

RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000085-MR

CHARLES EDWARD HENSLEY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RODERICK MESSER, SPECIAL JUDGE
ACTION NO. 00-CR-00187

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * * *

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

LAMBERT, JUDGE: Charles Hensley appeals the Harlan Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion seeking to vacate a life sentence for murder. After careful review, we affirm in part, vacate in part, and remand.

Hensley was indicted on December 12, 2000, for the murder of Rocky Haywood. The Commonwealth alleged that Hensley stabbed Haywood with a knife on October 19, 2000. Hensley's trial began on August 27, 2002, and continued through September 3, 2002. After hearing all the evidence, the jury returned a verdict against Hensley and recommended a sentence of life imprisonment. On March 5, 2003, the trial court imposed the recommended sentence.

The facts of the murder are somewhat unclear. However, the record reveals that on the night of October 19, 2000, Anna Young and several other people were coming home from church. Ms. Young testified that as she came over a hill, she saw a body lying in the road and thought it was a Halloween prank. As she approached the scene, she saw Hensley in a gray car trying to get it out of a ditch. Hensley told Ms. Young's son to go get help because his friend was hurt. Ms. Young knocked on the door of Junior Robbins' house. When Ms. Young knocked, Robbins' wife came to the door first. Ms. Young told her to call 911 because someone was lying in the road and was "real tore up." Ms. Young's son and her daughter's boyfriend ran up to the Hensleys' trailer to call 911. Ms. Young and Mr. Robbins walked over to the body, which was cut up badly. Mr. Robbins identified the victim as being Haywood. Ms. Young also testified that Hensley was sitting in the ditch throwing up and was wearing a "Kentucky" hat.

While they were at the scene, Mr. Robbins got a light and looked inside the car to see if Haywood's daughter was inside, because she was allegedly

with him prior to the incident. No one disturbed the body, other than placing a sheet over it. Ms. Young and Mr. Robbins told people not to touch anything.

At trial, Mr. Robbins also testified. He testified that at about five minutes to 10:00 on the evening of October 19, 2000, a woman beat on his door and stated that a man in front of his house had been run over. Mr. Robbins ran outside and saw a car in the ditch with its lights still on. Mr. Robbins followed a blood trail, which went into Virgie Hensley's house (Hensley's mother). He yelled for Hensley, who came out of the shower and said that someone had jumped Haywood and him and that he did not know what happened exactly. Hensley was drying off, and Mr. Robbins went back outside.

Mr. Robbins testified that Haywood's body was approximately fifteen feet from his porch. The sheet covering his body had come from his (Robbins') house, but he wasn't the one who placed it on Haywood's body. He wasn't sure who placed the sheet on Haywood, but he thought it might have been his neighbor, Susan. The police arrived and had the scene roped off in approximately thirty minutes. Mr. Robbins was present at the scene the whole time, and he testified that no one got close to Haywood's body.

When Trooper Keith Saylor arrived at the scene, there were approximately 20-30 people standing around. There was a body in the road with a tremendous amount of blood in the roadway. The body was covered with a green bedspread and a silver Thunderbird was backed into a ditch. Luther Combs told

Trooper Saylor that he saw a man with a blue baseball cap who had been sitting by the Thunderbird run into Virgie Hensley's trailer.

Trooper Saylor told Hensley that someone had seen a man with a blue baseball cap run into the trailer. Hensley stated that he was the one with the baseball cap on. Hensley explained to Trooper Saylor that he was squatting down talking to Haywood when someone ran up, pushed him, and started stabbing Haywood. Hensley said he got blood all over him and knew that it was dumb, but he washed it off because he was afraid of getting AIDS. He did not know what the assailant looked like and did not see which way they went. Trooper Saylor then used Hensley's phone to call dispatch.

Trooper Saylor finished using the phone, and when he came out of the bedroom, he noticed that Hensley was not in the trailer. Hensley was in the roadway talking with people. Trooper Saylor approached him and instructed him to stay on the porch until he could get a statement from him.

Sergeant Banks arrived at the scene and he and Trooper Slone began taping off the crime scene. At that point, Trooper Saylor saw two men talking to Hensley. He walked over and asked how they were involved. One of the men stated that he was related to the victim. Trooper Saylor asked them to leave and asked Hensley to bear with the police, that someone would take his statement as soon as possible. Hensley said, "no problem," and said he understood. Hensley went on to add that the knife was somewhere in the yard. He said the knife was either in the front of the trailer or over by the car. Hensley stated that he got the

knife away from the alleged attacker and slung it in the yard when he ran in to call 911. The police searched the yard but were unable to find the knife in the yard. The Harlan County Coroner ultimately saw the knife in the back seat of Haywood's car and said it was hard to see because of the angle and because there was a lot of blood in the car.

Charles Clem, an EMS technician, transported Haywood's body to the hospital morgue and left it in the care of the coroner. He did not make any changes to the condition of the body. Clarence Longworth testified that he owned an auto repair business and towing service. Mr. Longworth had stored items for the police previously, and on the night of the murder, he picked up Haywood's Thunderbird and towed it in for the Kentucky State Police. He stated that the car had been backed into a ditch and that he towed it in with a wrecker. When he got the car back to his garage, he stored it in his paint booth, which was covered in plastic and was the most secure storage area.

Numerous pieces of evidence were sent to the Kentucky State Police (KSP) Crime Lab for evaluation. Barbara Wheeler, the forensic lab supervisor of the trace evidence lab, analyzed the black hooded sweatshirt worn by Hensley on the night of the murder. She testified that the openings in the garment were caused by being ripped rather than by being cut with a knife.

Linda Winkle, a specialist at the KSP Crime Lab, came into possession of a hair found in the victim's car at the scene. She testified that the hair was similar in color and microscopic characteristics to both the defendant and

the victim. She stated that the hair had too few characteristics to eliminate the victim or Hensley as being the source. Ms. Winkle also analyzed the knife blade and handle for blood. All of the blood found upon the knife was Haywood's. Ms. Winkle was also presented with a paper towel which had come from the floorboard of the car. That contained enzymes and DNA which was consistent with Hensley's. Aside from Hensley's blood, Haywood's blood was the only other blood found in the car. The KSP lab could not find any usable or identifiable fingerprints on the knife.

Dr. Greg Davis performed the autopsy on Haywood. He testified that the cause of death was multiple sharp force injuries. Dr. Davis went on to describe twenty (20) major wounds. During the course of his testimony, he described at least three fatal wounds. One of the wounds was in Haywood's right front chest and penetrated six inches into his body. The wound perforated the cartilage around his ribs in the upper portion of his right lung, resulting in what would have been the equivalent of one and a half "Coke" cans of blood pooling there. Dr. Davis also described a five-inch deep wound into Haywood's kidney. In addition, there was also a wound which was three inches deep and separated two of Haywood's neck bones; in fact, it almost cut his spinal cord in half. Dr. Davis also explained that after the neck wound was inflicted upon Haywood, it would not have been possible for Haywood to have spoken. He examined the knife in the context of Haywood's injuries, and the injuries were consistent with having been inflicted by that knife.

Hensley ultimately gave a taped, voluntary statement to the police at 2:52 a.m. on October 20, 2000. After a suppression hearing, that entire tape was played for the jury. Hensley said that earlier in the evening he and Haywood had gone to his dad's house. They came back to Hensley's trailer and were in the driveway talking when the above events occurred. Hensley denied there being an altercation between him and Haywood, and he also denied that they were drug users. Hensley did not mention throwing the knife out in the yard during his taped statement, as he told police at the scene of the murder. Hensley did not testify at trial.

After hearing all the above facts and testimony, the jury convicted Hensley of murder and the trial court sentenced him to life imprisonment. Hensley directly appealed his conviction to the Kentucky Supreme Court, and in an unpublished opinion rendered on October 20, 2005, the Court affirmed his conviction and sentence. *See Hensley v. Kentucky*, 2005 WL 2674974 (Ky. 2005).

In September 2006, Hensley filed a motion for a new trial "due to a palpable error pursuant to CR 61.02." The trial court denied his motion, and this Court affirmed. *Hensley v. Commonwealth*, 2007 WL 3122271 (Ky. App. 2007). In October 2007, Hensley filed a *pro se* motion to vacate the judgment pursuant to RCr 11.42, arguing that he received ineffective assistance of counsel when his counsel failed to articulate a defense theory at trial.

On January 9, 2009, Hensley filed a motion for expert funds, asking for an expert to perform DNA testing on a hair found on the knife in Haywood's

car, on blood found on a paper towel in the car, and a single drop of blood located twenty-seven feet from Haywood's body.

On September 28, 2009, appointed counsel filed a supplemental memorandum in support of Hensley's *pro se* RCr 11.42 motion. Counsel also alleged that trial defense counsel had failed to investigate a shoulder injury suffered by Hensley, which he claims would have prevented him from committing the murder. On September 28, 2009, counsel also filed another motion for expert funding, arguing that DNA testing needed to be done on the drop of blood found several feet from the body of the victim, the hair previously admitted into evidence, the hair on the knife, and touch DNA on the handle of the murder weapon. In an order entered on June 4, 2010, the trial court denied Hensley's motion for expert funding and the release of physical evidence for DNA testing. The trial court noted that two of the three items that Hensley sought to be tested were not introduced into evidence at his trial. Only a hair collected from the victim's car was introduced. The trial court noted that the witness at trial testified that the hair was similar to the hair of the victim and Hensley. The trial court found Hensley's claim that scientific tests would exonerate him to be "speculative at best." The trial court also found Hensley's claim that the condition of his shoulder would have rendered him unable to stab the victim to death was speculative and noted that Hensley offered no basis to support the claim.

The trial court held an evidentiary hearing on September 29, 2011, and subsequently entered an order on December 20, 2011, denying Hensley's remaining arguments. This appeal now follows.

As a preliminary matter, we note that the proper standard for determining whether there was ineffective assistance of counsel was articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065. The defendant must also show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, S.Ct. at 2068. With that standard in mind, we turn to Hensley's arguments on appeal.

Hensley first argues that the trial court erred when it denied parts of his motion without conducting an evidentiary hearing in order to resolve issues that could not be refuted by the record alone. Specifically, Hensley argues that the trial court should have conducted a hearing regarding his alleged shoulder injury. In support of this argument, Hensley argues that his trial counsel was ineffective for failing to locate medical records showing an "ongoing ailment" which made it impossible for him to have murdered Haywood without, at a minimum, injuring himself.

The Kentucky Supreme Court has stated the following regarding when an RCr 11.42 movant is entitled to an evidentiary hearing:

Whether an RCr 11.42 movant is entitled to an evidentiary hearing is determined under a two-part test. First, the movant must show that the “alleged error is such that the movant is entitled to relief under the rule.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001). In other words, the court must assume that the factual allegations in the motion are true, then determine whether there “ ‘has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.’ ” *Id.* (quoting *Lay v. Commonwealth*, 506 S.W.2d 507, 508 (Ky. 1974)). “If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises ‘an issue of fact that cannot be determined on the face of the record.’ ” *Id.* (quoting *Stanford v. Commonwealth*, 854 S.W.2d 742, 743–44 (Ky. 1993)). To do this, **the court must “examin[e] whether the record refuted the allegations raised”** (and not “whether the record supported the allegations, which is the incorrect test”). *Id.*

Parrish v. Commonwealth, 272 S.W.3d 161, 166 (Ky. 2008) (emphasis added). An evidentiary hearing is not necessary to consider issues already refuted by the record in the trial court. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743–44 (Ky. 1993).

Hensley told the police on the night of the murder that he confronted the alleged attacker, managed to get the knife away from the attacker, and slung it into the yard. This impeaches his claim that his shoulder was injured to such a degree that he was unable to stab the victim and negates the need for an evidentiary hearing on this issue. Regarding whether this amounted to ineffective assistance of counsel, in light of Hensley’s pretrial statements to police, trial counsel could have made a reasonable decision to stand on Hensley’s pretrial statement and avoid

evidence which would show Hensley was lying about what happened. Although Hensley claims trial defense counsel was aware of his “handicap,” *Strickland* requires a court to “indulge [the] strong presumption” that counsel “made all significant decisions in the exercise of reasonable professional judgment.”

Strickland, 466 U.S. at 689-690, 104 S.Ct. at 2065-2066. A reviewing court is required not simply to give trial defense counsel the benefit of the doubt, but to affirmatively entertain the range of possible reasons counsel may have had for proceeding as he or she did. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1407, 179 L.Ed.2d 557 (2011), noting that *Strickland* calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.

The trial court did not err in refusing to hold an evidentiary hearing on Hensley’s alleged shoulder injury. Hensley failed to show ineffective assistance of counsel that could not be refuted by the record.

Hensley next argues that the trial court denied him access to “potentially exculpatory” DNA testing on a hair previously admitted into evidence, a hair on the knife, a blood drop found several feet from the body of the victim, and alleged touch DNA on the handle of the knife. The Commonwealth argues that Hensley has no constitutional right to further DNA testing and that he fails to satisfy the requirements of Kentucky Revised Statutes (KRS) 422.285. *See Bowling v. Commonwealth*, 357 S.W.3d 462 (Ky. 2011). We agree with Hensley in this regard.

KRS 422.285 was amended in June of this year, and it now allows:

[A] person who was convicted of a capital offense, a Class A felony, a Class B felony, or any offense designated a violent offense under KRS 439.3401 and who meets the requirements of this section may at any time request the forensic deoxyribonucleic acid (DNA) testing and analysis of any evidence that is in the possession or control of the court or Commonwealth, that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

In light of this amendment, which we believe applies to Hensley, we vacate the trial court's order in this regard and remand for consideration of the June amendment.

The trial court did not err by failing to conduct an evidentiary hearing on Hensley's alleged shoulder injury, and trial counsel did not provide ineffective assistance of counsel by failing to articulate this theory at trial. We affirm the trial court's order denying post conviction relief in this regard. However, we vacate the portion of the trial court's order regarding DNA testing and remand for consideration of Hensley's claims under KRS 422.285.

ALL CONCUR.

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