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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001293-MR

JIMMY THACKER, JR. — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE THOMAS M. SMITH, JUDGE
INDICTMENT NO. 10-CR-00114

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Jimmy Thacker, Jr. appeals from the Floyd Circuit Court orders denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. We affirm.

Thacker's conviction was affirmed on direct appeal to the Kentucky Supreme Court.[1] We rely on its brief recitation of the facts:

> On July 21, 2010, Appellant Jimmy Thacker, Jr. was indicted for one count of first-degree assault, five counts of first-degree wanton endangerment, and for being a first-degree persistent felony offender. The charges in this case resulted from a shooting that occurred on July 16, 2010. Appellant shot Elizabeth Conn multiple times while she, her little girl, and some of her friends were at her mother's house. He was charged with one count of wanton endangerment for each of the other persons who were at the home at the time of the shooting.
>
> The trial was conducted in Floyd Circuit Court on March 21-23, 2011. At trial, Appellant did not deny guilt, but claimed that he was acting under extreme emotional disturbance (EED) and asserted a voluntary intoxication defense. The jury convicted Appellant on all counts, and he was sentenced to a total of twenty-six (26) years in prison.

Thacker v. Commonwealth, No. 2011-SC-000338-MR, 2012 WL 3632349, at *1 (Ky. Aug. 23, 2012).

Thacker filed his motion pursuant to RCr 11.42 on April 24, 2013, alleging that his trial counsel's performance was deficient in eight areas, which can be grouped into three premises: (a) failure to consider Thacker's mental health issues in formulating potential defenses; (b) failure to move to strike a juror for

[1] Although Thacker's convictions were affirmed, our Supreme Court vacated in part and remanded the matter to the circuit court because of a sentencing error. The order correcting the judgment was entered in Floyd Circuit Court on November 2, 2012.

cause after Thacker advised of his personal knowledge of the juror; and (c) counsel's advice to Thacker to testify untruthfully. Post-conviction counsel was appointed the following month, and the motion was supplemented with the additional allegation that trial counsel had failed to pursue a self-protection defense. The circuit court held three hearings on Thacker's motion and entered orders of denial on August 4, 2016, and June 22, 2017.

On appeal Thacker contends that the circuit court erred by failing to consider the testimony at the hearings that supported his allegations of ineffective assistance of counsel. We begin by reciting the relevant standards of review, namely:

> The applicable standard of review in RCr 11.42 post-conviction actions is well-settled in the Commonwealth. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted), the Supreme Court stated, "[a]fter the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record."

Clark v. Commonwealth, 476 S.W.3d 895, 897-98 (Ky. App. 2015).

On appeal, our standard of review is enunciated in *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016):

> When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (*quoting Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *Haight*, 41 S.W.3d at 441-42. In addition, **the trial court's factual findings and determinations of witness credibility are granted deference by the reviewing court**. *Id.* Finally, we apply the de novo standard when reviewing counsel's performance under *Strickland*. *Bussell*, 226 S.W.3d at 100.

(Emphasis ours.) "In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Thacker first contends that the circuit court erred in its determination that trial counsel was not ineffective for failing to pursue a self-protection defense. At the very least, Thacker argues, he was entitled to an instruction on imperfect self-defense (*i.e.*, that he was '"mistaken in his belief' in the need for self-

protection"). *Commonwealth v. Hager*, 41 S.W.3d 828, 836 (Ky. 2001), *holding modified by Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012); Kentucky Revised Statute (KRS) 503.120(1). *See also Commonwealth v. Hasch*, 421 S.W.3d 349 (Ky. 2013). In support of this argument, Thacker points to his own testimony at the hearings as well as a recording of the 911 call on the date of the incident (wherein mention was made of another person besides Thacker being in possession of a weapon).

On this issue, the circuit court was faced with conflicting evidence, including Thacker's own testimony. At trial and at the initial RCr 11.42 hearing, Thacker testified that he went to the victim's home and began shooting without ever being shot at by others present at the scene. It was Thacker's recollection on both occasions that he had "snapped" and did not remember anything about that night. Thus, the circuit court correctly ruled that under those facts and circumstances it would have been improper to instruct the jury on self-defense or imperfect self-protection. Moreover, trial counsel, who appeared as a witness at the RCr 11.42 hearing, testified similarly and produced her notes from her interview of Thacker in December 2010. Counsel's notes reflected Thacker's statements to her at the time of the 2010 interview.

Our review of the record confirms that the circuit court's findings are supported by the testimony of the witnesses as well as the exhibits proffered.

McGorman, 489 S.W.3d at 736. The circuit court did not ignore the contents of the 911 recording, but rather it chose to rule, given the evidence before it, that Thacker did not act in self-protection and therefore his trial counsel was not ineffective for failing to pursue that as a defense to his charges. We find no error in this regard.

Thacker secondly maintains that counsel was ineffective for failing to have him evaluated for competency to stand trial and to present an EED defense. Concerning the latter allegation, the trial record refutes it: Counsel presented evidence that Thacker's actions were prompted by his EED and voluntary intoxication; the jury was instructed on both. *Thacker*, 2012 WL 3632349, at *1. Thus, this part of Thacker's argument on appeal must fail.

KRS 504.060(4) defines incompetency to stand trial: "'Incompetency to stand trial' means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense." Not only did Thacker "participate rationally in [his] own defense," but he also failed to be tested for competency by his expert witness at the post-conviction stage. Having failed in his burden of proof, Thacker cannot now convince this Court that the circuit court erred in finding against him on this issue.

Thacker's third assertion of error is that his trial counsel was ineffective for failing to strike an alleged biased juror (nicknamed "Poodle"). Thacker claimed that the juror had personal knowledge of the victim's family and that he had advised trial counsel during voir dire that he wanted the juror struck from the panel. It was Thacker's word against three others (trial counsel, a social worker who assisted at defense table during the trial, and the juror in question). We defer to the circuit court's finding that Thacker's testimony about the juror's bias was not credible. *Haight*, 41 S.W.3d at 441-42.

Our last issue for consideration is whether trial counsel was ineffective (and unethical) for coaching Thacker to testify untruthfully that he had no memory of the incident in question. Again, it was a matter of conflicting testimony. Trial counsel's notes corroborated her statements about Thacker's interview wherein he had stated that he had gotten upset and began shooting and then could not remember what happened after that. At least four other witnesses testified similarly. The circuit court's finding against Thacker was supported by substantial evidence, and we decline to set it aside. *McGorman*, 489 S.W.3d at 736.

The orders of the Floyd Circuit Court are affirmed.

ALL CONCUR.

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