

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001185-MR

SEAN D. MESSER

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 12-CR-00257

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

ACREE, JUDGE: Sean D. Messer appeals from the Laurel Circuit Court's July 19, 2016 order denying his motion seeking relief under RCr¹ 11.42. We affirm.

¹ Kentucky Rules of Criminal Procedure.

On October 22, 2012, Messer stabbed Pamela Bobbitt to death. He was indicted on one count of murder, one count of first-degree fleeing and evading police, and one count of being a first-degree persistent felony offender.

Defense counsel hired Dr. Eric Drogin to evaluate Messer and determine whether extreme emotional disturbance (EED) could be used to mitigate his conduct. Dr. Drogin noted Messer's recent psychological testing revealed he suffered from "Organic Brain Syndrome" and concluded Messer's test results were consistent with borderline intellectual functioning and a reading disorder. Dr. Drogin's evaluation noted that Messer was prescribed Elavil and "blood pressure medication" and that a previous evaluation had to be terminated because Messer claimed his medication made him "real drowsy" and "groggy[.]" The evaluation did not mention any additional information regarding the effects of Messer's medication. Dr. Drogin concluded Messer could be entitled to an EED defense if he conceded responsibility for Bobbitt's death. If Messer did not admit to his involvement and the jury found him guilty, however, he would be entitled to an EED mitigation instruction.

Subsequently, Messer and the Commonwealth reached a plea agreement. The Commonwealth offered to recommend a total sentence of thirty-five years' imprisonment in exchange for Messer pleading guilty to murder. The Commonwealth further recommended dismissing Messer's remaining charges.

Prior to accepting his plea, the circuit court conducted a colloquy pursuant to *Boykin v. Alabama*² and determined that Messer's plea was knowingly, intelligently, and voluntarily made. Messer participated in the colloquy and expressed an understanding of his possible defenses, including EED. He also asserted that he didn't have any mental defect that could affect his reasoning and that he was not under the influence of drugs or alcohol. The circuit court accepted Messer's guilty plea and sentenced him in accordance with the Commonwealth's recommendation.

Approximately two and one-half years later, Messer filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence. He made several allegations of error, including: (1) counsel was ineffective for failing to properly advise him of an EED defense; (2) his plea was not voluntarily made due to the effects of the medications he was taking; (3) counsel was ineffective for failing to move for a change of venue due to the influence of protesters on prospective jurors; (4) counsel was ineffective for failing to file a motion to suppress the murder weapon because it was not authenticated; (5) counsel was ineffective for failing to move to exclude evidence related to his past criminal record under KRE³ 404(b); and (5) the cumulative effect of the errors warranted reversal. He also

² 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

³ Kentucky Rules of Evidence.

requested an evidentiary hearing and the appointment of counsel. The circuit court denied Messer's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

To prevail on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test, proving first that counsel's performance was deficient and, second, that counsel's deficient performance caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Further, because he entered a guilty plea, Messer is required to 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, 88 L.Ed.2d 203 (1985); *Commonwealth v. Rank*, 494 S.W.3d 476, 481 (Ky. 2016). Review of counsel's performance under *Strickland* is *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citation omitted).

Messer presents three arguments to this Court. First, he argues defense counsel was ineffective for failing to advise him of an EED defense. Second, he argues his plea was not knowingly and voluntarily made due to effects of his prescription medication. Third, he argues the cumulative effect of the errors requires reversal. We address his arguments in turn.

Messer argues defense counsel was ineffective for failing to advise him of a possible EED defense. During his colloquy, the court asked Messer whether his attorney had explained the potential defenses in his case. After Messer responded in the affirmative, the court asked defense counsel whether he had explained Messer's potential defenses. Defense counsel responded he had and listed the defenses he discussed with Messer, mentioning EED specifically. Messer confirmed on the record his attorney had discussed EED with him and stated he had no questions about that defense. "Solemn declarations in open court carry a strong presumption of verity." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). Messer's claim that trial counsel failed to discuss the defense of EED with him is directly refuted by his own affirmations, under oath, to the circuit court. We cannot say trial counsel's performance was objectively unreasonable or in any way deficient regarding this claim of error.

Second, Messer argues his plea was not knowingly and voluntarily made because he was on high doses of three kinds of prescription medication – Buspar, Elavil, and Zyprexa – which affected his competence to plead guilty. In a thorough plea colloquy, Messer stated he was not suffering from any mental ailment which would affect his ability to knowingly and voluntarily enter his plea. He swore under oath that he was not under the influence of drugs or alcohol, that

his judgment was in no way impaired, that he fully understood the proceeding, and that he was acting of his own free will in entering his guilty plea.

Additionally, we have carefully reviewed the video record of Messer's plea colloquy. Messer was engaged and responsive to the circuit court's questions throughout the hearing. He demonstrated rational and clear thinking, and behaved appropriately.

Messer cites Dr. Drogin's evaluation to support his claim that his medications rendered him incompetent to plead guilty. But Dr. Drogin's evaluation does not support that assertion. Messer's sworn statements during the plea colloquy coupled with his alert and responsive demeanor demonstrate Messer retained the capacity to comprehend the proceedings. *See Edmonds*, 189 S.W.3d at 569. The record before us refutes Messer's assertion of incompetence.

Finally, Messer contends the cumulative effect of the errors he argued above deprived him of effective assistance of counsel. Because we have found no error in any of the arguments Messer has presented, we likewise hold that there is no cumulative error. *See Woodall v. Commonwealth*, 63 S.W.3d 104, 134 (Ky. 2001).

For the reasons stated above, we affirm the Laurel Circuit Court's July 19, 2016 order denying Messer's RCr 11.42 motion for relief.

ALL CONCUR.

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