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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000450-MR

FREDERICK DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CR-000399

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Frederick Davis, acting *pro se*, requests our review of the order of the Jefferson Circuit Court, which summarily denied his motion for post-conviction relief pursuant to Rule 11.42 of the Kentucky Rules of Criminal Procedure (“RCr”). Having reviewed the record and finding no reversible error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Davis was convicted of the February 4, 2009 murder of James Allen, the first-degree wanton endangerment of Charlotte Moore and her minor son, and tampering with physical evidence for disposing of the murder weapon. Following a six-day jury trial, which resulted in a conviction on all counts, the trial court imposed sentence of 37 years to serve.

Davis appealed his conviction as a matter of right to the Kentucky Supreme Court, which affirmed the conviction.¹ As to the issues relevant to this appeal, the Supreme Court held that the evidence did not support a jury instruction on first-degree manslaughter under extreme emotional disturbance (“EED”), that the testimony of the investigating officer that she had lied to Davis when feigning agreement with his statement during his interview was improper, but harmless, and that the evidence was sufficient to support the wanton endangerment convictions.

Davis then moved the trial court to vacate his conviction pursuant to RCr 11.42 due to ineffective assistance of counsel. In the motion he advanced several arguments. First, he argued that his trial counsel was ineffective in failing to present an EED defense and to request a jury instruction on the same. Second, he argued that trial counsel failed to properly cross-examine certain witnesses during trial. Third, he argued that trial counsel failed to properly defend him against the evidence tampering charge. Finally, he argued that the cumulative

¹ *Davis v. Commonwealth*, 2011-SC-000255-MR, 2012 WL 5289407 (Ky. Oct. 25, 2012).

effect of all of these alleged errors entitled him to a new trial. Without conducting a hearing, the trial court denied the motion, and this appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

The seminal case concerning claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* set the standard of review in such cases which the Courts of this Commonwealth later adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). This test begins with “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” and presents a significant hurdle for a claimant to overcome. *Strickland*, at 689. The test requires a two-pronged analysis, with the first prong being whether counsel’s assistance “fell below an objective standard of reasonableness.” *Strickland*, at 687-88. The second prong requires that the claimant affirmatively prove prejudice, or that there was a reasonable probability that but for counsel’s deficient performance the result of the proceeding would have been different. *Id.*, at 693-94.

The purpose of the rule is not to relitigate issues which could have been, or actually had been, resolved in a direct appeal. *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009) (quoting *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972)).

Appellate review of a trial court’s summary denial of a motion pursuant to RCr 11.42 employs an abuse of discretion standard. *Bowling v.*

Commonwealth, 981 S.W.2d 545 (Ky. 1998). In determining whether a trial court's actions amount to an abuse of discretion, we must consider whether the decision reflected arbitrariness, unreasonableness, unfairness, or a lack of support from sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

B. THE TRIAL COURT PROPERLY DENIED DAVIS' MOTION AS IT RELATED TO EXTREME EMOTIONAL DISTURBANCE

Davis alleges that his trial counsel was ineffective in failing to present a defense that he killed Allen while under extreme emotional disturbance. At trial, the evidence indicated that tensions between Davis and Allen, the victim, had initially developed when Davis learned that his girlfriend had simultaneously dated both himself and Allen, before she began dating Davis exclusively. These tensions heightened when, two days prior to the murder, Allen kicked in a window at her apartment. The girlfriend provided Davis with Allen's phone number so that he might scare him from similar future behavior.² The next day, Davis purchased the murder weapon from a friend. The day after that, February 4, 2009, the girlfriend sent Davis a text message urging him to come to her apartment. Davis arrived to find Allen standing near a window. Davis spoke to Allen, who, when turning to face him, slipped on some ice. Davis then fired the weapon seven times into Allen, who bled to death, still lying on the ground where he had slipped.

² Though less relevant for our analysis, the Supreme Court's opinion in the direct appeal noted this fact, but made no mention as to whether Davis ever actually called Allen. Nor did the parties' briefs.

Davis contends that this sequence of events displays the extreme nature of his anger at, and fear of, Allen, and that his trial counsel, in failing to make the same argument, rendered ineffective assistance. Davis' counsel presented a defense-of-others defense, but not an EED defense. At trial, Davis himself orally requested a jury instruction on EED, but the trial court denied the request. The Supreme Court held in Davis' direct appeal that the evidence did not support an EED instruction, noting:

No evidence of a triggering event was introduced, nor was there any evidence indicating that Davis was acting uncontrollably. In both the interview with Detective Downs and the text messages [with the girlfriend], Davis expresses his anger at Allen, his intent to confront Allen, and his feelings that Allen had disrespected him.

Davis v. Commonwealth, 2011-SC-000255-MR, at *3.

RCr 11.42(2) requires a movant to state the facts, with specificity, which the movant believes entitles him to relief. Davis, in his brief to this court, fails to identify any other evidence which his counsel could have presented to prove he operated under EED. In his brief, he explicitly asserts that the proof presented at trial adequately supported the EED defense: "The evidence shows that Appellant was clearly reacting from the Extreme Emotional Disturbance of another man harassing his girl friend [*sic*] and her child." Moreover, the Supreme Court conclusively dispelled any doubts as to the merits of Davis claims of entitlement to an EED defense when it affirmed the trial court's denial of the EED instruction.

Given that Davis cannot identify any further evidence which would support an EED instruction, we cannot conclude the trial court erred in summarily denying the motion as it relates to this issue. Davis' motion fails not only for lack of specificity under the terms the rule, but also the Supreme Court has previously held that an attorney cannot be deemed to have rendered ineffective assistance for failing to raise a meritless claim (*Williams v. Commonwealth*, 336 S.W.3d 42, 47 (Ky. 2011)); once the Supreme Court resolved the issue of an EED instruction in the direct appeal, any merit in Davis' position on the issue evaporated.

As Kentucky appellate courts have previously—and repeatedly—held, it is not the role of the courts to second-guess counsel's trial strategy in hindsight. *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985); *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008); *Robbins v. Commonwealth*, 365 S.W.3d 211 (Ky. App. 2012). We are not permitted to rule that trial counsel's strategic decision to employ one defense over another departs from the wide range of reasonable professional assistance, nor would we here even if permitted.

We cannot find any error in the trial court's ruling that Davis' trial counsel had acted within the norms of professional assistance. Not only does the record clearly refute the allegation that defense counsel failed to request an EED instruction, Davis also fails to identify any further evidence which could have been presented to entitle him to such an instruction.

**C. THE TRIAL COURT PROPERLY DENIED DAVIS' MOTION AS IT
RELATED TO THE TESTIMONY OF CERTAIN WITNESSES**

Davis next argues that his trial counsel rendered ineffective assistance in two ways which relate to the testimony of certain witnesses. He argues that his trial counsel should have called Charlotte Moore as a witness, and he argues that trial counsel should have objected at points to the testimony of Detective Downs, the investigating officer.

As noted above, Davis fired seven bullets which struck Allen, but the record reflects that he fired several other shots, which did not strike Allen. One of those errant bullets passed through the kitchen window of a nearby apartment, in which Charlotte Moore and her disabled son resided. This is the factual basis supporting the charges, and eventually the convictions, for first-degree wanton endangerment. Downs testified that Moore and her son were both home at the time of the shooting.³

Davis characterizes this testimony as inadmissible hearsay and that his trial counsel was ineffective in failing to object to it. However, Downs did not testify that Moore had told her she was home that night. Downs' testimony on this issue consisted only of the results of the canvas investigation, and not any statements from any particular source.

Moreover, counsel argued at the close of the Commonwealth's case-in-chief that the evidence inadequately supported the wanton endangerment charges, specifically that no proof existed that Davis knew he was firing into an

³ On this issue, Detective Downs testified as follows: "She [Charlotte Moore] was at home that night and was actually talked to during the canvas, and... um... and heard the shots, but you know it's late at night and she's in bed, so she didn't realize that anything had actually um... come in until the next morning and she saw the damage."

occupied apartment. The Supreme Court affirmed the conviction in the direct appeal, noting that “[t]here is no requirement in [Kentucky Revised Statute] KRS 508.060 that Davis know whether or not these apartments were actually occupied at the moment he shot the gun.” *Davis* at *6.

Given the Supreme Court’s ruling that Davis’ knowledge of occupancy was immaterial, the alleged hearsay testimony was likewise immaterial. Davis can show no prejudice resulted from the failure of his trial counsel to object thereto. Because this Court held in *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986), that hearings are unnecessary in situations where the prejudice element cannot be satisfied, the trial court properly denied Davis’ motion as to this issue.

Davis also claims his trial counsel rendered ineffective assistance at other points during the testimony of Downs. He contends that it was ineffective assistance for his trial counsel to have asked certain questions in cross-examination that “opened the door” for prejudicial testimony during the Commonwealth’s redirect examination. Specifically, Davis contends that his trial counsel was ineffective by playing a portion of a recorded interview, in which Downs appears to agree with Davis’ recounting of the events, and then questioning Downs about the apparently contradictory testimony she had given on direct. According to Davis, this opened the door for Downs to testify on redirect that she was lying to Davis during the interview, and in fact did not believe his story.

The trial court observed that these answers were not an attempt to attack Davis' credibility, but instead were an explanation of an interrogation technique Downs was employing. The Supreme Court, while disagreeing with the trial court that such testimony was proper, held that Downs' testimony on this point did not substantially effect the verdict.

Whether an error substantially effected the verdict is precisely the question to be resolved in the prejudice prong of the *Strickland* test. The Supreme Court's ruling on that issue is dispositive under the "law of the case" doctrine. See *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 332 S.W.3d 85 (Ky. App. 2009), and under *Brewster*, the trial properly denied Davis' motion as it relates to this issue as well.

D. THE TRIAL COURT PROPERLY DENIED DAVIS' MOTION AS IT RELATED TO THE EVIDENCE TAMPERING CHARGE

Davis argues in his brief that his counsel failed to present a defense as to the tampering charge. However, he takes the curious position that he is innocent of the tampering charge because he admitted to police that he had killed Allen, and attempted to assist police in locating the weapon.

This position demonstrates Davis' flawed understanding of the elements of the offense of evidence tampering. KRS 524.100 defines the offense:

A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

KRS 524.100(1)(a). The offense occurs with the act of disposing of the murder weapon, whether or not criminal proceedings have been initiated. Contrary to Davis' assertions, simply because the weapon is no longer strictly needed as evidence for the murder charge, does not mean his admission to the additional behavior of disposing of the weapon cannot support an additional offense.

In this case, Davis' admission to disposing of the weapon he had just used to murder Allen, knowing that it could be used against him in a future prosecution, for all practical purposes eliminated any meritorious defense to the charge of evidence tampering. His confession to the murder did not ameliorate the need to find the murder weapon or foreclose its usefulness in his trial. That his trial counsel chose to expend greater effort on a defense with what she deemed a greater likelihood of success was clearly a strategic decision, which, under the authorities noted herein, we are not permitted to assail. We cannot conclude that the trial court abused its discretion in denying the motion on this issue.

**E. THE DOCTRINE OF CUMULATIVE ERROR DOES NOT ENTITLE
DAVIS TO POST-CONVICTION RELIEF**

The doctrine of cumulative error provides that multiple errors, although individually harmless, may present a reversible error if their aggregated effect renders the trial fundamentally unfair. *Brown v. Commonwealth*, 313

S.W.3d 577, 631 (Ky. 2010). Logically, the record must present more than one error in order to properly invoke the doctrine. Here, we find no error by the trial court in denying Davis' motion, and thus his attempted invocation of the cumulative error doctrine fails.

III. CONCLUSION

After a thorough review of the record, and for the reasons stated herein, we find no abuse of discretion by the Jefferson Circuit Court in denying Davis' motion for post-conviction relief pursuant to RCr 11.42. Accordingly, we affirm.

ALL CONCUR.

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