RENDERED: DECEMBER 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013 CA-001509-MR

MACK M. TACKETT — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 11-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Mack Tackett appeals from the order of the Pike Circuit Court denying his motion to vacate, set aside, or correct his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After careful review, we

affirm in part, vacate in part, and remand for a ruling on Tackett's ineffective assistance of appellate counsel claim.

FACTS

In October 2009, Mack Tackett murdered his wife by shooting her in the neck when she threatened to leave him. He then turned the gun on himself, shooting himself in the face in a failed attempt at suicide. At trial, Tackett testified that he had been drinking and doing drugs all day and could not remember shooting his wife. However, Tackett repeatedly stated that "[he] could never shoot his wife." Other witnesses testified to having heard Tackett state that if his wife ever tried to leave him he would kill her. Police arrested Tackett on October 14, 2009, and after a trial by jury, Tackett was convicted and sentenced to twenty-two and a half years' imprisonment for the murder of his wife.

Tackett appealed his conviction as a matter of right to the Supreme Court of Kentucky. The Court upheld his conviction and sentence, holding that he was not entitled to jury instructions on second-degree manslaughter, reckless homicide, or self-defense.

On June 11, 2013, Tackett moved the trial court to vacate, set aside, or correct his sentence pursuant to RCr 11.42. In his motion, Tackett raised various claims relating to ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The trial court issued an order holding Tackett's *pro se* motion in abeyance and appointing counsel to represent him on his motion. Before appointed counsel could supplement Tackett's motion, the trial court entered an

order denying the motion, finding that the allegations set forth by Tackett were completely refuted by the record. Tackett then, through his appointed attorney, moved the court to reconsider pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, and for specific findings of fact pursuant to RCr 11.42(6) and CR 52.02. The trial court denied these motions, stating that the previous order denying Tackett's RCr 11.42 motion was based on sufficient findings of fact. It further noted that the claims of ineffective assistance of appellate counsel are left to the appellate court. Tackett now appeals the orders denying his motions.

STANDARD OF REVIEW

When reviewing an ineffective assistance of counsel claim, we are guided by the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The *Strickland* Court provided a two-part test for determining when errors made by trial counsel warrant relief. First, it must be determined that counsel's performance was deficient, and second, the deficient performance must have prejudiced the defendant. If the trial court found that it was unnecessary to hold an evidentiary hearing when it considered the RCr 11.42 motion, then appellate 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. Commonweatlh*, 411 S.W. 2d 321, 322 (Ky. 1967).

ANALYSIS

First, we address Tackett's claim that his counsel failed to investigate and present mitigating evidence at trial. Tackett alleges that, had counsel performed a proper investigation, he would have found out that Tackett had a head injury and received treatment at Charter Ridge Psychiatric Hospital. However, Tackett makes no claims on how this omitted information would have changed the outcome of his trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. The trial court held that Tackett's allegation that his trial counsel failed to adequately investigate and present mitigating evidence was refuted by evidence of record. We agree.

It is well-settled that counsel has a duty to investigate. "[I]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . ." *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 2466 (2005) (quoting the American Bar Association (ABA) Standards for Criminal Justice 4-4.1). Counsel's duty to investigate "exists regardless of the expressed desires of a client." *Dickerson v. Bagley*, 453 F.3d 690, 694 (6th Cir. 2006). Counsel has "an obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 452 (2009).

In this case, however, we need not discuss whether counsel failed to reasonably perform his duty to investigate because as *Strickland* directed, "if it is easier to dispose of . . . [a] claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466

U.S. at 697, 104 S.Ct. at 2069. "There is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry. . . . *Id*.

The determination of prejudice is accomplished by "examining whether there is a reasonable probability that a jury would have weighed the mitigating factors that should have been admitted and the aggravating factors differently had counsel performed adequately." *Hodge v. Commonwealth*, 68 S.W. 338, 345 (Ky. 2001) (citing *Skaggs v. Parker*, 235 F.3d 261, 274 (6th Cir. 2000)). The prejudice prong of the *Strickland* analysis is not satisfied where "one is left with pure speculation on whether the outcome of the penalty phase could have been any different." *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004).

Here, through Tackett's mother's testimony, counsel presented mitigating evidence regarding Tackett's troubles with drugs, light criminal history, normal childhood, excellent work history, and strong family support. From the evidence presented during mitigation, counsel attempted to show that there is a strong probability that Tackett could be rehabilitated and should thus receive a light sentence. Evidence of a head injury and therapy would have been incongruous with defense counsel's penalty phase strategy.

The jury, given the choice of sentencing Tackett to life in prison or a term of years, weighed the evidence and circumstances on which Tackett was convicted, against counsel's proffered mitigating evidence, and concluded that Tackett should be imprisoned for twenty-two and one-half years. The sentence

that Tackett received is very near the twenty-year minimum sentence permitted under the statute for the crime for which he was convicted. Because counsel is presumed to have rendered reasonable professional assistance, we are inclined to believe that the relatively light sentence Tackett received for the murder of his wife was because of his counsel's performance in mitigation and not in spite of it. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2065. Tackett offers no specifics on how presenting evidence of a head injury and treatment would have positively affected his sentence, and we will not speculate. Tackett failed to show any prejudice by the alleged failures of counsel, and therefore his claim is refuted by the record and no hearing was necessary.

Tackett's second claim is that the trial court erred in overruling his RCr 11.42 motion without holding an evidentiary hearing on his assertion that appellate counsel was ineffective for not briefing claims. He insists that because his counsel failed to provide any facts or legal analysis in its brief to the Kentucky Supreme Court, it amounts to the same as not pleading the issue. The trial court held that this claim of ineffective assistance of appellate counsel is a matter left to the appellate court.

The finding by the trial court is in opposition to the Kentucky Supreme Court's holding in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010). In *Hollon*, the Court held that ineffective assistance of appellate claims are the same as ineffective assistance of trial counsel claims in that they are both collateral attacks on the sentence. *Id.* at 437-39. "Courts . . . have construed

'collateral attack' broadly to include IAAC claims." *Id*. at 438. Thus, the claims may be appropriately handled at the trial court level because "there is no incongruity in having the trial court address IAAC claims." Because the trial court failed to rule on this issue, this court cannot review it, and we must remand to the trial court for a ruling.

For the foregoing reasons, the order of the Pike Circuit Court is affirmed in part, vacated in part, and remanded for a ruling on Tackett's ineffective assistance of appellate counsel claim.

ALL CONCUR.

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