

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000148-MR

DOMINIQUE LEWIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CR-00304-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Appellant, Dominique Lewis, *pro se*, appeals a January 7, 2015 order of the Fayette Circuit Court denying his motion to vacate judgment, set aside or correct sentence pursuant to RCr¹ 11.42. Lewis claims ineffective assistance of counsel to the extent that his plea of guilty and sentence should be vacated. He also argues that he was entitled to an evidentiary hearing on these issues. Upon

¹ Kentucky Rules of Criminal Procedure.

review of the evidence of record, this Court observes no such basis for relief.

Hence, we affirm.

On or about November 30, 2008, Lewis murdered Marilyn Hegge in her home in Lexington, Kentucky. Lewis was arrested on December 9, 2008, and admitted to law enforcement that he murdered Mrs. Hegge. Lewis further admitted to stealing the victim's credit card, purchasing items with the same, and removing evidence from the crime scene in an effort to prohibit its discovery. On February 24, 2009, a Fayette County grand jury returned an indictment that charged Lewis with one (1) count of first-degree murder, one (1) count of first-degree burglary, one (1) count of tampering with physical evidence, and one (1) count of fraudulent use of a credit card over \$100 within a six-month period.

Lewis was initially represented by retained counsel. However, Lewis's counsel withdrew and the trial court appointed the Lexington Public Defender's Office to represent him. The death penalty trial was scheduled to begin on June 3, 2011. However, the Commonwealth extended a plea offer on June 2, 2011. Lewis accepted the offer, entering a plea of guilty to all charges included in the indictment. Pursuant to the offer, the trial court sentenced Lewis to life without parole, plus twenty-four (24) years.

Almost three years after sentencing, Lewis filed a motion, *pro se*, to vacate the aforementioned judgment, pursuant to RCr 11.42. In support of his claim, Lewis filed a separate motion for an evidentiary hearing. The Department of Public Advocacy (DPA) was appointed by the court to represent Lewis, but

subsequently motioned to withdraw from the case. The trial court granted the DPA's motion to withdraw on July 29, 2014. Concluding that defense counsel provided effective legal representation, the trial court entered an order denying Lewis's motion without an evidentiary hearing. Lewis now appeals from this order. Additional facts will be set forth below as necessary for our analysis.

When reviewing a claim for ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), established the standard that:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. Therefore, to sufficiently prove a claim for ineffective assistance of counsel, the defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficiency prejudiced the defendant. *Id.* This two-part test provided in *Strickland* was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

In addition, when the defendant has entered a plea of guilty, the prejudice standard

requires the defendant to show ““a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”” *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012), quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

In his appeal, Lewis contends that his constitutional rights were violated as a result of ineffective assistance of counsel. Lewis asserts that defense counsel committed several errors, including failure to investigate defenses and failure to present mitigation evidence on his behalf. However, “Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule’s [RCr 11.42] specificity standard and so ‘warrant a summary dismissal of the motion.’” *Roach v.*

Commonwealth, 384 S.W.3d 131, 140 (Ky. 2012). *See also* RCr 11.42(2).² We will address each of Lewis’s assertions hereinafter separately.

First, Lewis argues that trial counsel failed to investigate witnesses that could testify to an intoxication defense, pursuant to KRS³ 501.080. Lewis, however, does not specify if trial counsel failed to investigate a voluntary or involuntary intoxication defense, as he references both terms interchangeably in his

² In its entirety, RCr 11.42(2) provides:

The 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.

³ Kentucky Revised Statutes.

brief. Neither defense would have been applicable. Lewis testified that he was under the influence of cocaine, twelve (12) Xanax, and ten (10) Lortabs during the commission of the murder. There is no evidence in the record that Lewis involuntarily took the drugs.

Furthermore, Lewis claims that “his defense counsel should have informed him of the voluntary intoxication defense, which acts to negate the intent element of a crime pursuant to KRS 501.080.” Here, Lewis is severely mistaken as “Voluntary intoxication ... is a defense only if there is something in the evidence sufficient to support a doubt that the defendant knew what he was doing...”

Foster v. Commonwealth, 827 S.W.2d 670 (Ky. 1991). But during his plea colloquy, Lewis testified in his own words, and in gruesome detail, about the forethought that he and his co-defendant put into planning the murder of Mrs. Hegge. He also included specific details concerning the discussions about which method of murder would be most effective. The Commonwealth correctly acknowledges that this admission fatally casts doubt on his ability to prove that he was too intoxicated at the time of the act to form criminal intent. While Lewis asserts that knowledge of his drug and alcohol intoxication may have resulted in a different sentence, the record clearly refutes that contention. This court agrees with the language used in *Evans v. Meyer* 742 F.2d 371 (7th Cir. 1984), stating that “It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence

than he actually received.” *Id.* at 375. *See also Hill v. Lockhart*, 474 U.S. at 59, 106 S.Ct. at 370.

Next, Lewis claims that his defense counsel was ineffective for failing to move the trial court for a competency hearing and a thirty-day evaluation at Kentucky Correctional Psychiatric Center (KCPC), pursuant to KRS 504.100. This assertion is completely unsubstantiated by evidence in the record. Lewis provides no affidavit in support of his claim that he exercised any behavior that gave the court reasonable grounds to believe that Lewis was not competent for trial or to enter a guilty plea. Without reasonable grounds on which to question a defendant’s competency, the trial judge is not required to conduct a hearing. *Gilbert v. Commonwealth*, 575 S.W.2d 455, 456 (Ky. 1979). *See also* RCr 8.06. Furthermore, “these reasonable grounds ‘must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them.’” *Id.* quoting *Matthews v. Commonwealth*, Ky., 468 S.W.2d 313, 314 (Ky. 1971).

The record also reflects that at a hearing on August 20, 2010, counsel for Lewis’s co-defendant raised a competency issue before the trial judge. The court entered an order for an independent evaluation for the co-defendant, and then inquired about Lewis’s competency. In response, Lewis’s counsel replied that Lewis was able to aid with the defense, and Lewis raised no objection. Moreover, during his guilty plea colloquy, Lewis explicitly stated that he never suffered from or had been treated for any mental condition that impaired his ability to

competently plead guilty. Since the record conclusively establishes that there was no basis to question Lewis's competency, the trial court properly rejected his claim that counsel was ineffective for failing to request a competency evaluation.

Lastly, and least convincingly, Lewis argues that trial counsel failed to investigate a defense and present mitigating evidence, pursuant to KRS 532.025. Lewis correctly notes that 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." *Foley v. Commonwealth*, 17 S.W.3d at 878, 885 (Ky. 2001), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). 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 2536. Matters involving trial strategy generally will not be second-guessed by hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky.1998).

As part of his guilty plea, Lewis stipulated that he was satisfied with his counsel's performance and that there was nothing that counsel had not done or investigated. "Solemn declarations in open court carry a strong presumption of verity." *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009), quoting *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006). To negate the

presumption of regularity that his guilty plea was voluntary, Lewis must identify specific facts or defenses that his counsel failed to investigate, and must show that the defense would have likely succeeded at trial. *Id.* at 122. Lewis'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*, 279 S.W.3d 151 (Ky. 2009).

In conclusion, the evidence of record does not corroborate Lewis's assertions that trial counsel was ineffective. Had the matter gone to trial, there was strong evidence of guilt and Lewis was facing the death penalty. Lewis failed to make any specific allegations showing that his counsel was ineffective for failing to investigate and pursue defenses or by advising him to accept the Commonwealth's offer. Therefore, the trial court did not err in denying his motion to set aside his conviction without an evidentiary hearing.

Accordingly, the order of the Fayette Circuit Court denying Lewis's motion to vacate judgment, set aside or correct sentence pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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