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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001278-MR

RODNEY FOY — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 12-CR-00380

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, D., JUDGE: Rodney Foy appeals the Hardin Circuit Court's summary denial of his motion seeking post-conviction relief pursuant to RCr[1] 11.42. He argues the trial court erred in summarily denying his *pro se* motion on

[1] Kentucky Rules of Criminal Procedure

the basis of a procedural defect. Having reviewed the record, we find no error and consequently affirm the Hardin Circuit Court.

I. FACTUAL AND PROCEDURAL HISTORY

Foy was being held in the Hardin County Detention Center on a probation violation. Deputy Anthony Medley entered Foy's pod, which also housed sixteen other inmates, to collect the dirty trays after breakfast. Foy was not fully dressed and was lying on his bunk, with his blankets pulled over him. Dep. Medley noticed this and, because facility rules required inmates to be fully dressed and their beds made by that hour, directed Foy to comply. After some animated discussion, Foy demanded to speak with the shift supervisor. Dep. Medley briefly left the pod to retrieve the supervisor on duty, Corporal Robert Watts. During this brief interlude, the pod's security camera captured Foy, visibly angry, completely removing his jail jumpsuit however, apparently, he thereafter put it on again.

Dep. Medley returned to the pod a few minutes later, accompanied by Cpl. Watts and Deputy Jeffrey Nipp. The three officers again told Foy to get dressed and make his bed, to which Foy responded argumentatively. Due to Foy's belligerence and his failure to comply with both facility rules and their reasonable commands, the officers ordered Foy to "roll up" his personal effects, because they were moving him to disciplinary segregation.

The interaction grew increasingly heated, with Foy threatening physical harm on all three officers.[2] Cpl. Watts sprayed Foy with pepper spray. Foy lunged toward Dep. Medley and a scuffle ensued, leaving all three officers injured. Dep. Medley suffered a severe chest wall contusion from Foy's head striking his chest; Dep. Nipp sustained a concussion from Foy's elbow striking him in the face; and Cpl. Watts escaped the brawl with only minor scratches and bruising.

A grand jury indicted Foy for multiple charges including three counts of third-degree assault and of being a first-degree persistent felony offender ("PFO"), among others. The matter proceeded to trial, during which Foy's counsel presented a version of events wherein Foy was not intentionally attacking the officers but was trying to get away from the pepper spray. After deliberating, the jury returned a verdict of guilty on the three assault counts and the PFO count, recommending a total sentence of 20 years to serve, due to the PFO enhancement. The remaining counts were dismissed on the Commonwealth's motion the morning of trial. The Kentucky Supreme Court affirmed Foy's sentence and conviction on direct appeal.[3]

[2] Though the security footage contains no audio, Foy's description of the events includes the verbal threats he made to the officers.

[3] *Foy v. Commonwealth*, 2013-SC-00388-MR, 2014 WL 2810022 (Ky. June 19, 2014).

On June 8, 2017, Foy filed a *pro se* motion to vacate his conviction due to ineffective assistance of counsel. He made four arguments primarily based around his attorney's alleged failure to offer proof that he was not the initial aggressor in the incident. He first argued that his trial counsel had failed to conduct an adequate pre-trial investigation, specifically that trial counsel had failed to request and introduce witness statements from the other inmates housed in his pod who witnessed the incident. He also argued that trial counsel failed to introduce one of the officer's employment records which contained a prior abuse complaint. His third argument was that his counsel erred in failing to tender an instruction on fourth-degree assault. His fourth argument was that his trial counsel failed to adequately challenge the testimony of one of the officers. The trial court based its denial, as it related to the failure to investigate, on the lack of specificity in Foy's allegations.

Foy, with the aid of appointed counsel, brings this appeal. He challenges the trial court's ruling only as it relates to the alleged failure to investigate.

II. ANALYSIS

A. STANDARD OF REVIEW

The United States Supreme Court case, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), established the standard of

review for motions alleging ineffective assistance of counsel. The following year, Kentucky adopted the rule of *Strickland* in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Analysis under *Strickland* begins with the reviewing court "indulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland* at 689, 104 S. Ct. at 2065. "[B]ecause, given the surrounding circumstances, 'the challenged action "might be considered sound trial strategy."' We employ this presumption to prevent the 'harsh light of hindsight' from distorting counsel's act or omission, making it appear unreasonable." *Commonwealth v. Searight*, 423 S.W.3d 226, 230 (Ky. 2014) (quoting *Strickland*, at 689, 104 S. Ct. at 2065).

Bearing that presumption in mind, courts must apply a two-pronged test to determine whether a defendant is entitled to relief, or an evidentiary hearing. As the first prong, the court must examine whether counsel's assistance "fell below an objective standard of reasonableness." *Strickland*, at 687-88, 104 S. Ct. at 2064. In the second stage of the analysis, courts look to see whether any error by trial counsel operated to prejudice the defendant, in other words, whether a reasonable probability existed that counsel's allegedly deficient performance negatively affected the outcome of the trial. *Id.* at 693-94, 104 S. Ct. at 2068; *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1998).

If the allegations in the motion do not create "an issue of fact which cannot be determined on the face of the record[,]" the reviewing court may properly deny the motion without a hearing. *Stanford v. Commonwealth*, 854 S.W.2d, 742, 743-44 (Ky. 1993). We have previously held in *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986), that the court may properly dispose of a motion without a hearing if the record adequately shows the prejudice element cannot be satisfied.

B. THE TRIAL COURT PROPERLY DENIED FOY'S MOTION WITHOUT A HEARING

1. THE TRIAL COURT PROPERLY FOUND THE ALLEGATION OF FAILURE TO INVESTIGATE THE OTHER INMATES WAS INSUFFICIENTLY SPECIFIC

The terms of RCr 11.42 contain very strict requirements. Among these is specificity. "The motion 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." RCr 11.42(2).

Foy contended before the trial court, and again before this Court, that the other inmates housed in his pod would have testified that he was not the initial aggressor in this encounter. The trial court found Foy's allegation that his trial

counsel had failed to investigate lacked the requisite specificity, and summarily dismissed Foy's motion according to the explicit directive of the rule.

An examination of Foy's own words is revelatory on this subject:[4]

> Movant was denied effective assistance of counsel . . . when Defense Counsel failed to conduct and [sic] adequate investagation [sic], and ask for the Sixteen Witnesses that was [sic] present or ask for the Sixteen Statement's [sic] the witnesses submitted . . . . [T]here is a reasonable probability that that the outcome of the Preceeding [sic] would have been different if she had called any of the witnesses, They [sic] would have let the jury know that Mr. Foy was not the agresser [sic] and that he was not being combatant and if she would have called Lt. Highnote as a witness as she was asked by the Movant, then he would have confirmed that there were witnesses as well as written statements that could have helped in my case[.] [T]here was also video's [sic] of the incident that would have been detramental [sic] to Movant's defence [sic].

At no point did Foy identify any of these sixteen witnesses. Moreover, his allegation relies entirely on speculation that any of these sixteen unidentified witnesses would have testified consistently with his allegation. The trial court correctly determined that the motion failed for lack of specificity.

Foy argues on appeal that the trial court, in so ruling, improperly held Foy to an unreachable standard for a *pro se* litigant. Foy argues that because the *pro se* motion provided a sufficient means to identify these witnesses (that they

[4] The following excerpt comes from Foy's *pro se* memorandum in support of his RCr 11.42 motion.

were captured in the video recording), this court should excuse the otherwise fatal defect in the pleading. We disagree.

While *pro se* defendants are normally given more leeway than an attorney would be under *Commonwealth v. Miller*, 416 S.W.2d 358 (Ky. 1967), subsequent courts have ruled that this leeway is not to be extended to a failure to comply with the Rule 11.42's basic requirements.

> Although we recognized in [*Miller*] that more liberal standards apply as to convicts proceeding pro se… we do not retreat from the precept required by the rule itself in which it is stated:
>
> "The motion shall be signed or 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 . . . ."

Brooks v. Commonwealth, 447 S.W.2d 614, 618 (Ky. 1969) (emphasis in original); *see also Campbell v. Commonwealth*, 316 S.W.3d 315, 317 n.2 (Ky. App. 2015) ("[W]hile Campbell is correct that more lenient standards apply to prisoners filing *pro se*, we have not interpreted this as an abandonment of our rules of procedure or jurisprudence." (citing *Brooks, supra*)).

As it relates to these witnesses, Foy has neither identified them, nor has he offered anything more substantive than his own speculation as to their testimony. The trial court properly held Foy's allegations failed to satisfy RCr

11.42(2)'s specificity requirement, and thus properly disposed of the motion, as it related to that allegation, according to the terms of the rule.

2. TRIAL COUNSEL'S ALLEGED FAILURE TO CALL LT. HINOTE AS A WITNESS WAS NOT INEFFECTIVE ASSISTANCE

Foy's motion did sufficiently identify one potential witness, Deputy Lieutenant Walter Hinote. Lt. Hinote is the supervising officer who conducted the jail's internal review of the incident. However, Foy's reliance on Lt. Hinote's theoretical testimony in arguing against his trial counsel performance is misplaced. Failure to call Lt. Hinote was neither a departure from prevailing professional norms for attorneys, nor was it prejudicial.

Foy alleges that his trial counsel rendered ineffective assistance in failing to call Lt. Hinote as a witness because his testimony would have proven that there were other witnesses to the incident. The jury already knew other individuals witnessed the incident. Thus, Lt. Hinote's testimony would have consisted of repetition of a fact already known to the jury. Further, the video of the incident itself would be the best evidence of the content of those statements, not the written statements or Lt. Hinote's recollection of the content of such statements. The absence of such testimony would have had no effect on the outcome of Foy's trial, in that such testimony, if counsel had attempted to introduce it, would likely have been the subject of a successful objection by the Commonwealth.

3. EVEN ABSENT THE PROCEDURAL DEFECT, FOY'S MOTION DID NOT ENTITLE HIM TO RELIEF OR A HEARING

Any evidence as to whether Foy was the initial aggressor is ultimately immaterial. Whether a person did or did not act as the initial aggressor in an altercation is an element of the affirmative defense of self-protection. Under Kentucky law, "[t]here is no right to use self-defense during an arrest[,]" even where the arrest was unlawful. *Stopher v. Commonwealth*, 57 S.W.3d 787, 803 (Ky. 2001); KRS[5] 503.060(1). The Kentucky Supreme Court has consistently held that police may arrest suspects for misdemeanor offenses without a warrant when such offenses are committed in an officer's presence. KRS 431.005(d); *Commonwealth v. Mobley*, 160 S.W.3d 783, 787 (Ky. 2005) (citing *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)). *See e.g.*, *Commonwealth v. Maloney*, 489 S.W.3d 235, 238 (Ky. 2016).

While not strictly parallel, removing an inmate from general population that has demonstrated unruly and defiant behavior towards corrections personnel bears a sufficient resemblance to an arrest for an offense committed in an officer's presence. Therefore, an inmate is not entitled to resist. Hence, Foy was not entitled to assert the affirmative defense of self-defense under KRS 503.060(1).

[5] Kentucky Revised Statutes.

Foy's allegation, that his counsel failed to offer evidence to support an affirmative defense he had no right to assert, could not be deemed a departure from professional norms. Even if the decision as to what defense to present did not lie solely within trial counsel's discretion as to trial strategy, Foy's argument still fails because the defense he—in hindsight—wishes his trial counsel would have presented on his behalf did not apply to his situation. "It is not ineffective assistance of counsel to fail to perform a futile act." *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002).

III. CONCLUSION

Having reviewed the record and finding no error in its ruling, we hereby affirm the Hardin Circuit Court's summary denial of Foy's motion for relief pursuant to RCr 11.42.

JONES, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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