

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001993-MR

SCOTT GERALD MALM

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 05-CR-00371

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT, AND MAZE, JUDGES.

COMBS, JUDGE: Without conducting an evidentiary hearing, the Fayette Circuit Court denied the Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct sentence filed by Scott Gerald Malm. Malm has appealed. After our review of the record, we affirm.

In January of 2005, Scott Malm shot and killed Alvis Thomas Agee in the course of a robbery. According to witness testimony, Malm organized a meeting among Agee, Archibaldo Salecedo-Diaz, and himself -- ostensibly for the purpose of purchasing half a kilogram of cocaine for \$13,000. Malm went to the meeting with no intentions of paying for the cocaine, informing several witnesses that he was going to rob Agee and that he possibly might have to kill him. When Malm arrived at the agreed upon meeting place, Agee walked to the driver's side of Malm's vehicle; Malm shot him in the face. Malm then turned the gun toward the vehicle that Agee had exited and shot Diaz in the thumb. Diaz testified that he feigned death so that Malm would not shoot him again. After the shooting, Malm went to his apartment where he and his roommates used some of the cocaine, bagged some of it for resale, and burned evidence of the shooting in the fireplace.

Meanwhile, from a hospital bed, Diaz identified Malm as the shooter from a photo line-up. After investigation, police were able to match the telephone number from the phone that Malm had been using to the last number that Agee called before he was murdered. Police later arrested Malm. A subsequent search of his residence produced 100 grams of cocaine, marijuana, and various other drug paraphernalia. Additionally, cocaine and blood were found in the vehicle that Malm was using at the time.

Malm was tried and convicted of murder, two counts of first-degree robbery, first-degree assault, first-degree trafficking in a controlled substance, and tampering with physical evidence. After the penalty phase of the trial in which the

death penalty was an option, the jury sentenced Malm to life without the possibility of parole for the murder and a total of seventy-five-years' imprisonment for the other convictions. On direct appeal, the Supreme Court of Kentucky affirmed his convictions but remanded the case to the trial court for resentencing in accordance with Kentucky Revised Statute[s] (KRS) 532.110(1)(c), which sets a seventy-year cap on consecutive sentences. Malm then filed a motion in the trial court to vacate his convictions and sentences pursuant to RCr 11.42 due to alleged ineffective assistance of counsel. Without appointing counsel or holding an evidentiary hearing, the trial court denied Malm's motion. Malm now seeks relief from this Court.

Because a hearing was not held on Malm's RCr 11.42 motion, we are limited on review to the question of "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. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court gave direction to a reviewing court in its analysis of a claim of ineffective assistance of counsel. Kentucky noted the binding authority of *Strickland* as follows: *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985), ("[t]his court is bound by the principles established by the Supreme Court of the United States in [*Strickland*] in the context of analyzing ineffective assistance of counsel claims under the Sixth and Fourteenth Amendments.")

In *Strickland*, the Supreme Court established a two-part test for determining when reversal is required due to counsel's ineffective performance at trial. First, a movant must show that counsel made errors that were objectively unreasonable under the circumstances as they existed at the time of trial while at the same time rebutting a strong presumption that counsel's actions were the result of trial strategy. Second, a movant must show that he was prejudiced to the extent that there was a reasonable probability of a different outcome. *Id.*, 466 U.S. at 687-694, 104 S.Ct at 2064-2069.

Malm claims that the trial court erred when it denied him an evidentiary hearing on his claim that trial counsel failed to adequately investigate his background and failed to present certain mitigating factors during the sentencing phase. He argues that the record does not refute his claim that for mitigation purposes, his trial counsel did not personally interview him or investigate his adoption records, medical records, or prison records. He also alleges that the record on its face does not refute his claim that the mitigation specialist utilized by his attorneys only visited him once and that, during that visit, only asked for the names and addresses of his parents and his sister.

Malm contends that his counsel's failure to investigate prejudiced him. He believes that there was a reasonable probability that the jury would have lowered his sentence if his attorneys had presented certain evidence that a proper investigation would have revealed. Specifically, Malm claims that counsel would have found out that as a child, he attempted to set the family home on fire with

lawnmower gasoline, that he received therapy because of the incident, and that he ran away from home at the age of thirteen, living on the streets of New York City until the age of majority. He is adamant that if the jury had had knowledge of these events, they would have sentenced him to a term of years rather than life without the possibility of parole.

The trial court found that Malm failed to demonstrate how the outcome of the proceedings would have been different in light of this putative evidence. After reviewing the record and the briefs of both parties, we agree with the trial court that the omission of this evidence did not render the result of the proceedings fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842 (1993).

When reviewing a claim of ineffective assistance of counsel, we must consider the following guideline: “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. We must assess whether the jury would have likely reached a different result if it had received the evidence that Malm claims that his counsel should have discovered.

A jury found Malm guilty of murder with the aggravating circumstance of a murder committed during the course of a robbery. In fixing his sentence, the jury had the option to sentence Malm to death. Consequently, during the penalty phase of the trial, defense attorneys bore the considerable burden of trying to save Malm’s life.

In order to prevent Malm's execution, the defense decided to paint a sympathetic picture of Malm by having his family testify regarding his troubled childhood. Through the testimony of Malm's adoptive parents and his biological sister, Malm's counsel presented evidence that Malm's biological parents were substance abusers who abandoned their children; that Malm was isolated and ridiculed because of his mixed race while growing up in an all-white Long Island neighborhood; that he dropped out of high school in the eleventh grade; that his adoptive father was a very strict disciplinarian; and that Malm had -- and continues to have -- an overall lack of self-confidence and low self-esteem due to events occurring during his formative years. The defense strategy of painting a sympathetic picture of Malm's family, social, and psychological background served to promote the concept that he was less culpable because his troubled childhood led him to a dangerous lifestyle and eventually to commit the crime for which he was convicted. This mitigation strategy was successful insofar as Malm's life was ultimately spared.

Malm believes that the jury may have reduced his sentence below life without the possibility of parole if it had heard evidence of his setting his house on fire and running away. However, Malm has failed to rise beyond mere speculation and to demonstrate that "absent counsel's errors, there exists a '*reasonable probability*' the jury would have reached a different [result]." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 (emphasis added).

The evidence that Malm proposes, while arguably enhancing the narrative of his troubled childhood, does not rise to the level of reducing his level of culpability in the murder. Malm makes no claims that his attorneys failed to uncover sexual or physical abuse, neglect, severe cognitive impairments, or any other evidence that would have had a substantial effect on how the jury perceived his culpability in light of his actions.

It is equally possible that the suggested evidence may have produced an unintended outcome had it been presented. Providing the jury with evidence that he set his home on fire when he was young could have opened the door for the prosecution to highlight additional aggravating behavior. Moreover, the claim that he ran away when he was thirteen until he reached the age of majority was potentially contradictory to some of the evidence that was presented in mitigation. In order to present the disputed evidence, some of the evidence that likely prevented Malm from being executed would have had to have been omitted. At best, the issue is subject to pure speculation, and we note that 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).

To reiterate, Malm was convicted of murder with the aggravating circumstance that the murder was committed during the course of a robbery. The sentencing choices before the jury were death, life without parole, or a fixed term of years. Defense attorneys presented the jury with evidence that depicted Malm

in a sympathetic light, thereby avoiding a sentence of death. And that was the very goal that defense counsel had set out to achieve.

Considering the whole of the mitigating evidence, along with the proffered evidence that Malm claims his counsel should have uncovered, we are not persuaded that his sentence would have been affected. Malm has failed to show that he was prejudiced by any alleged ineffectiveness by his attorneys. Thus, the trial court did not err in denying a hearing on this claim.

Malm next contends that the trial court erred in denying him an evidentiary hearing on his claim that his trial counsel failed to obtain a psychological expert. He argues that he showed signs of a psychological disorder and that his counsel should have been alerted as to the need to seek a mental evaluation. The signs of a psychological disorder on which he relies are: that he left the courtroom near the end of the trial and refused to return, that he made derogatory remarks to the judge during sentencing, and that he spat on the Assistant Commonwealth's Attorney during plea negotiations. (The Commonwealth's Attorney denies this allegation.)

In his brief to this Court, Malm states that his "refusal to stay in the courtroom *may* have been a symptom of mental illness." He further states that it is "*possible* that an expert would conclude that Malm could participate in his own defense." Malm then claims that a mental health expert *could* have assisted counsel in formulating a mitigation case -- *if* he had been diagnosed with a mental

illness. The trial court dismissed this claim without holding an evidentiary hearing, finding that Malm was on “a fishing expedition.” We agree.

In *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005), the appellant claimed that his attorney was ineffective for failing to hire a mental health expert to explore issues of possible extreme emotional distress, which he believed could have assisted him at trial. The Supreme Court of Kentucky held that “a claim that certain facts might be true, in essence an admission that the Appellant does not know whether the claim is true, cannot be the basis for RCr. 11.42 relief.” (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist to examine, treat, and report on the defendant’s mental condition whenever the court has a reasonable ground to believe that the defendant is incompetent to stand trial. The trial court found that while Malm’s behavior may have been ill-advised and rude, nothing in the record placed Malm’s competence in question. The record reflects that Malm’s behavior during trial, even while refusing to return to court, was consistent with an intelligent individual who was fully capable of understanding the charges against him and the circumstances of the case.

Malm’s claim that his counsel was ineffective for failing to explore *possible* mental health issues is speculative and does not warrant RCr. 11.42 relief. A hearing was unnecessary because the record refutes Malm’s claim.

We affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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