RENDERED: NOVEMBER 20, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000460-MR

DEREK KEELING — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Derek Keeling appeals an order of the Graves Circuit Court denying a motion to vacate his criminal conviction under RCr[1] 11.42. Keeling alleges a juror failed to disclose during *voir dire* he would not find Keeling not guilty by reason of insanity (NGBRI) under any circumstances. Keeling also claims his right to due process was violated when jurors failed to heed the trial

[1] Kentucky Rules of Criminal Procedure.

court's admonition and considered punishment during the guilt phase of trial. Finally, Keeling claims he was wrongly denied an evidentiary hearing at which he could substantiate his claims. Discerning no error, we affirm.

Keeling has suffered from schizophrenia for years. In May 2004, he stabbed and injured William Morefield with a knife; two days later, he stabbed and killed his own father. Keeling confessed to both stabbings, making the real question at trial the level of his culpability for those actions. From the beginning of trial, defense counsel acknowledged this case was "not a whodunit."

Keeling was subsequently arrested and thereafter began a cycle of being charged, determined to be incompetent, committed under KRS[2] Chapter 202A, discharged, and re-indicted. The cycle lasted until June 2008, when he was ultimately declared competent to stand trial, was tried, and convicted in May 2010. Jurors found him guilty but mentally ill (GBMI) of both murder[3] and assault in the first degree.[4] He was sentenced to life imprisonment for the murder and twenty years for the assault. The Supreme Court of Kentucky affirmed the conviction and sentence on direct appeal in *Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012).

With the help of counsel, Keeling filed an RCr 11.42 motion attacking the constitutionality of the GBMI instruction given to jurors, seeking another trial

[2] Kentucky Revised Statutes.

[3] KRS 507.020, a capital offense.

[4] KRS 508.010, a Class B felony.

because Daniel Flynn had allegedly withheld information during *voir dire,* and arguing jurors had disregarded both their oath and a trial court admonition given during the Commonwealth's summation to not consider punishment during the guilt phase. Keeling submitted recordings of conversations with jurors in support of his claim. After reviewing the recordings, the trial court denied the motion without a hearing. This appeal followed.

ANALYSIS

RCr 11.42 is most often used by prisoners alleging ineffective assistance of counsel. Not so in this case. Here, Keeling attacks the constitutionality of the GBMI instruction given at trial—an issue already considered and rejected on direct appeal, *Keeling,* 381 S.W.3d at 259-60, and therefore, one that will not be relitigated in this Court. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky. 1998), *as modified on denial of reh'g* (Oct. 15, 1998), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Regarding other issues raised on appeal, we review a trial court's denial of a motion to vacate for abuse of discretion. *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

Keeling first argues Flynn failed to disclose during *voir dire* that no evidence could lead him to reach a verdict of NGBRI. During *voir dire,* defense

counsel asked several questions to which no one on the venire responded. One of those questions was whether all could consider insanity as a defense. A few minutes later, no one disagreed with his statement that all would consider the defense of insanity if instructed to do so. Thus, from all appearances, if seated on the jury, Flynn would consider the defense of insanity.

Keeling's claim that Flynn did not is based on a response Flynn gave during a post-conviction interview with a defense attorney and an investigator. Never during the recording did the attorney specify he was interested only in events or thought processes that occurred *during the guilt phase of trial*, which may have caused Flynn to speak in terms of the trial as a whole, rather than to focus on a single phase of trial. During the interview, Flynn speaks about specific testimony given by witnesses as well as the arguments of counsel. The conversation on which Keeling relies, unfolded as follows:

> Attorney: Let me ask you this. Now, the prosecution in their closing, they talked about how, if you wanted to make sure Mr. Keeling wasn't walking the streets, you needed to find him guilty but mentally ill.
>
> Flynn: No, I don't remember them actually saying it that way. It was one of our options.
>
> Attorney: OK.
>
> Flynn: It came in the judge's instructions.
>
> Attorney: OK.

Flynn: They wanted him – they wanted – the prosecution's main contention was he needed to be off the street.

Attorney: OK. And that – with the prosecutor saying that, did it make you more comfortable deciding that way?

Flynn: No, with all the testimony, I just figured this boy – he shouldn't be anywhere. I mean, when they asked his mother at the end of the trial if he got out, you know, with medication and all that, could she take care of him? "No." I felt sorry for her; the grandmother the same way. She mentioned that he killed her animals, he was abusive, he was (unintelligible). She didn't – she didn't want him anywhere around either.

Attorney: Was there any evidence that could have been offered to you that would have led you to find him not guilty by reason of insanity?

Flynn: I don't think so – I think the thing – insanity kinda means that you don't know what you're doing. But on the way out, when [Keeling] left the scene of the crime and walked away, he went down the street, he took the knife, he stuck it in the ground and stomped it in with his foot.

Attorney: OK.

Flynn: They found it later. I think that was, I think he may have confessed to that.

Attorney: OK.

Flynn: But, I figured at that, ya know, if he was trying to hide the fact that he'd done something, I figured he knew the difference between right and wrong.

Attorney: OK.

Flynn: Mentally ill, I think, means that he wouldn't have cared, he'd have still been there when the cops showed up.

Keeling reads the above exchange to say Flynn was never going to consider a NGBRI verdict under any circumstances, and had Flynn's view been known before the jury was seated, Flynn would have been struck for cause. We see the exchange differently. Had evidence supported a NGBRI verdict, Flynn would have considered it, but that was not the way the proof developed.

Under RCr 10.04, "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." This rule has not been interpreted as "the clear-cut exclusionary rule that its text appears to suggest," allowing the rule to "give way to various constitutional requirements, such as due process." *Taylor v. Commonwealth*, 175 S.W.3d 68, 74 (Ky. 2005). Our Supreme Court has declared a defendant may offer competent evidence to prove "a juror did not truthfully answer on *voir dire*[,]" but not by offering testimony from "another juror as to anything that occurred in the jury room." *Hicks v. Commonwealth*, 670 S.W.2d 837, 839 (Ky. 1984).

> Essentially, there are three elements a defendant must show to deserve a new trial because of juror mendacity during *voir dire*. First, a material question must have been asked. Second, the juror must have answered the question dishonestly. And finally, the truthful answer to the material question would have subjected the juror to being stricken for cause.

Taylor, 175 S.W.3d at 74-75.

In denying Keeling's motion to vacate, the trial court stated it had reviewed the post-trial jury interviews. The trial court found the jurors had considered the evidence before reaching their verdict, and based their vote on the testimony heard at trial. For Flynn, the most compelling evidence came from a mental health professional called by the defense who characterized Keeling's journey since the stabbings as a "revolving door"—a fact Flynn candidly stated he did not like.

We agree with the trial court's assessment. We do not believe Flynn lied on *voir dire.* During the interview, Flynn indicated he considered the insanity defense, but rejected it in light of Keeling's attempt to destroy evidence by stomping the knife into the ground, believing this act showed Keeling "knew right from wrong." The trial court found these statements demonstrated Flynn based his decision on the testimony presented. Thus, Keeling failed to establish Flynn was dishonest during *voir dire*—one of three required showings under *Taylor.* Therefore, the trial court did not abuse its discretion and reversal is unnecessary under *Teague.*

Keeling next argues jurors ignored their oath and a trial court admonition during the Commonwealth's guilt phase summation and considered punishment during the guilt phase of trial. He bases this claim on post-trial interviews with Flynn and a second juror, Michael Freeman, in which both agreed getting help for Keeling and keeping him off the street were considered by jurors. In denying the

motion to vacate, the trial court found, "[t]his is exactly what RCr 10.04 is designed to prohibit."

We agree. This was a tragic case and Keeling's attempt to use post-conviction juror interviews to uncover inconsistencies in deliberations during the guilt phase of trial must be rejected. *Gall v. Commonwealth,* 702 S.W.2d 37, 44; (Ky. 1985) (argument that jurors did not consider mental illness during penalty phase was meritless where based on incompetent juror testimony); *Ne Camp v. Commonwealth,* 311 Ky. 676, 225 S.W.2d 109 (Ky. 1949) (juror affidavits may not be used to impeach verdict). Therefore, the trial court correctly denied the motion to vacate.

Finally, Keeling argues he was entitled to an evidentiary hearing under *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (internal citations omitted). However, a hearing is required only "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Id.* All of Keeling's claims were refuted by the record eliminating the need for a hearing.

Based on the foregoing, and discerning no abuse of discretion, the decision of the Graves Circuit Court is affirmed.

ALL CONCUR.

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