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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001249-MR

STEVEN BRAY

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 98-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: On November 8, 1982, a mobile home in Marshall County burned to the ground. Two bodies were found inside; Effie York and Audrey Bray. Both victims had received gunshot wounds to the head prior to this fire. The victims were the mother-in-law and wife, respectively, of the Appellant, Steven Bray. Bray disappeared shortly after the fire. In 1995, authorities located

Bray in Toronto, Canada, where he was living under a false name, and he was extradited to Kentucky for prosecution.

Thereafter, a Marshall County grand jury returned an indictment charging Bray with two counts of murder and one count of first-degree arson. Following a change of venue, trial was held in Calloway County. The jury at that trial convicted Bray on all counts and sentenced him to life imprisonment on each count. On appeal, the Kentucky Supreme Court reversed the convictions and remanded the matter for a new trial. *Bray v. Commonwealth*, 68 S.W.3d 375, 378 (Ky. 2002).

On remand, Bray was retried and again convicted of two counts of murder and one count of first-degree arson. The jury sentenced him to life imprisonment for each murder conviction and to forty years imprisonment for the arson conviction. The Kentucky Supreme Court affirmed the convictions on appeal. *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005), *overruled by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

On June 4, 2007, Bray filed a motion to vacate the convictions pursuant to RCr¹ 11.42. The trial court appointed counsel for Bray, but the motion languished on the docket for an extended period of time. Eventually, appointed counsel supplemented Bray's *pro se* motion. The trial court conducted an

¹ Kentucky Rules of Criminal Procedure.

evidentiary hearing on June 7, 2013. On June 14, 2013, the trial court entered an order denying the motion.

The trial court entered an order allowing Bray to proceed *in forma pauperis* and appointing counsel to represent him on appeal. However, the Department of Public Advocacy declined to represent him, stating that the appeal was not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967). KRS² 31.110(2)(c). This *pro se* appeal followed.

Bray raises a number of claims alleging ineffective assistance of counsel. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance.

² Kentucky Revised Statutes.

Id. at 690, 104 S. Ct. at 2066. When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. CR³ 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Although Bray divides his argument into twelve separate allegations of ineffective assistance of counsel, the substantive points fall into five general categories. He first argues that his trial counsel was ineffective in failing with regard to the testimony of Ernestine Goins, the sister of Audrey Bray. Goins testified regarding statements which Audrey made to her by telephone on the night of the murders. Bray contends that his trial counsel should have sought suppression of the statements as testimonial hearsay.

As the Commonwealth notes, Bray did not raise this particular issue in his motion before the trial court, and he is precluded from raising it for the first time on appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002). Furthermore, the record shows that Bray's trial counsel sought to have the testimony excluded prior to the second trial.⁴ Following that trial, the Kentucky Supreme Court held that the statements were admissible. *Bray*, 177 S.W.3d at 745-46. Finally, Bray does not identify any other grounds upon which his counsel

³ Kentucky Rules of Civil Procedure.

⁴ Record on Appeal (ROA) at 480-484.

should have sought suppression of the testimony. Therefore, we find no basis to support a finding that Bray's counsel was ineffective in these matters.

Second, Bray argues that his counsel was ineffective in failing to challenge the credibility of the Commonwealth's witnesses. RCr 11.42(2) requires that "[t]he motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." While Bray points to "inconsistencies" in certain witnesses' testimonies, he does not identify any specific actions which his trial counsel failed to take regarding any particular witnesses. In the absence of any underlying facts supporting these general allegations, we decline to address the matter further.

Third, Bray argues that his trial counsel failed to fully investigate facts and defenses which could have changed the outcome of his trial. Trial counsel must undertake reasonable investigation of facts and law which support the defense of his client. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003). "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Haight*, 41 S.W.3d at 442. The focus of the inquiry must be on whether trial counsel's decision not to pursue evidence or defenses was objectively reasonable under all the circumstances.

Wiggins, 539 U.S. at 523, 123 S. Ct. at 2535. Matters involving trial strategy, such as the decision to call a witness, generally will not be second-guessed by hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998).

Bray's conclusory allegations regarding his counsel's failure to investigate and prepare for trial are not sufficient to warrant further inquiry. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth, supra*. Bray's only specific allegation is that his counsel failed to obtain scientific testing of the bullets used to kill his wife and mother-in-law. But as the Commonwealth points out, trial counsel used the testing conducted by the State Police and the FBI to dispute any match between these bullets and those found in Bray's truck. Bray makes no showing that independent testing would have produced any additional favorable evidence. Consequently, Bray failed to establish either that a reasonable investigation would have produced additional exculpatory evidence or that he was prejudiced as a result of his trial counsel's actions.

Fourth, Bray states that the trial court failed to ensure that certain pre-trial and post-trial testimony by Detective Eugene Spillman was included in the record. However, he makes no allegation that the alleged omission of this testimony was caused by any action of his trial counsel. Furthermore, he does not make any specific allegation how this testimony affected his ability to present a

defense or influenced the outcome of the trial. In the absence of sufficient allegations, we decline to address the issue further.

And finally, Bray argues that his trial counsel failed to hold a competency evaluation after the trial court ordered one to be conducted. The record refutes this contention. Bray was evaluated by a psychologist and a psychiatrist, who both found him to be competent to stand trial. *Bray*, 177 S.W.3d at 749-51. Based on this evidence, the Kentucky Supreme Court found that any failure to conduct an additional evaluation was harmless error, concluding that “a reasonable trial judge would have no basis to doubt [Bray’s] competence.” *Id.* at 751.⁵ The trial court ordered an additional competency evaluation prior to Bray’s RCr 11.42 hearing. However, Bray refused to participate in that evaluation. Under these circumstances, we have no basis to conclude that trial counsel was ineffective in failing to seek an additional competency evaluation or that Bray was prejudiced as a result.

Accordingly, the order of the Marshall Circuit Court denying Bray’s RCr 11.42 motion is affirmed.

ALL CONCUR.

⁵ At the time of Bray’s second trial and appeal, Kentucky courts held that a competency hearing is constitutionally mandatory if the trial court knows facts that place the defendant’s competency in doubt, but the failure to conduct a hearing may be harmless error absent a showing of such facts. *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999). Subsequently, in *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), the Kentucky Supreme Court held that the competency hearing is a statutory right and not constitutional, and therefore can be waived when there is no substantial evidence of incompetency in the record. *Id.* at 348. The result in this case would be the same under either approach.

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