motion filed on Hodge's behalf by appellate counsel, it is asserted Hodge would have insisted on standing trial but for counsel's errors.

To justify an instruction on voluntary intoxication, the accused must have been "so intoxicated that he could not have formed the requisite *mens rea* for the offense." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (citing *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004)). In other words, he must have been "so drunk that he did not know what he was doing." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002) (quoting *Meadows v. Commonwealth*, 550 S.W.2d 511, 513 (Ky. 1977)).

During the guilty plea colloquy, Hodge admitted he made "a bad judgment call" indicating he knew he had choices on January 26, 2006, and made the wrong one. Moreover, Hodge armed himself with a knife and a pistol and went to Jackson's home intending to rob her and Turner. Hodge argues a hearing was necessary to explore whether counsel told him voluntary intoxication was a possible defense. We disagree and again reference paragraph seven of the waiver in which Hodge says he provided his attorneys all the facts and they discussed with him "any possible defenses I might have." Under *Fredline,* an involuntary intoxication instruction would not have been warranted.

Appellate counsel suggests trial counsel did not fully consult with Hodge and did not investigate how intoxicated he was when he spoke to police.

This claim directly contradicts the written waiver in which Hodge stated he had told his attorneys "all the facts" and believed they were "fully informed"; confirmed his defense team had counseled him "at length"; and "believe that my attorney has done all that anyone could do to counsel and assist me, and that there is nothing about the proceedings in this case against me which I do not fully understand." During the guilty plea colloquy, Hodge stated he was satisfied with the advice given by his attorneys and had no complaints about their representation. In light of the written waiver Hodge signed and the responses he gave to the trial court during the colloquy, Hodge's current claims are refuted by the record and therefore, no evidentiary hearing was necessary.

Finally, appellate counsel argues trial counsel would have moved to suppress Hodge's statements if they had only spoken to Hodge. It is curious that Hodge makes this argument now since it is a radical change from the answers he gave to the trial court on September 7, 2007. During the guilty plea colloquy, Hodge told the court he was satisfied with the legal advice given by his attorneys; he had no complaints about their representation; he did not need additional time to discuss anything; and he had no questions. With such diametrically opposed stories, we discern no error in the trial court relying upon the written waiver and the guilty plea colloquy to deny relief.

Hodge's goal on appeal is to have us reverse the trial court's denial of relief and vacate his conviction. Alternatively, he asks us to remand the case for an evidentiary hearing. Hodge had to prove two things to trigger relief—that counsel's performance was less than competent, and, that but for counsel's errors, he would not have pled guilty and would have demanded on going to trial. *Hill.* Since his allegations are conclusively refuted by the record, *Lewis*, 411 S.W.2d at 322, there was no need for a hearing and no basis for vacating his conviction. For the foregoing reasons, the order of the Madison Circuit Court denying RCr 11.42 relief without an evidentiary hearing is affirmed.

ALL CONCUR.

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