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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000274-MR

EDWARD R. STOESS — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN CONRAD, JUDGE
ACTION NOS. 06-CR-00069 AND 07-CR-00065

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Following entry of a guilty plea, Edward R. Stoess appeals from an order of the Oldham Circuit Court denying a *pro se* RCr[1] 11.42 motion primarily alleging ineffective assistance of counsel. Upon review of the record, the briefs and the law, we affirm.

[1] Kentucky Rules of Criminal Procedure.

Stoess confessed to lying in wait, shooting and killing[2] James D. Shuttler, III—his best friend and his estranged wife's boyfriend—in Shuttler's Crestwood, Kentucky, home on May 9, 2006.[3] Stoess then traveled to his own home in Floyd County, Indiana, where he shot his estranged wife—Deena Stoess—four times, paralyzing her. He was arrested that same day and charged with Deena's attempted murder in Floyd County, Indiana, where he remained jailed until May 4, 2007.

In September 2006, an Oldham County, Kentucky, grand jury had indicted Stoess on a single count of murder for Shuttler's death.[4] A year later, in September 2007, a separate indictment was returned, charging him with a single count of first-degree burglary for his illegal entry into Shuttler's home.[5] On November 27, 2007, the Commonwealth filed its notice of intent to seek the death penalty because the murder occurred during commission of a first-degree burglary.

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[2] Stoess maintained his crime spree resulted from a belief Shuttler was supplanting him as husband and father. In preparation for the shootings, Stoess said he spent "three hours burning business records and his wife's keepsakes in the fireplace, in addition to destroying the phone lines at the [Stoess] home." Stoess then "purchased ammunition and went to his parents' house to retrieve a gun before driving to [Shuttler's] house."

[3] On May 10, 2006, a murder charge was filed against Stoess in Kentucky, and a warrant was issued for his arrest.

[4] Kentucky Revised Statutes (KRS) 507.020, a capital offense.

[5] Kentucky Revised Statutes KRS 511.020, a Class B felony.

In an Indiana courtroom on April 4, 2007, with counsel[6] at his side, Stoess pled guilty to the attempted murder of his wife. At sentencing on May 3, 2007, he received a term of thirty years.

Other than execution of search warrants and the return of the murder indictment, nothing happened in the Kentucky court case until May 4, 2007, when Stoess waived extradition and was brought to Kentucky. Two attorneys[7] were appointed to represent Stoess on the Kentucky charges on May 17, 2007, the date he was arraigned.

On August 22, 2007, Stoess argued for the first time the Interstate Agreement on Detainers (IAD)—requiring trial within 120 days—applied to him. While he demanded a trial date, he did not ask that trial occur within 120 days, and he did not request a speedy trial. On September 11, 2007, defense counsel filed a written motion to dismiss the indictment due to an alleged violation of the IAD. Stoess claimed an indictment and warrant of arrest had been issued in Oldham County and sent to the Floyd County (Indiana) jail on September 28, 2006. Defense counsel argued under KRS 440.450, Article IV, Stoess should have been tried within 120 days of his arrival in Kentucky. The Commonwealth responded, "[a]t no time during [Stoess's] detention in the Floyd County, Indiana, Jail did the Oldham County Police Department or the Commonwealth's Attorney's Office

[6] Hon. J. Patrick Biggs represented Stoess on the Indiana charge. Biggs is neither licensed to practice law in Kentucky nor familiar with Kentucky law.

[7] Hon. Dennis Burke and Hon. Joanne Lynch, both Assistant Public Advocates, were originally appointed to represent Stoess. As the case continued, Hon. Aaron Currin succeeded Burke. Lynch served as lead counsel.

cause a detainer to be placed against the defendant in the State of Indiana." On October 2, 2007, the trial court overruled the motion, finding the IAD did not apply under *United States v. Taylor,* 173 F.3d 538 (6th Cir. 1999), and *United States v. Glasgow,* 790 F.2d 446 (6th Cir. 1985), because "Stoess was housed in an Indiana county jail and not a state correctional facility[,]" and furthermore, two of the five requirements for considering an arrest warrant to be a detainer had not been satisfied. A request for reconsideration was denied October 8, 2007. Additional motions on the same argument were also denied.

Defense counsel filed two motions on September 11, 2009. To allow sufficient time for briefing, the motions were to be heard October 6, 2009, with trial scheduled for October 12, 2009. In the first motion, defense counsel moved to dismiss the indictment, or alternatively, to exclude enhanced penalties for a capital offense because counsel was not appointed until more than one year after the crimes had occurred and more than eight months after his indictment, thus denying Stoess the opportunity to work a single deal resolving all charges in both states. In the second motion, counsel sought to accomplish two tasks—exclude a report from Kentucky Correctional Psychiatric Center (KCPC) because it referenced competency and criminal responsibility—two items Stoess claimed he had not challenged[8]—and exclude testimony from Dr. Amy Trivette, who had evaluated Stoess at KCPC and opined he did not kill Shuttler while under EED. Dr. Trivette

[8] Citing *Bishop v. Caudill,* 118 S.W.3d 158, 162 (Ky. 2003); *Coffey v. Messer,* 945 S.W.2d 944, 945 (Ky. 1997); and *Stanford v. Commonwealth,* 793 S.W.2d 112, 115 (Ky. 1990), the Commonwealth argued Stoess raised the issue of criminal responsibility by claiming he acted under extreme emotional disturbance (EED).

believed Stoess had a sufficient "cooling off" period before the shooting, but did not identify a triggering event(s), which the defense pointed out is required by *Fields v. Commonwealth,* 44 S.W.3d 355 (Ky. 2001). The Commonwealth argued that while there was no independent evidence of a triggering event, if Stoess was permitted to offer testimony from Dr. Keith Caruso—his psychiatric expert—the Commonwealth was entitled to rebut that proof with testimony from Dr. Trivette. During an interview with Dr. Trivette, Stoess had outlined the events leading to Shuttler's death. Based on Stoess's own explanation of the shootings, Dr. Trivette concluded he did not act under EED.

Clearly, EED was going to be the centerpiece of the defense. However, the trial court ruled on September 24, 2009, before Dr. Caruso could testify Stoess killed as a result of EED, Stoess would have to personally testify—and subject himself to cross-examination—about his assertion of EED. In the same order, the trial court ruled testimony and evidence about Stoess's traveling to Indiana and shooting his wife after killing Shuttler was relevant and would be admitted, including the two taped confessions he gave Indiana police.

On October 5, 2009, defense counsel filed more motions seeking to allow: one or more members of Stoess's family to remain in the courtroom during trial (despite his mother, father and sister having been subpoenaed to testify by the Commonwealth); conduct individual *voir dire* of jurors on capital punishment, pretrial publicity and domestic violence; exclude the KCPC report due to a conflict of interest because Shuttler—as an employee of the Kentucky Department of

Corrections—had, at one point, been assigned to work at KCPC; and, exclude the thirty-year sentence imposed for Deena's attempted murder in Indiana.

The next items in the court record pertain to the guilty plea and include the Commonwealth's offer, Stoess's motion to enter the guilty plea, and the trial court's order accepting the guilty plea—all executed on October 6, 2009—a complete set of documents for the murder charge and another complete set for the first-degree burglary charge. The Commonwealth recommended twenty years on the first-degree burglary, to be served concurrently with a sentence of fifty years for the murder. The Commonwealth recommended the two Kentucky terms run concurrently with one another for a total of fifty years to serve, and concurrently with the Indiana sentence.[9]

With his legal defense team at his side, Stoess[10] asked the Oldham Circuit Court to accept his guilty pleas. The colloquy that followed was thorough—lasting nearly one hour. When the hearing started, the Commonwealth noted it had taken several days to negotiate the plea agreement, and while the victims were aware of its terms, they were not in full agreement. The Commonwealth further noted, as a violent offender, Stoess would serve the lesser of 85% or twenty years before meeting the parole board pursuant to KRS 439.3401(3).

[9] While the Commonwealth recommended the Kentucky and Indiana sentences be served concurrently, the Commonwealth repeatedly stated it could not guarantee Indiana would agree.

[10] When he pled guilty, Stoess was a forty-year-old father of four with a bachelor's degree who worked with computers at Bellarmine University. Stoess had served with Shuttler—also a father of four—in the United States Army during the first Gulf War.

The trial court questioned both counsel and Stoess during the colloquy. Defense counsel confirmed they had explained to Stoess the charges, the full range of penalties, the rights waived by pleading guilty, and all available and potential defenses including EED, and self-protection (based on statements Stoess had made to police shortly after the shootings); had retained Dr. Caruso to testify Stoess suffered from EED at the time of the shootings; and, had prepared for trial until the day of the guilty plea hearing. Counsel explained Stoess had been given an AXIS I diagnosis of severe depression and adjustment disorder; had been prescribed antidepressants and anxiolytic drugs to help him sleep; and, while not currently taking those drugs, they would have been an issue at trial. Defense counsel stated they did not believe Stoess was currently suffering from any mental illness, disease or defect impacting his ability to understand the ramifications of his guilty plea, and, in reliance on the Commonwealth's offer, Stoess wished to plead guilty.

When the trial court addressed Stoess directly, Stoess stated counsel had explained the charges, defenses and penalties to him "at length." When asked if he was satisfied he fully understood his legal situation, he responded, "Yes, your Honor," and confirmed it was his desire to plead guilty to both murder and first-degree burglary. He went on to testify he knew by pleading guilty he was waiving the right to a speedy and public jury trial, to confront and cross-examine witnesses, to remain silent, and to appeal. Stoess told the trial court he had not been threatened, coerced or forced to plead guilty and was entering a guilty plea because

he believed it to be in his best interests to do so. Stoess confirmed he had read all four forms pertaining to the guilty plea; understood and agreed to all the provisions contained therein; and, had no questions for either the trial court or his attorneys.

When the trial court asked Stoess if he was satisfied with the services and advice of counsel, he responded, "Yes, your Honor." When asked "Do you feel, and are you satisfied, that these attorneys have done everything for you that they could legally, morally, ethically do on your behalf," he responded, "Very much so, your Honor, I am." When asked whether he was "pleading guilty because you are guilty and for no other reason," he responded, "Your Honor, I'm guilty of the charges." The trial court stated it had always found Stoess to be "a very highly educated, articulate, intelligent person."

Thereafter, the trial court explored the factual basis for the guilty plea. Defense counsel explained Stoess had entered Shuttler's home without permission and remained, shooting his long-time friend and Army buddy twice, thereby causing his death. Afterwards, Stoess made statements to law enforcement in both Kentucky and in Indiana in which he admitted killing Shuttler. Stoess confirmed he agreed with counsel's statement of the facts. The Commonwealth added that Stoess had threatened Shuttler the morning of the shooting; Shuttler was aware of those threats; and in his taped statement to police, Stoess said he went to Shuttler's home intending to shoot him.

The Commonwealth asked the trial court to make additional inquiry of Stoess to ensure there were no unexplored defenses and no witnesses left to

question. Defense counsel responded every statutory defense and those allowed by case law had been explored. Stoess also confirmed there were no other defenses to explore. On the matter of witnesses, counsel said there were mitigation witnesses that had not been contacted because the guilty plea was occurring. Stoess agreed there were no witnesses to interview who would change the facts of the case.

The trial court then noted there were pending defense motions awaiting briefing—in particular, one seeking to exclude Dr. Amy Trivette's opinion of Stoess's mental state, and another seeking to eliminate an aggravating circumstance because a Kentucky attorney had not been appointed to represent Stoess immediately upon his arrest in Indiana. Due to entry of the guilty plea, the trial court stated consideration of these pending motions would cease, although if filed in the future, motions pertaining to sentencing would still be considered. Out of caution, the trial court identified the four motions that would not be resolved—a request to exclude the thirty-year Indiana sentence for the attempted murder of Deena; a request to exclude a KCPC report due to a conflict of interest; a request for individual *voir dire* on capital punishment, pretrial publicity and domestic violence; and, a motion pertaining to Stoess's family members being allowed to remain in the courtroom during trial. Stoess personally stated he understood the trial court would not rule on these motions due to entry of his guilty plea.

The trial court then asked counsel whether Stoess had seen all evidence and discovery. Defense counsel stated Stoess had either seen or received a description of all evidence provided by the Commonwealth and collected by the

defense team. When asked if he was aware of anything that had not been shared with him, Stoess mentioned his computers had been confiscated and he believed they contained mitigating evidence as well as items of sentimental value (family photos) he desired to have returned to him. The Commonwealth explained some of the computers had been returned to Bellarmine, where Stoess worked, and other items were in the custody of police in Floyd County, Indiana, as a result of charges in that jurisdiction.

Convinced Stoess's guilty plea was being entered knowingly, freely, intelligently and voluntarily, the trial court accepted the plea and set a sentencing date for November 12, 2009. At that hearing, Shuttler's father, mother and widow testified to the impact of his death on them and on Shuttler's four children. Thereafter, defense counsel requested minor corrections to the presentence investigation (PSI)[11] report as well as additions. Specifically, counsel asked that the "Mental Health" section reflect Stoess was prescribed antidepressants and anxiolytic drugs for about one year, starting May 9, 2006—the day of the shootings—and he was twice diagnosed with moderate or severe depression at the time of the shootings. Defense counsel also asked that under the "Comments and Recommendations" section, the opinion of the PSI's author about a specific aggravating circumstance be stricken because Stoess had not plead guilty to that. The Commonwealth objected to striking the statement because KRS 532.050 does

[11] The PSI has not been provided to this Court for review.

not prohibit the PSI author from forming an opinion, and further, the Commonwealth believed the aggravating circumstance was true.

Defense counsel then asked that several items be attached to the PSI including: Dr. Caruso's complete psychiatric evaluation of Stoess;[12] summaries from Stoess's close friends[13] which Dr. Caruso reviewed in developing his opinion; and, an affidavit from Boyce Carter highlighting good work Stoess had performed with inmates in the Oldham County Jail library. The Commonwealth objected to including Dr. Caruso's report because it told only one version of Stoess's mental state. The Commonwealth argued if Dr. Caruso's report was to be attached to the PSI, the Commonwealth's view should be attached, too, but he ultimately argued attaching the reports was not the appropriate way to present the information to the parole board. The Commonwealth objected to the inclusion of witness summaries because there had been no opportunity to challenge the comments of the witnesses and the information could be presented to the parole board at a later time. Defense counsel responded that since the "nature of the offense" can be included in the PSI, Stoess should be allowed to include information to counteract that provided by Probation and Parole to ensure the institution received a complete PSI. Thereafter, Stoess gave tearful testimony in which he stated, "James Delbert Shuttler was my friend, and I am responsible for his death." The trial court then entered judgment in conformity with the Commonwealth's recommendation and Stoess's acceptance

[12] Counsel noted Dr. Caruso would have testified Stoess was severely depressed at the time of the shooting if trial had gone forward.

[13] Indicating Stoess was remorseful after the shootings; lost 25-50 pounds; and, was extremely unkempt, withdrawn, and "out of it."

of the Commonwealth's offer. In a written order entered November 24, 2009, the trial court appended to the PSI Dr. Caruso's report, the witness summaries on which Dr. Caruso relied in developing his report, and a KCPC report requested by the Commonwealth. The Carter affidavit was not appended to the PSI.

On July 27, 2010, Stoess filed a *pro se* motion to vacate, set aside or correct sentence under RCr 11.42 in which he alleged his Kentucky attorneys were ineffective in five ways. He alleged counsel did not: object to KCPC serving as the Commonwealth's expert forensic witness; pressured him into pleading guilty rather than proceeding to trial on an EED defense; did not represent and advise him during critical stages of the Indiana case which caused him to plead guilty; allowed him to enter into a plea agreement under which the written opinion of Dr. Trivette was included in the PSI and would unfairly influence the parole board; and, did not seek to enjoin the trial court's ruling that IAD did not apply to his case. Included in the motion were requests for an evidentiary hearing and appointment of counsel.

The Oldham Circuit Court denied the motion without a hearing on June 8, 2011. On appeal to this Court, Stoess claims the trial court abused its discretion in finding he received effective assistance of counsel, denying his request for RCr 11.42 relief, and failing to hold an evidentiary hearing on the motion. We disagree and affirm.

ANALYSIS

Initially, we note Stoess is proceeding *pro se*. Therefore, he is not held to the same standard as an attorney. *Commonwealth v. Miller*, 416 S.W.2d

358, 360 (Ky. 1967). While we are willing to relax the rules of appellate procedure for *pro se* litigants, we are unwilling to totally disregard them.

The principal purpose of an appellate brief is to give opposing counsel and this Court notice of the claims alleged. *Lee v. Stamper,* 300 S.W.2d 251, 253 (Ky. 1957). The appellant is required to state: if, how and where the claims were preserved for appellate review; the facts necessary for resolution of the claims; and the legal authority enabling evaluation of the claims. CR[14] 76.12. Stoess's brief falls short of the mark in various ways—for example, there is no statement of preservation for any of the five arguments as required by CR 76.12(4)(c)(v). Furthermore, arguments pertaining to the PSI and the trial court's ruling on an IAD issue are identified only by severely truncated headings without any factual or legal support and no body of an argument. Because this approach contravenes CR 76.12(4)(c)(v), those issues will not be considered. This Court will not create arguments for Stoess and we will not practice the case for him. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). It is against this backdrop that we review the case.

To prove ineffective assistance of counsel, Stoess must establish two elements.

> He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the

[14] Kentucky Rules of Civil Procedure.

> process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Sparks* [*v. Commonwealth*, 721 S.W.2d 726, 727-28 (1986)]. *See also Meeks v. Bergen*, 749 F.2d 322 (6th Cir. 1984). In determining whether the degree of skill exercised by the attorney meets the proper standard of care, the attorney's performance is judged by the degree of its departure from the quality of conduct customarily provided by the legal profession. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Henderson v. Commonwealth*, Ky., 636 S.W.2d 648 (1982).

Centers v. Commonwealth, 799 S.W.2d 51, 55-56 (Ky. App. 1990). When an RCr 11.42 motion is denied without an evidentiary hearing, we confine our inquiry to whether the motion states grounds on its face "that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Sparks v. Commonwealth,* 721 S.W.2d 726, 727 (Ky. App. 1986) (internal citations omitted). No hearing is required when claims are refuted on the face of the record. *Id.*

On appeal, Stoess claims his defense team pressured him into pleading guilty before the trial court ruled on pending motions to exclude the KCPC report; exclude Dr. Trivette's report; and, preclude the Commonwealth from using his Indiana conviction for the attempted murder of his wife as an aggravating circumstance to make him death-eligible. Counsel filed motions raising all three issues in the trial court. During the guilty plea colloquy, the trial court specifically explored with Stoess the fact that his entry of a guilty plea would halt the trial court's consideration of those motions; Stoess said he understood.

Stoess characterizes his guilty plea as the result of pressure from his attorneys. However, during the plea colloquy he told a very different story—there, he maintained he was fully satisfied with his defense team and their advice; he was pleading guilty solely because he was guilty and believed a plea to be in his best interests; and, he had not been threatened, coerced or forced to plead guilty. We are hard-pressed to believe Stoess's current tale when he testified to the exact opposite and signed not one—but two—standard motions to enter guilty plea which read in pertinent part:

> 7. In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead "**GUILTY."**
>
> 8. Because I am **GUILTY**, and make no claim of innocence, I wish to plead **"GUILTY"** in reliance on the attached "Commonwealth's Offer on a Plea of Guilty."
>
> 9. I declare my plea of **"GUILTY"** is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.

Because counsel filed motions raising the very points Stoess says should have been raised, and continued working to perfect the EED defense until the morning the guilty plea was entered, we discern no flaw in counsel's representation. Stoess freely chose to enter a guilty plea, which was probably wise in light of his taped

confessions, the facts, and the Commonwealth's intention to seek the death penalty. Seeing no indication of attorney error, and certainly none convincing us Stoess would have insisted on going to trial, he has not satisfied the two-prong *Strickland* standard. Thus, the trial court properly denied the request for RCr 11.42 relief. Because the claims were resolved on the face of the record, no hearing was required.

Finally, discerning no error, we can ascertain no cumulative error. For the foregoing reasons, the Oldham Circuit Court's denial of RCr 11.42 relief is affirmed.

ALL CONCUR.

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