RENDERED: SEPTEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001810-MR

RONALD COPLEY — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD JR., JUDGE
ACTION NO. 07-CR-00121

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: Ronald Copley appeals the order of the Russell Circuit Court which denied his motion for relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After our review of the record and the law, we vacate and remand.

It is undisputed that in 2007, Copley's wife Pamela was involved in extramarital affairs. She openly flaunted the affairs to Copley; *e.g.*, planting used condoms next to his truck, receiving numerous landline phone calls from her paramours, and staying out late most nights. Copley fell into a deep depression. On November 3, 2007, he was hospitalized following a suicide attempt.

Copley claims that four days after the suicide attempt, he and Pamela engaged in a verbal altercation which became physical. She struck him in the head with an object. It is disputed whether it was a telephone or a gun. What is undisputed is that Copley chased Pamela with a gun and shot her. Pamela died of her wounds.

Copley then stabbed himself multiple times in the stomach, once again attempting suicide. He was taken to the hospital where a scan of his brain revealed a large hematoma on his scalp. Copley was released from the hospital on November 14, 2007. He was charged with murder, wanton endangerment, and burglary.

On April 9, 2008, Copley filed a motion to suppress evidence which had been found in his residence. The trial court denied the motion on September 10, 2008. Copley appealed the order to the Court of Appeals. The record reflects that proceedings in the trial court – including discovery – were suspended until this Court dismissed the appeal as being interlocutory on January 8, 2010.

In September, 2010 – nearly three years after Pamela's death – Copley's counsel hired Dr. Hartwell Smith to conduct a mental examination of Copley. Dr.

Smith concluded that because of the passage of so much time, he would not be comfortable testifying that Copley had acted under extreme emotional disturbance when he shot Pamela.

On November 16, 2010, Copley entered a guilty plea to murder in exchange for dismissal of the other charges and a sentence of twenty-years' incarceration. The Supreme Court of Kentucky upheld the conviction on March 22, 2012. *Copley v. Commonwealth*, 361 S.W.3d 902 (Ky. 2012).

On November 25, 2013, Copley filed a motion to vacate his sentence pursuant to RCr 11.42, alleging that he had received ineffective assistance of counsel. The trial court held an evidentiary hearing on September 5, 2014, and entered an order denying Copley's motion on September 29, 2014. This appeal followed.

RCr 11.42 is a vehicle by which a convicted defendant may challenge his conviction and sentence on collateral grounds. RCr 11.42(1). In order to prove that he received ineffective assistance of counsel, a convicted defendant "must show that counsel's performance was deficient" and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice must be proven by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.C. at 2068.

In the context of guilty pleas, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed. 203 (1985).

In order to prevail on an RCr 11.42 motion, the appellant must overcome a presumption that counsel's representation was effective. *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008). Our review must be deferential, and we must examine allegations of error within the context of totality of the evidence. *Id*. Trial strategy which is reasonable according to "prevailing professional norms" is not deemed to be ineffective. *Brown v. Commonwealth*, 253 S.W.3d 490, 498-99 (Ky. 2008).

Copley argues that his counsel was ineffective by failing to fully advise him regarding a defense of extreme emotional disturbance (EED). Kentucky Revised Statute[s] (KRS) 507.020(1)(a) provides that "a person shall not be guilty [of murder] if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. . . ." It also provides that a person found to be acting under EED may be prosecuted for manslaughter.

There is a considerable difference in the penalties for murder and manslaughter. Murder is a capital offense. KRS 507.020(2). If convicted of murder, Copley faced a variety of possible sentences: life imprisonment or a range of twenty to fifty years of incarceration. KRS 532.030(1). Also possible were the

sentences of death, life imprisonment without parole, and life imprisonment without parole for twenty-five years, which may only be imposed if the Commonwealth has provided *notice* that certain aggravators are present; *e.g.,* murder of multiple victims, murder for financial gain, murder by a defendant with previous capital crimes, murder of a law-enforcement officer, or murder with a weapon of mass destruction. Manslaughter, on the other hand, is a class B felony. KRS 507.030(2). It carries a penalty of imprisonment for a range of ten to twenty years. KRS 532.020(1)(c). Thus, Copley theoretically might have received a sentence of as little as ten-years' incarceration. KRS 532.030(3).

Our Supreme Court has defined EED as follows: "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986). EED is a viable defense only when a defendant can identify "adequate provocation"; *i.e.*, a "triggering event." *Fields v. Commonwealth*, 44 S.W.3d 355, 359 (Ky. 2001). The triggering event and the act of homicide do not have to be contemporaneous; the catalyst event may fester in the mind before erupting. *Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky. 1999). However, it must be uninterrupted in order to qualify as EED. *Id*. The EED may also result from the "impact of a series of related events." *Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (Ky. 2008) (*citing* Lawson and W. Fortune, *Kentucky Criminal Law* § 8-3(b)(3), at 342). Whether a

defendant acted under EED is a question of fact which may only be determined by a jury. *McClellan, supra*.

In this case, Copley claims that he was entitled to an EED defense. However, he contends that his trial counsel did not adequately advise him of the defense. Therefore, believing that he did not have any defense, Copley entered a guilty plea. Copley testified that if he had known that the EED defense was available, he would have elected to proceed to trial instead of entering a guilty plea.

At the evidentiary hearing, trial counsel testified that he had considered the possibility of an EED defense. But he said that he did not think it was viable because of a letter[1] that the Commonwealth would introduce. Counsel also relied heavily on Dr. Smith's reluctance to testify regarding whether Copley had acted under EED. He also said that he had had "general discussions" with Copley regarding EED. Counsel did not remember Copley's attempting suicide after he shot Pamela. He asserted that Copley asked him to negotiate a plea bargain in order to avoid subjecting his family to the ordeal of a trial.

Copley testified that counsel did not explain the viability of an EED defense to him. He did not think that he needed to inform counsel about the second suicide attempt because counsel should have known that fact from his medical records. Copley alleged that he did not know the purpose for his visit with Dr. Smith.

[1] A letter was referred to several times during the hearing, but the record does not reveal its contents.

Finally, he said that he entered the guilty plea because counsel led him to believe that *no defenses* were available to him.

We are persuaded that Copley received ineffective assistance. As noted above, the existence of EED is a question to be answered by a jury. From his testimony, it appears that counsel assumed the role of the jury. Counsel testified that after the Commonwealth mentioned its conflicting evidence and after receiving Dr. Smith's letter, he abandoned the possibility of an EED defense.

We note in particular the contradictory interpretation with regard to Dr. Smith's letter. Trial counsel - and now the Commonwealth – have characterized Dr. Smith's statement as a refusal to testify resulting from his review of the evidence and his examination of Copley. On the contrary, however, our review of the letter indicated that Dr. Smith believed that Copley was indeed suffering significant psychological disturbance at the time of the shooting. But he felt that he was precluded from delivering his opinion professionally because his examination was too far removed in time from the actual events. Dr. Smith did not believe that information that was nearly three years old was professionally acceptable to meet the level of certainty required from a legal expert witness.

Significantly, the delay between the events and the psychological evaluation was the direct result of counsel's actions in creating the temporal hiatus by ceasing all activity on the case while he waited for resolution of an interlocutory appeal from a motion to suppress evidence. And the appeal itself was unorthodox and meritless.

Kentucky Rule[s] of Civil Procedure (CR) 54.01 provides that an appealable judgment is one that adjudicates "all the rights of all the parties in an action or proceeding, ***or*** a judgment made final under Rule 54.02." (Emphasis added). CR 54.02 sets forth that:

> [w]hen more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final.

Otherwise, the appeal is interlocutory, and we do not have jurisdiction to consider it. *Wilson v. Russell*, 162 S.W.3d 911, 913-14 (Ky. 2005).

In this case, a motion to suppress is not the proper subject of an appeal, and it does not qualify as appealable under any of the exceptions that would allow for an appeal from an interlocutory order. The court's addition of "final and appealable language" to its order was irrelevant. There were no appealable issues at that time.

Nonetheless, trial counsel commenced an appeal on November 14, 2008. It appears from the record that all discovery and motion practice ceased while the appeal was at the Court of Appeals for sixteen months. The Court of Appeals entered its order dismissing the appeal on January 8, 2010. That order recites that counsel had created unnecessary and inappropriate delay at the Court of Appeals:

> This Court entered an order on March 3, 2009, giving appellant 20 days to show cause why this appeal should

> not be dismissed as having been prematurely filed. Appellant, represented by Jeffrey H. Hoover, did not file a response to this order. Therefore, this Court entered an order on June 5, 2009, directing Mr. Hoover to show cause why sanctions up to the amount of $500.00 should not be imposed for the failure to respond to this Court's March 3, 2009, order. Mr. Hoover filed a response to this Court's June 5, 2009, order. In his response Mr. Hoover acknowledges that this appeal was prematurely filed.

Following this Court's decision in January of 2010, trial counsel waited until September 2010 – some nine months later – to send Copley and his records for evaluation by Dr. Smith. By that time, the information had become stale; the shooting had happened nearly three years earlier, and it was impossible for Dr. Smith to conduct a meaningful analysis that could be used in court. Dr. Smith's letter clarified the reason for his reluctance to testify on the basis of the delay.

Finally, our Court has held that "in order to be valid, a guilty plea in a criminal case must represent a ***meaningful choice*** between the probable outcome at trial and the more certain outcome offered by the plea agreement." *Vaughn v. Commonwealth*, 258 S.W.3d 435, 439 (Ky. App. 2008). (Emphasis added).

We are not persuaded that Copley was given adequate information to make a meaningful choice between pleading guilty or going to trial. Trial counsel testified that he had engaged Copley only in general discussions regarding EED. Copley is a layperson who has an eighth grade education. Copley should have been adequately informed of the application of EED to the facts of his case in a manner commensurate with his ability to comprehend. Testimony indicated that counsel

and Copley had discussed the probable result of presenting an EED defense to a jury. We are not persuaded that Copley was given enough information to decide whether he wanted to take his chances at trial.

It is reasonably foreseeable that an EED defense might have persuaded a jury that Copley was not guilty of murder. Testimony revealed that Copley had endured months of his wife's infidelity and taunting. Witnesses confirmed that he had not been himself, including not eating or sleeping and displaying lethargy. Hospital records substantiated his two suicide attempts. Both times, the records indicated that Copley was deeply depressed. After his second suicide attempt, doctors released him to a psychiatric facility. Hospital records also confirmed that Copley received a blow to the head at the time of the shooting. While the Commonwealth possessed contradictory evidence, it is the province of the jury to weigh the evidence. We hold that Copley should have been given information regarding the implications of all the evidence pertaining to an EED defense in order to make a meaningful, reasoned, and informed choice concerning whether or not to enter a guilty plea.

In summary, we conclude that Copley's counsel provided ineffective representation by causing a delay in proceedings, which in turn allowed evidence to become stale; pre-empting the role of the jury by abandoning a defense merely because of contradictory evidence; and failing to provide Copley with adequate information to support a meaningful choice regarding the consequences of presenting an EED defense.

Therefore, the trial court erred in denying Copley's motion for relief. Accordingly, we vacate the order of the Russell Circuit Court and remand this matter for a new trial.

J. LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS BY SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. Our standard of review of the trial court's determinations of law are made under the *de novo* standard of review. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). However, when a trial court conducts a RCr 11.42 hearing, we will only set aside the trial court's factual determinations if they are found to be clearly erroneous, meaning the findings are not supported by substantial evidence. *Id*. (citing CR 52.01). Furthermore, we will defer to the trial court's determinations in regards to the facts and witness credibility. *See Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

In *Park v. Commonwealth*, 413 S.W.3d 638, 643 (Ky. App. 2012), we stated:

> The test for determining ineffective assistance of counsel on a guilty plea is whether
>
> > counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and ... that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that

> the defendant would not have pleaded guilty, but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727–28 (Ky. App.1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)).

In this case, the trial court conducted a hearing and made extensive findings concerning the availability of extreme emotional disturbance (EED) defense and trial counsel's discussion with Copley. Ultimately, Copley made a decision to negotiate a plea bargain instead of proceeding to trial to spare his family the ordeal of a trial. Trial counsel negotiated a twenty-year sentence for the murder charge, the minimum sentence for a capital offense, and obtained dismissal of two felony offenses. In my view, Copley, with advice of counsel, made a strategic decision not to go to trial, and had counsel obtain the best deal possible under the circumstances.

I would affirm the Russell Circuit Court's order denying RCr 11.42 relief.

BRIEF FOR APPELLANT:

Krista A. Dolan
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky