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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000616-MR

WENDELL DIXON APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 13-CR-01124

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

JONES, JUDGE: The Appellant, Wendell Dixon, appeals from the denial of his RCr[1] 11.42 motion seeking to vacate his judgment of conviction and sentence. Dixon was sentenced to twenty-eight years following a jury trial in Fayette Circuit Court at which he was adjudged guilty of having committed one count of first-

[1] Kentucky Rules of Criminal Procedure.

degree assault[2] and two counts of first-degree wanton endangerment.[3] Dixon asserts on appeal that the trial court erred to his substantial prejudice when it denied his RCr 11.42 without conducting an evidentiary hearing. Having reviewed the record in conjunction with all applicable legal authority, we affirm.

I. Background

As part of its direct review of Dixon's convictions and sentence, the Kentucky Supreme Court summarized the underlying facts as follows:

> Appellant, Wendell K. Dixon, and April Ballentine had dated and lived together for approximately five years before she ended their relationship. On the evening of their breakup, Appellant assaulted Ballentine. According to Keith Martin, an acquaintance of the couple, Appellant threatened killing Ballentine at least three times in the following weeks. Approximately two months later, Appellant shot Ballentine multiple times, causing severe injuries necessitating the use of life-saving measure[s] by emergency responders. Ballentine's spinal cord was severed and she was paralyzed from the breastbone down. It is unlikely she will ever walk again.

Dixon v. Commonwealth, 2015-SC-000226-MR, 2016 WL 672026, at *1 (Ky. Feb. 18, 2016).

The assault on Ballentine occurred on August 9, 2013. Eight days later, on August 17, 2013, Dixon voluntarily surrendered himself over to the

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[2] Kentucky Revised Statute (KRS) 508.010.

[3] KRS 508.060.

authorities. The case proceeded to trial on March 3, 2015. The following day, the jury found Dixon guilty of having committed one count of first-degree assault and two counts of first-degree wanton endangerment. The jury recommended a sentence of twenty years for the assault and five years for each wanton endangerment count. Ultimately, the trial court sentenced Dixon to twenty-eight years.

Dixon appealed his convictions and sentence to the Kentucky Supreme Court. On direct appeal, Dixon argued that the trial court erred in: (1) striking two impartial jurors for cause and (2) admitting irrelevant and unduly prejudicial KRE[4] 404(b) evidence of prior bad acts. Following review, the Kentucky Supreme Court rejected both of Dixon's arguments and affirmed his convictions and sentence.

On May 8, 2017, Dixon filed a *pro se* motion to vacate pursuant to RCr 11.42. The trial court appointed counsel to assist Dixon. Thereafter, counsel filed a timely supplemental memorandum of law in support of Dixon's RCr 11.42 motion. Dixon's motion alleged numerous incidents of ineffective assistance by his trial counsel: (1) allowing a "biased" judge to preside over this trial; (2) failing to investigate and call witnesses to corroborate Dixon's claim that his assault on Ballentine was the product of extreme emotional disturbance ("EED"); (3) failing

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[4] Kentucky Rules of Evidence.

to object when the prosecutor made false and/or unsubstantiated statements to the jury; (4) failing to move for a mistrial after the jury observed Dixon in physical restraints; and (5) failing to consult with and present testimony from an expert witness concerning Dixon's EED claim. Dixon requested an evidentiary hearing on each issue. In an opinion and order entered on April 4, 2018, however, the trial court determined that an evidentiary hearing was not necessary because each of the claims could be resolved by examination of the record.

This appeal followed.[5]

II. Standard of Review

"The purpose of RCr 11.42 is to provide the [appellant] with a means to obtain relief for errors that rise to the level of a constitutional deprivation of due process." *Johnson v. Commonwealth,* 180 S.W.3d 494, 498 (Ky. App. 2005). When a claim under RCr 11.42 alleges ineffective assistance of counsel, we evaluate that claim under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *as adopted by the Kentucky Supreme Court in Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016). Pursuant to

[5] On appeal, Dixon makes arguments concerning only three of the claims presented in his RCr 11.42 motion-- the jury's observation of him being restrained and counsel's failure to secure expert and lay witness testimony to support his EED argument. He has abandoned his claims regarding judicial bias and misstatements made before the jury. Therefore, we will not discuss those claims further.

Strickland, "an appellant must first show that counsel's performance was deficient." *Id.* (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Additionally, the appellant must show that counsel's deficient performance prejudiced his defense in such a way as to "deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The result may be considered unreliable if there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different. *Id.* at 688-89. Reasonable probability means a probability sufficient to undermine confidence in the original outcome considering the totality of the evidence. *Id*. at 694-95.

If an evidentiary hearing is held, the reviewing court must determine whether the lower court acted erroneously in finding that the defendant below received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky. App. 1983). If an evidentiary hearing is not held, as in this case, our review is limited 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." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967); *see also*

Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky. App. 1986). More specifically, the Supreme Court set forth the applicable standard as follows:

> After 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. *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743-44 (1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); *Lewis v. Commonwealth*, Ky., 411 S.W.2d 321, 322 (1967). The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir. 1971).

Fraser v. Commonwealth, 59 S.W.3d 448, 452-53 (Ky. 2001).

III. ANALYSIS

Dixon's first argument is that the trial court erred when it denied his claim that his counsel was ineffective when he failed to move for a mistrial after the jury observed Dixon in physical restraints. The factual argument Dixon makes, however, is that jury *heard* chains rattling and/or jingling after Dixon was taken to the holdover area following his emotional outburst during the trial proceedings.

Dixon was emotional throughout the jury trial. The trial court warned Dixon early on that if he could not control his emotions, he would have to be removed from the courtroom. When Ballentine entered the courtroom in her wheelchair, Dixon can be heard on the record sobbing and crying out to her that he

is sorry. Although not part of the video record, Dixon admits that he was then voluntarily escorted from the courtroom room by a bailiff. The bailiff's keys can be heard rattling as he walks past Ballentine. Once in the holdover room, out of the sight of the jury, more sobbing and rattling/jingling can be heard. It is clear the sobbing is coming from Dixon. What is not clear, however, is whether the rattling/jingling noise is coming from the bailiff's keys or from some kind of restraints used to hold Dixon.

Dixon argues that the rattling/jingling noise is clearly coming from restraints that were placed on him in the holdover area, and it had a prejudicial effect on the jury. To this end, he posits that his counsel was ineffective when he failed to request a recess, make any objections or request a mistrial concerning the effect of the jury hearing and/or seeing Dixon in restraints.

As a preliminary matter, we agree with the trial court that Dixon has failed to put forth anything beyond mere speculation to support the fact that the jury ever saw Dixon in physical restraints. Blanket speculation of this nature is insufficient to justify the need for an evidentiary hearing, especially when the video record belies Dixon's factual assertion that he was ever in the jury's field of vision while restrained.

Dixon's assertion that he was prejudiced by the rattling or jingling sound coming from the holdover area can be determined from the face of the

record because the noises Dixon references are audible in the record. Therefore, no evidentiary hearing was necessary to resolve this claim. Moreover, the trial court properly rejected this claim.

"Visible shackling undermines the presumption of innocence and the related fairness of the fact-finding process." *Deck v. Missouri*, 544 U.S. 622, 630, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). To this end, "[i]t has long been the law in Kentucky that, in the absence of special circumstances, an accused should not be forced to face the jury in chains." *Hill v. Commonwealth*, 125 S.W.3d 221, 233 (Ky. 2004). The right to be free of shackles when in the presence of the jury was codified in RCr 8.28(5): "Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for his physical restraint." While only the term "seen" is referenced in the RCr 8.28(5), we believe due process would cover situations where chains or restraints can be heard by the jury and clearly indicate restraint.

Even so, the Supreme Court of Kentucky has explained that the use of shackles on certain defendants is necessary and permissible where the trial court has "encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials." *Tunget v. Commonwealth*, 303 Ky. 834, 836, 198 S.W.2d 785, 786 (1946), *reh'g denied*, Feb. 7, 1947. Thus, when a trial court is faced with the decision to shackle a defendant, it must balance "the

serious prejudice that may result from manacling a defendant in the presence of the jury" against the necessity of the restraints considering the circumstances of the case. *Hill*, 125 S.W.3d at 233. The ultimate decision to shackle a defendant rests within the sound discretion of the trial court.

Even if we assume for the sake of argument that the rattling/jingling sound coming from the holdover room came from some type of restraint being used to subdue Dixon, we do not believe counsel was ineffective for failing to request an admonishment or mistrial. First, at defense counsel's request, the trial court did admonish the jury not to draw any inference from Dixon's decision to leave the courtroom. Second, given Dixon's extreme outburst, it was appropriate to restrain him in some manner in the holdover room. Any restraint was done out of the jury's sight so that the jurors were only tangentially aware of it. And, given the situation, the jury was more likely to infer that any restraint was used more out a need to calm Dixon down than to confine him due to guilt. Under these circumstances, a mistrial would not have been warranted. A motion by counsel would likely have only unnecessarily drawn more attention to Dixon's confinement to the holdover room.

Dixon's second claim is that his counsel was ineffective when he failed to consult with and present testimony from a necessary expert witness concerning Dixon's EED defense. EED is not a complete defense. However,

pursuant to KRS 508.040, first-degree assault committed under the influence of EED is a Class D felony whereas first-degree assault in the absence of EED or some other mitigating factor is Class A felony. To prevail, a defendant must establish that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." KRS 507.020(1)(a). Extreme emotional disturbance is "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986).

The interplay between EED and expert testimony is complicated. It is generally not permissible for an expert to testify that a defendant was acting under EED at the time of the event in question because EED is a factual determination to be made by the jury. However, an expert may testify as to the presence of mental illness because such evidence "is entirely relevant to a subjective evaluation of the reasonableness of the defendant's response to the provocation." *Fields v. Commonwealth*, 44 S.W.3d 355, 359 (Ky. 2001).

Dixon, however, has failed to point to anything in the record that supports that his counsel should have consulted an independent expert with respect to any aspect of Dixon's mental health. At the request of his trial counsel, Dixon was evaluated at the Kentucky Correctional Psychiatric Center ("KCPC") for competency and criminal responsibility. While at KCPC, Dixon was evaluated by Dr. Timothy Allen. Dr. Allen did not diagnose Dixon as suffering from any mental illness other than episodic mild to moderate depression around the time of the event. Given Dr. Allen's assessment, we do not believe that any request by Dixon's appointed counsel for expert funding would have well taken by the trial court. Likewise, we are not persuaded by Dixon's RCr 11.42 motion that an expert was necessary. Dixon has failed to point to anything that would have merited further exploration by an expert. A defendant who raises EED is not automatically entitled to present expert testimony.

Finally, we examine Dixon's claim that his counsel was deficient for not calling several lay witnesses: (1) his sister, Saburah El-Min, who he claims would have testified Ballentine "sought out" Dixon several times following their breakup; (2) his brother, Terrine Dixon, who could have provided further testimony that Ballentine had continued to contact Dixon after their breakup; and (3) Mr. Kavanaugh, a patron at the Elks Lodge on the night of the shooting, who

could have testified that he saw Dixon become "increasingly agitated, as evidenced by his body language just prior to the shooting."

The totality of this testimony, however, amounts to little more than the jury already knew about the events. Dixon did not testify at trial. The events in question were relayed by other witnesses. According to the other witnesses, primarily Ballentine, she and Dixon had dated for about five years but had broken up about two months before the shooting. On the day she was shot, Ballentine was at the Elks Lodge for a potluck dinner. Immediately prior to the shooting, Dixon approached Ballentine who indicated that she did not want to talk to him. Dixon then shot her. There was no testimony that Ballentine and Dixon engaged in a lengthy conversation that evening or that Ballentine said or did anything to him in the moments proceeding the shooting that would have triggered Dixon. Annette Reed, a friend of Dixon, testified that she talked to Dixon after the shooting, and he told her that he was sorry and that he just wanted Ballentine to talk to him and tell him why.

We cannot accept that simply seeing Ballentine at the Elks Lodge with her friend on the night in question following the couple's long and acrimonious breakup entitled Dixon claim he acted under EED. *See, e.g.*, *Greer v. Commonwealth*, 2008-SC-000847-MR, 2010 WL 2471842, at *3 (Ky. June 17, 2010) ("A romantic breakup that upset the defendant, even if traumatic, is simply

insufficient standing alone, either to constitute a triggering event or to supply a reasonable explanation for the purported EED.").[6] Put simply, a difficult, protracted breakup is not the type of triggering event that gives rise to EED. Even if counsel's failure to illicit the above-described testimony could somehow rise to the level of a deficiency, Dixon failed to establish there is a reasonable probability that had this testimony been before the jury that the outcome of his trial would have been different.

IV. CONCLUSION

For the forgoing reasons, we AFFIRM the order of the Fayette Circuit Court.

ALL CONCUR.

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[6] This unpublished opinion is cited pursuant to CR 76.28(4)(c) as illustrative of the issue before us and not as binding authority.