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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001948-MR

KATHY WILLIAMS APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 04-CR-00040

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Kathy Williams appeals from the Letcher Circuit Court order denying her motion to vacate, set aside, or correct her sentence made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, and from the order overruling her motion to reconsider pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. After careful review, we affirm.

RELEVANT FACTS AND PROCEDURAL HISTORY

In November 2003, the building where Kathy Williams lived burned down. Around the same time, Williams had been involved in an ongoing feud with the Adams family, which caused her to believe that the fire was intentionally set by someone in that family, specifically Toby Adams. In late November, Williams observed a truck pull into a saw mill next to the house where she had been staying since the fire. Believing the driver of the vehicle to be Toby Adams, Williams grabbed a gun belonging to the owner of the house and proceeded to the saw mill to confront Adams. When she arrived at the saw mill, she discovered that the occupant of the truck was a friend of the Adams family, Forrester Caudill. Williams and Caudill began to argue, resulting in Caudill being shot and killed by Williams. According to Williams's police statement and trial testimony, she shot Caudill because he lunged at her with a large knife; however, the evidence suggested that her version of the events was untrue.

On April 22, 2005, after a trial by jury, Williams was found guilty of murder and sentenced to life imprisonment. Thereafter, Williams appealed as a matter of right to the Supreme Court of Kentucky, who, on November 1, 2007, upheld her conviction. *Williams v. Commonwealth*, 2005-SC-000472-MR.

On May 27, 2008, Williams filed, *pro se*, a motion to vacate, set aside, or correct her sentence pursuant to RCr 11.42, raising numerous claims of ineffective assistance of trial counsel. On July 18, 2008, the trial court appointed counsel to represent Williams in the collateral attack proceeding. Appointed

counsel supplemented Williams's *pro se* motion on December 27, 2011, and an evidentiary hearing was held on October 12, 2012. On March 1, 2013, the trial court entered an order denying Williams's motion. The trial court found trial counsel provided reasonable effective assistance and further found Williams received a fair trial. Williams promptly filed a motion to reconsider pursuant to CR 59.05, which the trial court overruled on September 4, 2013. It is from these orders Williams appeals. Further facts will be developed as necessary.

ANALYSIS

On appeal, Williams contends the trial court improperly rejected her claims of ineffective assistance of counsel. The Commonwealth counters that Williams's RCr 11.42 motion was time-barred and lacks merit. A motion under RCr 11.42 must be filed within three years after the judgment becomes final, with two exceptions: "(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." RCr 11.42.

Williams's supplemental motion was filed more than three years after judgment became final in November 2007, and neither of the above exceptions to the statute of limitations is applicable. Thus, we may only consider those issues raised in the supplement insofar as they "relate back" to any of the claims in her original, timely, *pro se* motion. In *Roach v. Commonwealth*, 384 S.W.3d 131 (Ky.

2012), our Supreme Court explained the application of the "relation back" doctrine with respect to RCr 11.42 motions:

> "[R]elation back in the RCr 11.42 context should be limited to amended pleadings amplifying and clarifying the original claims, and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by shared facts such that the claim can genuinely be said to have arisen from the same 'conduct, transaction, or occurrence.' New claims based on facts of a different time or type will not meet that standard and so, generally, should not be allowed." *Id*. at 137.

Williams raises to this Court, three claims of error due to ineffective assistance of trial counsel, to wit: (1) failure to present mitigating evidence during the sentencing phase; (2) failure to adequately present the defense of extreme emotional disturbance, and (3) failure to object to improper comments made by the Commonwealth during closing arguments. We address each of these claims to assess whether the claim relates back to Williams's original timely claims.

Upon review, we cannot say Williams's first claim—counsel's failure to present mitigating evidence during sentencing phase--attempts to clarify or amplify any of her original claims. Additionally, because all of Williams's original claims refer to conduct occurring during the guilt phase of trial, it cannot genuinely be said that this new claim arose from the same conduct, transaction, or occurrence. The facts needed to support this new contention differ in both time and type from those needed to support the claims in her original pleading. Accordingly, we hold that Williams's first claim does not relate back to her original timely motion. Therefore, the trial court was without jurisdiction to

adjudicate this issue. *See Bush v. Commonwealth*, 236 S.W.3d 621 (Ky. App. 2007) (concluding that the trial court did not have jurisdiction to adjudicate defendant's motion for postconviction relief, where defendant failed to file motion within three-year statute of limitations, and failed to meet elements required to toll the statute). As the trial court was without jurisdiction to adjudicate this issue, we have no jurisdiction to review this issue on appeal.

With regard to Williams's second and third claim, we believe both can be properly construed as clarifications of at least one of Williams's original claims. Williams's second claim—counsel's failure to adequately present an EED defense--merely clarifies her original contention that counsel was ineffective for failing to present mitigating evidence to support a lesser offense. A jury finding that Williams suffered from EED would have resulted in her murder charge being reduced to the lesser-included charge of first-degree manslaughter. Thus, the supplemental motion merely made Williams's general contention more specific. In the same vein, Williams's third claim—counsel's failure to object to improper comments made by the Commonwealth during closing argument—clarifies her original argument regarding counsel's failure to object to prosecutorial misconduct. Because both issues relate back to the original timely motion, the trial court properly adjudicated these issues and we may properly consider these issues on appeal.

Turning now to the merits of Williams's two surviving claims, we recognize that our standard of review on claims of ineffective assistance of counsel

is two-fold. In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984); *Harper v. Commonwealth*, 978 S.W.2d 311, 314-15 (Ky. 1998).

Williams first claims her trial counsel was ineffective for failing to present evidence supporting a defense of extreme emotional distress. According to a pretrial report compiled by the Kentucky Correctional Psychiatric Center (KCPC), Williams had a history of mental illness, including bipolar disorder and depression. Additionally, close to the time of the murder, Williams experienced a series of adverse circumstances. First, seven weeks prior to the murder, she lost her son in a motor vehicle accident. Then, a few weeks later, her house and all her belongings burned to the ground. Based on Williams's self-reported mental history and her then present circumstances, Commonwealth witness Dr. Simon, a doctor at KCPC, noted in his report that he believed "a case could be made for a defense which includes EED."

Defense counsel, on cross examination of Dr. Simon, elicited the following testimony at trial:

> Trial Counsel: Now, as part of that [patient] history, she told you that, that her son, she had a son killed in a motor vehicle accident not too long before that, is that right?
>
> Dr. Simon: I believe two or three weeks before, yes.

> Trial Counsel: And she also reported to you in the history that where she was living burned down and she lost all of her possessions, is that right?
>
> Dr. Simon: That's correct.
>
> Trial Counsel: And that's a fact, one of the facts that would cause . . .
>
> Dr. Simon: Both of those facts were included in what I just said—the information, that, if true, and I had no reason not to believe it, would contribute to an EED type defense.

Williams argues that, while trial counsel presented enough evidence to obtain a jury instruction on EED, he failed to go "in-depth" and failed to "develop" the defense. The trial court found Williams's argument failed to meet the legal requirements for a finding of ineffective assistance of trial counsel.

We agree with the trial court because trial counsel's actions were the result of a valid strategic decision made after thorough investigation. Trial counsel testified at the RCr 11.42 hearing that he reviewed the KCPC report; spoke with Dr. Simon; consulted the Diagnostic and Statistical Manual of Mental Disorders; and conferred with an in-house consultant who had a master's degree in psychology. He testified that based on his investigation and his trial experience, he decided to focus more on the self-preservation defense because Williams's mental illness was self-reported, it would have been hard to convince a jury that she was mentally ill, and she told the police that she shot Caudill in self-defense. As explained in *Strickland*, *supra*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at

690. Accordingly, we hold trial counsel's choice to focus more on the defense of self-preservation and less on the defense of EED was reasonable and we will not second-guess reasonable strategic decisions on appeal. *See Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998) (explaining counsel's strategic trial decisions will generally not be second-guessed by hindsight).

Williams next argues trial counsel was ineffective for failing to object to improper comments made by the prosecutor during closing argument. During cross-examination of Williams, the Commonwealth asked her about certain testimony she had given on direct-examination regarding an incident that occurred prior to the shooting:

> Commonwealth: Yesterday, when you started testifying, Mr. Reynolds asked you about Leslie [sic] Gibson and what she had testified to, and I believe your answer about putting a gun to this young boy's head, Dustin Adams, was you said you weren't denying it, you just couldn't remember it. Is that correct?
>
> Williams: I didn't do it.
>
> Commonwealth: Well that's not what you said yesterday.
>
> Williams: Well . . .
>
> Commonwealth: Have you changed since yesterday?
>
> Williams: No, no.
>
> Commonwealth: The jury heard you. I'm sure you said, "I'm not saying I didn't do it. I was on PCP. I don't remember it." Is that what your answer is?
>
> Williams: No sir.

Defense counsel objected on the basis that the Commonwealth was misstating Williams's prior testimony, that she did not say anything about PCP. Despite uncertainty regarding what Williams said during her testimony, the trial court overruled the objection and the Commonwealth proceeded. However, no further mention of PCP was made by the Commonwealth until closing arguments.

During closing argument--again alluding to the evidence that Williams held a gun to Dustin Adams's head--the Commonwealth stated, "She [Williams] testified yesterday, if you remember. You can look at your notes – I know a lot of you took notes - 'I'm not saying I didn't point that pistol at his head. I'd taken so much PCP I don't remember.'" At this point, possibly believing any objection would be futile, defense counsel chose not to object to the remark. Williams claims counsel's failure to object is reversible error because the jury likely convicted her believing she was a "drug using woman."

Williams first broached the subject of the improper PCP remarks on direct appeal where she argued that the Commonwealth's misrepresentations and improper questioning denied her a fair trial. On direct appeal, Williams asked our Supreme Court to review the statement made in the Commonwealth's closing argument for palpable error. The Court reviewed both the statement made during cross-examination and the remark made in closing argument and found that both statements amounted to prosecutorial minconduct. However, the Court held that due to the overwhelming evidence against Williams any error was harmless.

On appeal to this Court, Williams presents her argument as a claim of ineffective assistance of counsel. She alleges that counsel was ineffective for failing to object to the PCP remark in closing argument and that the trial court improperly held that she was precluded from bringing the argument because it was raised and rejected on direct appeal.

On review, we are bound by the prior decision of the Supreme Court. *See Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). Therefore, applying the *Strickland* standard, Williams's claim of ineffective assistance of counsel fails because the Supreme Court previously held that she was not prejudiced by the prosecutor's remarks.

CONCLUSION

The trial court did not err in finding that Williams failed to establish that she received ineffective assistance of counsel. Therefore, the orders of the Letcher County Circuit Court are affirmed.

ALL CONCUR.

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