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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001388-MR

DEIONTA L. HAYES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 12-CR-00628-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, DIXON, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Deionta L. Hayes ("Appellant") appeals from an opinion and order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion to vacate his judgment and his request for an evidentiary hearing. Appellant argues that his trial counsel was ineffective in failing to offer the defense of extreme emotional disturbance and in failing to

present expert testimony in support of that defense. Appellant also argues that the circuit court erred in failing to conduct an evidentiary hearing. For the reasons addressed below, we find no error and affirm the opinion and order on appeal.

FACTS AND PROCEDURAL HISTORY

The underlying facts were memorialized in the unpublished Kentucky Supreme Court opinion of *Hayes v. Commonwealth*, No. 2015-SC-000501-MR, 2017 WL 639387 (Ky. Feb. 16, 2017). The Kentucky Supreme Court stated that,

> On March 17, 2012, several friends/acquaintances—Laroz Mitchell (Laroz), James Mitchell, Dominque Godfrey, Chaz Black, DeAngelo Yarborough, and Garfield Starnes—gathered at an apartment being rented by Amber Toomer. Throughout the night they "hung out" and smoked marijuana, and at least two of them, Laroz and Godfrey, shot dice. They all spent the night and, at approximately 9:00 a.m., Koree Smith arrived at the apartment. At approximately 10:00 a.m. several of the men went to a nearby gas station/convenience store to buy food and drinks. When they returned, Godfrey and Laroz again began shooting dice. At some point after that, Godfrey went outside and returned with his cousin, Hayes, who joined the dice game. The witnesses' versions of what happened next differed but there is no dispute that Hayes pulled out a gun and shot Smith, Laroz, and Black, wounding Smith and Laroz, and killing Black. Hayes and Godfrey fled.
>
> . . . .
>
> The apartment had a front door and a sliding-glass back door. The witnesses generally agreed that, a short time before Hayes began shooting, Smith picked up a handgun that was sitting in front of him on a coffee table, said, "F[---] this," and put the gun in his waistband. The

> witnesses also generally agreed Hayes started toward the front door, stopped, and moved hurriedly toward Smith. When he got to Smith, Hayes put his arm on Smith's chest, told him not to move, and then shot Smith in the shoulder. After that shot was fired, Laroz ran toward the sliding-glass door and, when he was in the doorway, he turned back toward Hayes. Hayes then shot Laroz in the right thigh. Hayes then shot Black, who was either getting up from a chair, standing, or charging at Hayes.

Id. at *1, 3.

Black died from the shooting, and Smith and Laroz were injured. Appellant was charged with one count of murder, two counts of assault in the second degree, and other offenses. The matter proceeded to trial in July 2015, where Appellant admitted shooting the individuals, but claimed that he acted in self-defense.[1] In support of the defense, Appellant, through counsel, called his mother, Sheryl Burnett, to the witness stand who testified that someone had previously shot at her house on twelve occasions. The Commonwealth objected to her testimony as not relevant, and the objection was sustained. Burnett then testified by avowal that Appellant had been present during three of the shootings and that two had taken place after Black's death.

At the close of the evidence, Appellant was convicted of one count of murder, two counts of assault in the second degree, one count of theft by unlawful

[1] Kentucky Revised Statutes ("KRS") 503.050.

taking, and with being a persistent felony offender in the first degree.[2] He was sentenced to 35 years in prison. Appellant appealed to the Kentucky Supreme Court, where he argued that Burnett's testimony should have been admitted at trial because it was offered to show his state of mind when he shot Black. The Kentucky Supreme Court determined that this was a new argument not properly preserved for appellate review because Burnett's testimony was offered at trial to show why Appellant carried a gun, but not why he shot Black. The court affirmed the Fayette Circuit Court's judgment of conviction.

On July 14, 2017, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel.[3] Appellant's primary argument was that his trial counsel improperly failed to present an extreme emotional disturbance ("EED") defense. He also asserted that counsel should have obtained an expert witness to investigate Appellant's claim that everyone present in the apartment where he shot Black was "trippin' out on synthetic marijuana," and that trial counsel failed to offer jury instructions on appropriate defenses and lesser-included offenses. On August 17, 2018, and without conducting a hearing, the circuit court rendered an opinion and order which held in relevant part that Appellant's trial counsel was not ineffective in failing to prosecute an EED defense. This appeal followed.

[2] KRS 507.020, KRS 508.020, KRS 514.030, and KRS 532.080(3).

[3] Appellant later received appointed counsel.

ARGUMENTS AND ANALYSIS

Appellant argues that his trial counsel improperly failed to present an EED defense and that this deprived him of a fair trial.[4] He also asserts that he was entitled to expert testimony in support of the EED defense and that the circuit court should have conducted a hearing on the motion. Appellant claims that his trial counsel was aware that the home of Appellant's mother had been shot at on multiple occasions and that Appellant had witnessed an unrelated murder resulting in Appellant being covered in the victim's blood and brain matter. He asserts that these events produced a lasting mental state of which trial counsel was aware. According to appellate counsel, Appellant told his trial counsel that the shootings caused him to constantly be in fear of his life and that he was afraid for his safety every time he left his house.

Appellant contends that he alleged material facts that, if true, would have warranted an EED defense. He claims that he grew up impoverished, witnessed gang activity and multiple shootings, had been shot, and his house had been shot at nearly a dozen times. He argues that this life experience, which was coupled with Smith picking up a handgun in a threatening manner, easily lend themselves to an EED defense. He contends that trial counsel's failure to assert

[4] Appellant has not raised arguments relating to intoxication, jury instructions, or lesser-included offenses.

such a defense denied him the effective assistance of counsel to which he was entitled.

> Although EED is essentially a restructuring of the old common law concept of "heat of passion," the evidence needed to prove EED is different. There must be evidence that the defendant suffered "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." "[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted. It is not a mental disease or illness[.] Thus, it is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown." And the "extreme emotional disturbance . . . [must have 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."

Greene v. Commonwealth, 197 S.W.3d 76, 81-82 (Ky. 2006) (citations omitted).

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

> 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. This requires showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* (citation omitted).

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id., 466 U.S. at 691-92, 104 S.Ct. at 2066-67 (citation omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, 466 U.S. at 693, 104 S.Ct. at 2067. "The 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.*, 466 U.S. at 694, 104 S.Ct. at 2068. Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

The questions for our consideration are whether trial counsel made errors so serious that Appellant did not receive the counsel guaranteed the

defendant by the Sixth Amendment and whether those errors deprived Appellant of a fair trial. *Strickland, supra*. Having closely examined the record and the law, we must answer these questions in the negative. In its unpublished opinion disposing of Appellant's direct appeal to the Kentucky Supreme Court, the Court determined that

> [t]here was no evidence that Smith, Laroz, Black, or anyone in the apartment in March 2012 was associated with the house shootings. Furthermore, there was no evidence that Hayes was in fear because of the house shootings or that his actions in March 2012 were motivated by those shootings. . . . *[T]here was no connection between the house shootings and the events of March 2012*[.]

Hayes, 2017 WL 639387, at *2 (emphasis added). This finding is subject to the law of the case doctrine, which precludes an appellate court from reviewing prior appellate rulings. *See generally Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). As the Kentucky Supreme Court previously ruled that there was no connection between the house shootings and the events of March 2012, we cannot now conclude that trial counsel's failure to assert this connection constitutes a serious error depriving Appellant of a fair trial.

Even when taking into account that Appellant allegedly witnessed another murder which adversely affected his mental state,[5] the efficacy of an EED

[5] No evidence was presented at trial as to this claim.

defense under the facts before us is wholly speculative and falls far short of demonstrating that Appellant was deprived of a fair trial and that the outcome would have been different but for the EED defense. An RCr 11.42 motion may not be sustained on mere conjecture that a different strategy might have proved beneficial. *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). As there was no connection between the house shootings and the events of March 2012, and as it is purely speculative whether an EED defense based on that connection would have altered the outcome of the trial, we cannot conclude that Appellant was deprived of effective assistance of counsel on this issue. This is especially true given that we must be highly deferential to counsel's performance and should avoid the strong temptation to second guess that performance. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). Furthermore, we are not persuaded that trial counsel's failure to produce expert testimony on this issue constituted ineffective assistance, nor that a hearing on the matter was required. Appellant's motion was justiciable by reference to the record. *See Stanford, supra*.

CONCLUSION

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrea Reed
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky