

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001422-MR

LONNIE SCHOOLEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 12-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Lonnie Schooley brings this *pro se* appeal from an August 25, 2016, order of the Fayette Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.¹ We affirm.

¹ During the course of this appeal, after Lonnie Schooley's *pro se* brief had been filed, attorney Louis W. Rom moved to enter an appearance on behalf of Schooley, which was granted by the court. Attorney Rom filed the Reply Brief for Schooley.

In 2012, Schooley was indicted by a Fayette County Grand Jury upon first-degree wanton endangerment, first-degree assault, second-degree fleeing and evading police, and tampering with physical evidence. The events leading to the indictment are as follows:

On October 7, 2011, Schooley left home with prescription medication, \$250.00 in cash, and a handgun. After arriving at Paradise City, a gentleman's club/strip club in downtown Lexington, Schooley ordered a beer and seated himself at a table near the stage. Schooley then got into a verbal altercation with waitress Teresa Gray. Shortly thereafter, Schooley got into a second verbal altercation at the bar with the bartender. After Schooley returned to his table, the club manager saw that Schooley was seated at a table with a gun. Hoping to sneak behind Schooley and acquire the gun, the manager moved towards the table. Schooley then picked up the gun and pointed it at Turner. Schooley fired the gun and then ran from the club. The bullet from Schooley's gun struck a wall. Gray also fled the club, ran into a nearby alley, and hid in some bushes. Schooley discovered Gray and repeatedly struck her in the face and head with his gun. Gray fell to the ground and Schooley kicked Gray in the ribs. Schooley then fled. Gray suffered multiple broken bones on her face, broken ribs, bruised bowels, and had to have one of her eyes replaced with a prosthetic.

Schooley v. Commonwealth, Appeal No. 2013-CA-001346-MR, 2015 WL 510660 (Ky. App. February 6, 2015). A jury trial ensued. The jury ultimately found Schooley guilty of first-degree assault, first-degree wanton endangerment, and tampering with physical evidence. On July 2, 2013, the circuit court sentenced Schooley to a total of fourteen-years' imprisonment.

Schooley filed a direct appeal in the Court of Appeals. By Opinion rendered February 6, 2015, this Court affirmed Schooley's conviction and sentence of imprisonment. *Schooley v. Commonwealth*, Appeal No. 2013-CA-001346-MR, 2015 WL 510660 (Ky. App. February 6, 2015).

Schooley then filed an RCr 11.42 motion to vacate his conviction alleging that trial counsel rendered ineffective assistance. By Opinion and Order entered August 25, 2016, the circuit court denied Schooley's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Schooley contends that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. In particular, Schooley maintains:

On June 23, 2016[,] DPA file[d] on [sic] motion to the Fayette Circuit Court to withdraw from [Schooley's] case.

On August 11, 2016, Commonwealth Attorney filed Response to [Schooley's] RCr 11.42 Motion.

On August 25, 2016, Fayette Circuit Court entered opinion and order on [Schooley's] RCr 11.42 motion, 14 days after the Commonwealth's Response.

On September 26, 2016, over a month after the Courts opinion and order denying [Schooley's] RCr 11.42 Motion, the court ruled on the DPA's motion to withdraw and granting their motion to withdraw. The Court did not give [Schooley] the opportunity to supplement his pleadings. The Circuit Court led [Schooley] to believe that the Court ordered DPA to supplement [Schooley's] RCr 11.42 Motion. This action

by the court denied [Schooley] the right to fundamental fairness and due process of the law. . . .

Schooley's Brief at 4 (citations omitted).

The record reveals that Schooley initially filed a *pro se* RCr 11.42 motion to vacate sentence and sought appointment of counsel. The circuit court appointed the Department of Public Advocacy (DPA) to represent Schooley on May 11, 2016. Thereafter, on June 24, 2016, DPA filed a motion to withdraw as counsel as it concluded that the motion was not one a reasonable person with means would pursue. The circuit court granted DPA's motion to withdraw on June 24, 2016. The Commonwealth then filed a response to the RCr 11.42 motion on August 11, 2016. Some fourteen days later, on August 25, 2016, the circuit court denied Schooley's RCr 11.42 motion to vacate.

From the above, it is clear that Schooley received ample notice that DPA was no longer representing him and had sufficient time to file additional "pleadings." He was served with DPA's motion to withdraw on June 23, 2016, and also with the Commonwealth's response to his RCr motion to vacate on August 11, 2016. Therefore, we reject Schooley's contention of error.

Schooley also asserts that trial counsel was ineffective for failing to seek removal of the trial judge during the trial for "personal bias and prejudice." Schooley's Brief at 5. Schooley claims that the trial judge "made statements to the jury . . . that clearly showed and proved . . . [his] personal bias and prejudice."

Schooley's Brief at 5. However, Schooley failed to specifically identify the particular comments allegedly made by the trial judge. Rather, Schooley has merely advanced general allegations without supporting facts.

To prevail upon a claim of ineffective assistance of trial counsel, Schooley must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An evidentiary hearing is required if the allegations are not refuted on the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). And, a motion made pursuant to RCr 11.42 must specifically state the grounds for relief, and mere conclusory allegations of error are insufficient to warrant an evidentiary hearing. *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993); *Wedding v. Commonwealth*, 468 S.W.2d 273, 274 (Ky. 1971).

In this case, Schooley has advanced only conclusory allegations and has failed to set forth any facts in support thereof. As a result, we believe that Schooley's allegation that trial counsel was ineffective for failing to seek the removal of the trial court judge is totally without merit.

Schooley next argues that trial counsel was ineffective for failing to protect his right to due process because the trial judge did not impose the jury's recommended sentence of imprisonment. The jury recommended a total sentence

of thirteen-year's imprisonment. The trial court imposed a total sentence of fourteen-years' imprisonment. Schooley, however, has not demonstrated how trial counsel rendered ineffective assistance as to sentencing. In the absence thereof, we view Schooley's argument to be meritless.

Schooley finally claims that trial counsel was ineffective by failing to argue the defense of voluntary and involuntary intoxication and by failing to request a jury instruction upon such defenses. Schooley points out that he testified at trial that upon being given a second beer he felt disassociated from himself and possessed no memory of the events that transpired in the bar. According to Schooley, his testimony further established that upon exiting the bar he regained his senses and detected movement in a bush. Fearing for his safety, Schooley stated that he merely defended himself when he attacked Gray. Schooley claims that he was entitled to both a voluntary intoxication defense instruction and an involuntary intoxication defense instruction. As trial counsel failed to present these defenses and failed to request jury instructions thereupon, Schooley maintains that trial counsel rendered deficient assistance that was clearly prejudicial.

The defense of intoxication is codified in Kentucky Revised Statutes (KRS) 501.080 and provides:

Intoxication is a defense to a criminal charge only if such condition either:

- (1) Negatives the existence of an element of the offense; or
- (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

And, voluntary intoxication is defined in KRS 501.010(4), as follows:

“Voluntary intoxication” means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime.

Under KRS 501.080(1), voluntary intoxication is a defense to a criminal charge if it negates “the existence of an element of the offense.” Thus, the voluntary intoxication defense is available to “intentional and knowing offenses” but unavailable for wanton or reckless offenses. *Malone v. Commonwealth*, 636 S.W.2d 647, 647 (Ky. 1982); *McGuire v. Commonwealth*, 885 S.W.2d 931, 934 (Ky. 1994). To be entitled to a jury instruction upon the voluntary intoxication defense, there must exist “reasonably sufficient [evidence] to prove that the defendant was so [intoxicated] that he did not know what he was doing.” *Conyers v. Commonwealth*, 530 S.W.3d 413, 432 (Ky. 2017) (quoting *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky 2017)). It has been emphasized that “mere drunkenness” is insufficient. *King v. Commonwealth*, 513 S.W.3d 919, 923 (Ky. 2017).

As to involuntary intoxication, there is no statutory definition. So, it has been recognized that “the scope of possible forms of involuntary intoxication is illuminated by what is excluded from the [statutory] ‘voluntary intoxication’ definition.” *Holland v. Commonwealth*, 114 S.W.3d 792, 804 (Ky. 2003). There are four general categories with respect to involuntary intoxication: (1) “intoxication resulting from substances taken into the body under coercion or duress,” (2) “intoxication resulting from a genuine mistake as to the character of the substance causing it,” (3) “intoxication resulting unexpectedly from prescribed medication,” and (4) “intoxication resulting from a weakness unknown to the defendant and grossly excessive to the quantity of stimulant taken into the body.” KRS 501.080 cmt. (Ky. Crime Comm’n 1974); *see also Holland v. Commonwealth*, 114 S.W.3d 792, 803-04 (Ky. 2003).

In this case, voluntary intoxication could have been a defense to the offenses of first-degree assault and tampering with physical evidence, as both require intent. The offense of first-degree assault was based upon Schooley’s vicious attack upon Grey outside of the bar. According to Schooley’s own testimony, he remembered running outside of the bar. He also recalled someone in a bush and then someone being in his face. At that point, Schooley testified to believing that he was going to be robbed and acted in self-defense. Schooley’s testimony establishes that he acted in self-defense when he attacked the person in

the bush. Therefore, it is evident that Schooley was not so intoxicated to have been unaware of what he was doing in relation to his attack upon Gray.

As for involuntary intoxication, there was simply an absence of evidence establishing such defense. Schooley did not testify that he believed he consumed any drugs unknowingly. Rather, Schooley testified that after consuming some alcohol at the club he felt disassociated from his body. But, Schooley admitted that he took his father's prescription drug, dilaudid, with him to the bar.

Upon the whole, we simply do not believe that trial counsel was ineffective for failing to submit jury instructions upon the defense of voluntary intoxication or the defense of involuntary intoxication. Also, trial counsel was not ineffective for failing to investigate such defenses. Schooley testified as to his state of mind and the relevant facts surrounding both defenses at trial.

In sum, we hold that the circuit court properly denied Schooley's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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