

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001706-MR

MARK A. TAYLOR

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 10-CR-00580-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Mark A. Taylor (Mark) appeals from an order of the McCracken Circuit Court denying his motion to vacate, set aside or correct his sentence pursuant to RCr¹ 11.42. Mark argues that the trial court erred in denying his motion without an evidentiary hearing because he presented factual issues whether

¹ Kentucky Rules of Criminal Procedure.

his trial counsel provided ineffective assistance. We conclude that the record clearly refuted the allegations, and that Mark failed to set forth sufficient facts showing either that his trial counsel's performance was deficient or that he was prejudiced as a result. Hence, we affirm.

I. Facts and Procedural History

On December 23, 2010, a McCracken County grand jury returned an indictment charging Mark with murder, kidnapping, and tampering with physical evidence. Mark was charged along with his wife, Jamie Taylor, and daughter, Jasmine Taylor, for the circumstances surrounding the death of CaSondra Evrard. The underlying facts were set out by the Kentucky Supreme Court on direct appeal. *Taylor v. Commonwealth*, No. 2013-SC-000604-MR, 2015 WL 5626433 (Ky. 2015), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015). For purposes of this appeal, the following facts are relevant.

Jasmine accused Evrard of drugging her and "selling her out to be raped" at a party. Based on this report, Mark and Jamie took Jasmine to the hospital and contacted the police. However, the police declined to pursue the charges due to the lack of physical evidence, inconsistencies in Jasmine's account, and Jasmine's pre-existing mental illness. Nevertheless, Mark and Jamie believed Jasmine's account and decided to perform their own investigation.

On December 10, 2010, Mark, Jamie and Jasmine lured Evrard to their residence. Mark and Jamie repeatedly struck Evrard and then dragged her to the bathroom. They then tortured Evrard to obtain a confession and information about her alleged accomplices. At some point, Jasmine joined her parents in the bathroom. While all three cut Evrard, Mark stabbed Evrard in the chest and Jamie cut Evrard's throat. The three then disposed of Evrard's body and possessions. After Evrard's body was found, Mark made statements to the police which implicated himself, Jamie, and Jasmine. Additional evidence was found during a search of the Taylor's home. Various other individuals were also charged with crimes relating to Evrard's murder.

Jamie and Jasmine pleaded guilty prior to trial. Following an eight-day trial, the jury convicted Mark of murder, kidnapping, and tampering with physical evidence, for which the jury recommended sentences of life imprisonment, life imprisonment without parole, and five years' imprisonment, respectively. The trial court sentenced Taylor to life imprisonment without the possibility of parole. The Kentucky Supreme Court affirmed Mark's conviction on direct appeal.

Thereafter, Mark filed his current RCr 11.42 motion, alleging ineffective assistance by his trial and appellate counsel. The trial court denied the motion without appointing counsel or conducting an evidentiary hearing.

Thereafter, Mark filed motions to alter, amend or vacate, CR² 59.05, and for additional findings of fact, CR 52.02, which the trial court also denied. This appeal followed.

II. Appointment of Counsel

As an initial matter, we begin by noting that Mark filed motions to proceed *in forma pauperis* and for appointment of counsel when he filed his RCr 11.42 motion. In its order denying Mark's RCr 11.42 motion, the trial court denied both motions as moot. However, the court granted both motions for Mark's current appeal.

While there is no constitutional right to counsel in post-conviction proceedings, Kentucky law grants defendants a statutory right to counsel. *See Moore v. Commonwealth*, 199 S.W.3d 132, 138-39 (Ky. 2006), and *Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001). RCr 11.42(5) creates a conditional right to counsel in cases where the answer raises a material issue of fact on its face and the movant is financially unable to employ counsel. Furthermore, KRS³ 31.110 authorizes appointment of counsel for a "needy person" who would be otherwise entitled to appointment of counsel.

² Kentucky Rules of Civil Procedure.

³ Kentucky Revised Statutes.

In this case, the trial court found that the conditions for appointment of counsel had not arisen because the record on its face refuted Mark's allegations of error. But "the rule does not preclude appointment of counsel at any stage of the proceedings if deemed appropriate by the trial judge." *Fraser*, 59 S.W.3d 448, 453. Under the circumstances presented in this case, the trial court was not obligated to appoint counsel to represent Mark on his motion. But given the serious nature of Mark's conviction and the lifetime sentence imposed, we believe that the trial court would have been well within its discretion to appoint counsel, notwithstanding the apparent lack of merit to his *pro se* RCr 11.42 motion.

III. Standard of Review

On appeal, Mark again argues that his trial counsel provided ineffective assistance by failing to secure witnesses for his defense and by failing to file a motion to suppress the statements he made to police. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). More specifically,

[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... 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.

Id. at 687, 104 S. Ct. at 2064.

The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S. Ct. at 2064-2066. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066. Generally, a reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Secondly, to prove prejudice, "[t]he defendant must show that there is 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." *Id.* at 694, 104 S. Ct. at 2068.

In determining the necessity of a hearing on allegations made in an RCr 11.42 motion, a trial court must find whether there are material issues alleged which cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record. *Fraser*, 59 S.W.3d at 452. "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id.* at 452-53. Where the trial court has denied an RCr 11.42

motion without a hearing, this Court's review is confined to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). As this is entirely an issue of law, we review this question *de novo* and without deference to the trial court's conclusion.

IV. Counsel's failure to disclose Dr. Ralston

Mark first argues that his trial counsel failed to abide by the trial court's procedural rules for identifying expert witnesses, resulting in the exclusion of his expert's testimony. The Commonwealth's medical examiner, Dr. Deirdre Schluckebier, testified that both the chest wound inflicted by Mark and the neck wound inflicted by Jamie were both potentially fatal, and that there was no way to determine which wound was inflicted first or which was fatal. In rebuttal, Mark's counsel attempted to call Dr. John Ralston as an expert witness. The Commonwealth objected, noting that defense had not disclosed Dr. Ralston as a witness as required by the court's pre-trial order and RCr 7.24(3)(a). The trial court agreed and excluded his testimony. On avowal, Dr. Ralston stated that he believed that the neck wound was more likely the primary fatal injury.

Mark argues that his trial counsel was deficient in failing to disclose Dr. Ralston as an expert prior to trial, thus leading to Dr. Ralston's exclusion. He

also contends that his appellate counsel was deficient in failing to raise the exclusion of Dr. Ralston on direct appeal. Since Mark raises this as an issue of ineffective assistance of appellate counsel, we disagree with the Commonwealth and the trial court that his failure to bring a direct appeal on this issue bars him from raising it in this action. *Hollon v. Commonwealth*, 334 S.W.3d 431, 437-38 (Ky. 2010).

The primary issue in this appeal is whether Mark was prejudiced by the alleged deficient performance of either his trial or his appellate counsel. With respect to the latter, Mark does not allege that his appellate counsel unreasonably failed to discover a non-frivolous basis to appeal from the trial court exclusion of Dr. Ralston's testimony. *Id.* at 436 (citing *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000)). Mark must also establish that, but for appellate counsel's failure to raise the issue, he would have prevailed on his appeal. *Id.*

A trial court's ruling on discovery issues, such as failure to comply with RCr 7.24, is reviewed for abuse of discretion. *Hilton v. Commonwealth*, 539 S.W.3d 1, 9 (Ky. 2018). Mark does not make any substantive argument that the Supreme Court would have found that the trial court abused its discretion in excluding the testimony. Consequently, we can find no basis to support a claim of ineffective assistance of appellate counsel.

Rather, Mark's claim turns on his trial counsel's failure to disclose Dr. Ralston to the Commonwealth in a timely manner. However, Dr. Ralston's testimony was not directly contradictory to that of Dr. Schluckebier. Indeed, he agreed with Dr. Schluckebier that both wounds were potentially fatal. He merely believed that the neck wound inflicted by Jamie was the more immediate cause of Evrard's death than the chest wound.

This distinction would not have made any difference to the verdict. The instructions permitted the jury to find Mark guilty of murder either, "while acting alone, he killed CaSondra Evrard by stabbing her;" or "while acting in complicity with Jamie Taylor, he and/or Jamie Taylor killed CaSondra Evrard by stabbing her[.]" Considering the totality of the evidence presented, we find no reasonable basis to conclude that Dr. Ralston's testimony would have affected the jury's findings that Mark was guilty of murder or complicity to murder. Therefore, we must agree with the trial court that Mark failed to establish prejudice from his trial counsel's deficient performance in this regard.

V. Failure to Call Witness

Mark next argues that his trial counsel was ineffective in failing to call his mother, Dorothy, as a witness during the guilt phase of the trial. During the sentencing phase, Dorothy testified that Jamie confessed to her that she killed Evrard. Again, we find no indication that Mark was prejudiced as a result of this

tactical decision. Jamie admitted that she made statements to the police and to others taking sole responsibility for Evrard's murder. Jamie was questioned and cross-examined on this point. Dorothy's testimony would have been merely cumulative to the evidence already presented on this point.

VI. Failure to File Motion to Suppress Confession

Finally, Mark contends that his trial counsel was ineffective in failing to file a motion to suppress his interview with the police. Mark asserts that, at the time of the interview, he was functioning on very little sleep, he was under the influence of drugs, and he was suffering from mental health problems. Consequently, Mark argues that his confession was not knowing and voluntary, and therefore his counsel was deficient in failing to seek to suppress it.

The trial court noted that Mark failed to identify specific facts which counsel failed to investigate relating to the motion to suppress. Most notably, Mark does not identify any specific facts showing that the officers knew or had reason to know of his impairments during the interview. The mere existence of a mental condition, by itself and apart from its relation to police coercion, does not make a statement constitutionally involuntary. *Lewis v. Commonwealth*, 42 S.W.3d 605, 612 (Ky. 2001) (citing *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473 (1986)). Furthermore, the Commonwealth points

out that the officers provided Mark with *Miranda*⁴ warnings at the beginning of the interview. Under the circumstances, we agree with the trial court that Mark's general allegations of error regarding the suppression issue were not sufficient to warrant an evidentiary hearing.

VII. Conclusion

As discussed above, appointment of counsel is generally not required unless the RCr 11.42 sets forth sufficient grounds to create an issue of fact concerning the performance of counsel. Nevertheless, we believe that appointment of counsel at the circuit court level would have greatly aided review of Mark's RCr 11.42 motion. However, we are constrained to agree with the trial court that appointment of counsel was not necessary because the record in this case clearly refuted Mark's allegations of ineffective assistance. Consequently, the trial court properly denied Mark's motion without appointing counsel or conducting an evidentiary hearing.

Accordingly, we affirm the order of the McCracken Circuit Court.

ALL CONCUR.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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