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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001612-MR

JEFFERY L. PETERS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 06-CR-00495

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: We must decide whether Appellant Jeffery Peters' trial counsel's failure to advise him of a lesser-included offense prior to his entering a guilty plea amounts to ineffective assistance of counsel. The Warren Circuit Court found no ineffectiveness by trial counsel. We agree and affirm.

I. Facts and Procedure

Peters and his then-fiancé, Patrease Freeze, lived in Bowling Green, Kentucky, with their two-month old daughter, A.P. On April 12, 2006, Peters was caring for A.P. while Freeze attended class at Western Kentucky University. A.P. was colicky and fussy. Peters became frustrated with A.P. He picked her up, shook her, and asked what was wrong. Peters then threw A.P. onto the couch. A.P. slid off the couch and landed head first on the hardwood living room floor. Peters called Freeze, who notified law enforcement.

A.P. was transported to a local hospital where medical personnel diagnosed her with a skull fracture and bleeding on the brain. A.P.'s injuries were so severe a portion of her brain had detached due to blunt force trauma. Medical personnel also discovered preexisting rib fractures. Five days later, A.P. died.

Peters presented three different stories to law enforcement attempting to explain A.P.'s injuries. Peters initially stated A.P. had fallen off a love seat while napping. Peters next claimed he was playing with A.P. by tossing her in the air and, when he accidentally failed to catch her, A.P. landed on the couch and then fell onto the floor. He later confessed he had become frustrated with A.P.'s crying and "hollering," and had thrown her, causing her injuries. Peters provided both a written statement and multiple recorded confessions.

Peters was indicted on one count of murder. The circuit court appointed dual counsel to represent him. Following an extended pretrial process, Peters entered a guilty plea to wanton murder on February 12, 2009. The circuit

court conducted a plea colloquy pursuant to *Boykin v. Alabama*[1] and determined that Peters' plea was knowingly, intelligently, and voluntarily made with advice of counsel and with a full understanding of the consequences. The circuit court sentenced Peters, in accordance with the Commonwealth's recommendation, to thirty years' imprisonment with parole eligibility after serving twenty years.

On October 5, 2009, Peters moved, *pro se*, to vacate his conviction under RCr[2] 11.42 alleging ineffective assistance of counsel. Peters claimed his trial counsel failed to: (i) properly investigate the case and prepare an adequate defense; (ii) move to suppress his confession; and (iii) move the circuit court for a lesser-included offense. Peters also requested appointment of counsel and an evidentiary hearing.

The circuit court appointed counsel to represent Peters. Counsel filed a supplemental RCr 11.42 pleading alleging trial counsel rendered ineffective assistance when they failed to advise Peters of several lesser-included offenses.

An evidentiary hearing was held on March 23, 2012. Peters and his trial counsel, Diana Werkman and Eric Clark, testified. Werkman explained she was tasked primarily with assessing the medical evidence. She had Peters evaluated by Dr. Eric Drogin and secured the services of mitigation expert Dr. Ann Charvat. Werkman testified she was aware of Peters' background, including his shaky relationship with his father and his abusive stepfather. Werkman also

[1] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

[2] Kentucky Rules of Criminal Procedure

explained that Dr. Charvat had opined that Peters did not handle stress well and, in times of stress, reacted with anger and, at times, suffered blackouts.

Werkman met with Peters several times over the course of her representation. She discussed with him the lesser-included offenses of reckless homicide and second-degree manslaughter. She was unable to specifically recall discussing with Peters the defense of extreme emotional disturbance (EED), but did not rule out the possibility that such discussion took place. Werkman clarified that Dr. Drogin, who is an EED expert, did not identify EED as a potential defense upon evaluating Peters.

Werkman described the medical evidence as devastating. She acknowledged A.P.'s severe injuries were not consistent with Peters' version of events. Werkman thought it was extremely unlikely Peters would receive a favorable outcome at trial – particularly taking into consideration A.P.'s tender age and the inconsistencies in Peters' stories – and feared Peters would face an extremely long sentence, possibly life imprisonment, if his case went to trial.

Clark also testified as to his representation of Peters. Like Werkman, Clark reviewed discovery and met with Peters. Clark recalled researching whether EED was an available defense and discussing EED with Werkman, but they ultimately determined that such an approach was not legally sound. Clark explained his understanding of EED as the law's recognition that certain provocative circumstances may cause a person to be overcome by an emotional disturbance which may mitigate legal culpability. In Clark's opinion, as difficult

as child rearing may be, he did not believe an upset child to be a reasonable provoking triggering event warranting an EED instruction. Clark concluded EED would not be a viable defense at trial.

Peters also testified at the evidentiary hearing. As noted by the circuit court, Peters recounted a relatively mild history of purported verbal and isolated physical abuse at the hands of his stepfather. Peters also testified to the loss of a significant other to cancer, and his brief relationship with Freeze. Peters explained he relocated from Tennessee to Kentucky to help Freeze raise A.P. At the time of A.P.'s death, Peters testified he was experiencing financial difficulties, he had limited experience with young children, A.P.'s fussiness had disrupted his sleep patterns, and he became "nasty" when he was tired.

By order entered September 6, 2012, the circuit court denied Peters' RCr 11.42 motion finding no evidence of ineffective assistance of counsel. Relying on *Schrimsher v. Commonwealth*, 190 S.W.3d 318 (Ky. 2006), the circuit court concluded Peters would not have been entitled to an EED instruction at trial. Therefore, the circuit court reasoned, trial counsel was not deficient when they chose not to discuss the defense with Peters. Peters promptly appealed.

II. Standard of Review

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard first articulated

in *Strickland v. Washington*, 466 U.S. 688, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010).

Under this standard, the movant must first prove that his trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

When the movant has entered a guilty plea, the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). To satisfy the "prejudice" component, the movant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* And, "where 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." *Id.*

In conducting our review, we must be ever mindful that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. As such, we must make every effort "to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

III. Analysis

Peters' sole argument on appeal is that his trial counsel was ineffective by neglecting to advise him of the possibility of an EED defense. Peters asserts that had he been informed of the defense, he would not have pleaded guilty; he would have instead proceeded to trial on the theory that he was not guilty of murder, but instead was guilty of second-degree manslaughter or reckless homicide.

A defendant is not guilty of murder "if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse[.]" KRS[3] 507.020(1)(a). Of course, an EED defense does not exonerate the defendant or relieve him of criminal responsibility, but functions to reduce the degree of a homicide from murder to manslaughter. *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986).

EED is only a viable defense if there is evidence that the defendant suffered "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." *Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2006). EED mitigation is thus limited to cases involving an enraged or inflamed state of

[3] Kentucky Revised Statutes

mind so emotionally disturbed as to overcome the person's judgment and the person acts while under its influence. *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2000).

To succeed on an EED defense, the defendant must show "adequate provocation" for the disturbance. *Keeling v. Commonwealth*, 381 S.W.3d 248, 265 (Ky. 2012). That is, a "sudden and uninterrupted" event, *id.*, that "triggers an explosion of violence on the part of the defendant at the time he committed the offense." *Baze v. Commonwealth*, 965 S.W.2d 817, 823 (Ky. 1997). "The 'triggering event' may include 'the cumulative impact of a series of related events.'" *Keeling*, 381 S.W.3d at 265 (citation omitted). However, circumstances involving gradual victimization from the defendant's environment, *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991), and chronic conditions have been held not to satisfy the triggering-event requirement. *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 4 (Ky. 2007); *Cecil v. Commonwealth*, 888 S.W.2d 669, 673-74 (Ky. 1994).

Kentucky law also requires that the provoking circumstances, as perceived by the defendant, provide "a reasonable explanation or excuse" for the defendant's loss of judgment and uncontrolled reaction. *McClellan*, 715 S.W.2d at 468-69.

In *Schrimsher v. Commonwealth*, 190 S.W.3d 318 (Ky. 2006), a case with facts similar to this one, the Kentucky Supreme Court examined whether a child's "persistent crying" and thumb-sucking, despite the defendant's insistence that the child not do so, coupled with the stress of parenting multiple children provided a

reasonable explanation for the defendant's enraged emotional state. *Id.* at 333. There, the defendant was charged with multiple counts of assault after medical personnel discovered copious injuries to the defendant's infant child. The child had five skull fractures, bruises and scratches on her face, swelling on the back of her head, and numerous preexisting injuries in varying stages of healing. The defendant argued that the "reasonable explanation or excuse" for his EED was the child's persistent crying and thumb-sucking along with the stress of parenthood, including caring for multiple children (the defendant was the primary caretaker) and financial concerns (the defendant was unemployed). Ultimately, the Supreme Court rejected the defendant's position, holding that "no reasonable person would consider the ordinary stresses of childrearing, specifically an infant's crying and thumb-sucking," sufficient as a reasonable explanation. *Id.*

Peters argues *Schrimsher* is distinguishable on its facts from this case. Peters points out that he was a first-time father, while the defendant in *Schrimsher* was an experienced parent; unlike the defendant in *Schrimsher*, he was not the primary caretaker and therefore lacked familiarity with childrearing; unlike the child in *Schrimsher*, A.P. showed no signs of extensive physical abuse; and the stressors of Peters' background impacted his perception of the events.

Peters' attempts to distinguish his situation from the facts of *Schrimsher* are not persuasive. Both the defendant in *Schrimsher* and Peters pointed to the stressors in their lives as justification for their disturbed emotional states. Both were unemployed and facing monetary distress. Both were caring for

inconsolable, crying children. The children in both cases suffered severe injuries at the hands of their parents and showed signs of prior injuries. *Schrimsher* makes clear that the stresses of parenthood, including an infant's uncontrollable and inconsolable crying, do not provide a "reasonable explanation or excuse" for a violent loss of self control. Sleep deprivation, financial concerns, and stress are part and parcel of parenthood and are factors faced by many parents, both new and experienced. In light of *Schrimsher*, we agree with the circuit court that Peters would not have been entitled to a lesser-included EED instruction had he rejected the plea offer and proceeded to trial. Likewise, we find there is no deficiency in failing to advise one's client of a nonviable legal defense or strategy.

Accordingly, trial counsel's decision not to discuss a possible EED defense with Peters was reasonable under the circumstances and did not amount to deficient performance.

Because we have found no failing on the part of Peters' trial counsel, we need not discuss the prejudice component.

IV. Conclusion

We affirm the Warren Circuit Court's September 6, 2012 order denying Peters' RCr 11.42 motion.

ALL CONCUR.

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