

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000859-MR

JAMES STELL

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 09-CR-00217

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: James Derring Stell appeals from an Order of the Montgomery Circuit Court denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief from Judgment. Stell contends that his trial counsel's failure to advise him of the extreme emotional disturbance defense constituted

ineffective assistance of counsel. We find no error, and affirm the Order on appeal.

On February 26, 2010, Stell entered a plea of guilty in Montgomery Circuit Court to one count each of murder, tampering with physical evidence and possession of a handgun by a convicted felon. The charges resulted from a police investigation which determined that Stell shot and killed his stepbrother, David Dotson Jr., during the course of an argument, then buried Dotson's body and disposed of the evidence of the crime. Stell was sentenced to 25 years in prison.

On March 28, 2013, Stell filed a *pro se* RCr 11.42 motion and supportive memorandum. He argued therein that his trial counsel rendered ineffective assistance by failing to pursue and present a defense of extreme emotional disturbance ("EED"). As a basis for his claim of entitlement to the EED defense, Stell maintained that he became enraged upon discovering that Dotson had stolen medications from Stell's dying father. Stell also argued that he suffered justifiable anger because he believed that Dotson had recently framed him for felony charges stemming from a vehicle collision. Finally, it was Stell's contention that when he confronted Dotson, Dotson became belligerent and aggressive, and attempted to punch Stell. Stell argued that these factors triggered "a temporary state of rage" which overcame his judgment and caused him to act uncontrollably rather than with intent or malice. Stell argued that he lacked the requisite intent to be convicted for murder under Kentucky Revised Statutes (KRS)

507.020, and that counsel's failure to assert the EED defense constituted ineffective assistance.

After considering the motion, the Montgomery Circuit Court rendered an Order on April 8, 2013, denying Stell's claim for relief. In support of the Order, the Court determined that Stell knowingly, intelligently and voluntarily entered a guilty plea which acknowledged that he had sufficient time to discuss the case with counsel, and that he was satisfied with counsel's representation. Additionally, the Court determined that Stell had not alleged or proven evidence of a deficient performance sufficient to support the relief sought. Finally, the Court determined that Stell's motion was justiciable by reference to the record and that it did not require a hearing. This appeal followed.

Stell now argues that the Montgomery Circuit Court erred in denying his motion for RCr 11.42 relief from judgment. His primary claim of error is that counsel rendered deficient performance when counsel failed to advise Stell of the EED defense, and that this failure substantially prejudiced the proceedings against him. Stell contends that his anger at Dotson for allegedly stealing medication from his dying father, along with his anger arising from Dotson allegedly framing Stell on unrelated charges and Dotson's aggressive physical response to Stell's claims produced such rage that the shooting was not intentional but rather the result of extreme anger. Stell contends that the EED defense was a viable and appropriate defense under the facts of the case, and met the standard set out in KRS 507.020(1)(a) and the supportive case law. In sum, Stell argues that counsel's

failure to employ the EED defense so prejudiced the proceedings against him as to result in a substantial injustice and wrongful conviction. He seeks an Opinion reversing the Order on appeal, and remanding the matter for an evidentiary hearing.

KRS 507.020(1)(a) states that,

A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; *except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.* However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime[.] [Emphasis added].

To establish EED, a defendant must show 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.” *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986). “[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted.” *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991).

The issue before us is not whether Stell was entitled to assert the EED defense had the matter proceeded to trial, nor whether the EED defense would

have been successful. Rather, the dispositive inquiry is whether trial counsel's failure or refusal to employ the defense constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant 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). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. [Internal citation omitted].

Strickland, 466 U.S. at 691-692, 104 S.Ct. at 2066-2067. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 2067. "The defendant must show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 2068.

Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

Similarly, the test for determining ineffective assistance of counsel on a guilty plea is whether

counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and ... 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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)).

In the matter at bar, the Montgomery Circuit Court determined that Stell failed to meet the two-prong *Strickland* test. We find no error in that conclusion. Counsel's performance is presumed to be effective, and the burden to overcome that presumption rests with the movant. *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005)(*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). In order to sustain his burden of proof, Stell was required to demonstrate not only that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth

Amendment, but that these errors were so serious as to affect the outcome of the proceeding. *Strickland, supra*. In overruling Stell's motion, the Montgomery Circuit Court implicitly found as unpersuasive Stell's contention that he became so enraged and inflamed with anger that he was not acting with evil intent or malice when he killed Dotson. *See McClellan, supra*. We have no basis for finding this conclusion to be erroneous. *Arguendo*, even if Stell's counsel improperly failed to assert the EED defense, the record fails to establish that the outcome of the proceeding would have been different but for the alleged failure. In order to have prevailed at trial on an EED defense, Stell would have to have proven an “adequate provocation,” *Keeling v. Commonwealth*, 381 S.W.3d 248, 265 (Ky. 2012), of 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 Montgomery Circuit Court determined that the alleged theft of medication, coupled with Dotson's alleged framing of Stell in an unrelated automobile accident, failed to meet that burden. As we find no error in this conclusion, it follows that counsel's failure to raise the EED defense did not run afoul of *Strickland*. Additionally, because the matter was justiciable by reference to the record, no hearing was required. *Stanford, supra*. The Montgomery Circuit Court properly so found.

For the foregoing reasons, we Affirm the Order of the Montgomery Circuit Court denying Stell's Motion for RCr 11.42 relief.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Meredith Krause
Assistant Public Advocate
Frankfort, Kentucky

Margaret A. Ivie
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky