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RENDERED: DECEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0115-MR

DATE 5-24-07 E.A. GORMAN P.C.

MITCHELL WILLOUGHBY

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
1983-CR-152-2

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from orders which denied post-conviction motions pursuant to CR 59.05 and RCr 11.42. Willoughby was found guilty by a jury of three counts of murder in 1984 and sentenced to death for two of the murders and life in prison for the third murder.

The questions now presented are: 1) whether effective assistance of counsel was provided regarding the testimony of Dr. Schwartz and the preparation of and investigation of the mitigation phase of the case; and 2) whether it was error not to consider the cumulative impact of alleged ineffectiveness, to decline to provide funding for post-conviction relief, or not to conduct an evidentiary hearing on additional mitigation witnesses in regard to the CR 59.05 motion.

Willoughby was indicted in 1983, along with two codefendants, for the three murders. Codefendant Hutchins entered a plea of guilty to two counts of hindering prosecution and testified against Willoughby and the other codefendant Halvorsen. The underlying offenses were summarized by this Court in Willoughby v. Commonwealth, 730 S.W.2d 921 (Ky. 1986). The bodies of two men and a woman were found in the Kentucky River. Each victim had been shot to death. Two of the victims were found on the side of the bridge, each bound with a blue and yellow rope that was attached to a heavy rock. The third victim was found in the river below the bridge wrapped in a sheet that was also bound in a blue and yellow rope attached to a heavy rock. Willoughby testified at trial and took all of the responsibility for the shootings. On direct appeal, this Court affirmed the jury verdict.

This case is before this Court in regard to the effectiveness of trial counsel, a 1972 law school graduate who was employed at the Fayette County Legal Aid as a public defender. Specifically, Willoughby appeals from the orders of the circuit judge overruling post-conviction motions.

Defense counsel filed motions for a new trial and judgment notwithstanding the verdict that were overruled. A presentence investigation report was filed and final judgment and the sentence of death were entered on September 15, 1983. The conviction was affirmed by this Court in Willoughby, supra. Certiorari was denied by the United States Supreme Court in Willoughby v. Kentucky, 484 U.S. 982, 108 S.Ct. 496, 98 L.Ed.2d 495 (1987).

In 1988, Willoughby filed a motion pursuant to RCr 11.42 on the basis of ineffective assistance of counsel and other allegations. Following those events, pleadings and an original action were then filed which delayed the case; specifically

relating to the disqualification of a judge and the entire Fayette Commonwealth Attorney's Office, as well as the substitution of Department of Public Advocacy personnel with private counsel for Willoughby and Halvorsen.

Willoughby was represented by the DPA for five years when private counsel assumed responsibility for the case in 1993. During the following years, the proceedings were delayed, largely over the attempt to get funds for an expert and investigative services. In 1997, the trial judge issued an order for an evidentiary hearing to be held in 1998. At that time, the original defense trial counsel testified regarding his experience, workload, preparation and strategy for the trial. He frequently answered that he did not have a sufficient recollection of the circumstances to answer questions propounded by both sides in view of the 15-year gap between trial and the evidentiary hearing. This was due in part because his file had been dissected and pieced apart for the direct appeal and a trial on charges in another county.

Other witnesses at the evidentiary hearing were Steven Bright, an attorney, and law professor and director of the Southern Center for Human Rights, who among other things acknowledged that the ABA guidelines that he cited during his testimony were adopted in 1989, six years after the trial of this case. Other witnesses were the parents of Willoughby and Dr. Peter Schilling, a forensic psychologist who testified that he believed that Willoughby suffered from attention deficit hyperactivity disorder, and was probably suffering from this affliction at the time of the crime, as well as substance abuse disorder. Dr. Schilling did admit that his intelligence testing indicated that Willoughby had an I.Q. of 91. Post-hearing briefs were filed in the RCr 11.42 action in 1998. Thereafter the case sat dormant for four years. In 2003, counsel for Willoughby filed a supplemental brief. In November of that year, the circuit judge entered an order

denying the RCr 11.42 motion. In 2005, a trial judge denied a CR 59.05 motion. This appeal followed.

I. Standard of Review

Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001), states the standard for RCr 11.42 motions. In such proceedings, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief given by post-conviction proceedings. The post-conviction relief afforded by this rule is not a substitute for appeal and it does not permit review of alleged trial errors which fall short of a denial of due process. See Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967) and Dorton v. Commonwealth, 433 S.W.2d 117 (Ky. 1968).

The federal standard for such review is found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984), which establishes a two-prong test for determining ineffective assistance of counsel. A petitioner must show both incompetence and prejudice: 1) he must show that the representation fell below an objective standard of reasonableness, and 2) that there is a reasonable probability that because of the unprofessional conduct, the result of the proceedings would have been different. Accord Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). See also United States v. Morrow, 977 F.2d 222 (6th Cir. 1992). A defendant is not guaranteed error-free counsel or counsel judged ineffective by hindsight, but counsel likely to render and who does render reasonably effective assistance. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997).

When considering a claim of ineffective assistance of counsel, the appellate court must review the matter on the totality of the evidence before the trial judge or jury. We must assess the overall performance of defense counsel throughout the case in order to determine whether the identified omissions overcome the presumption that defense counsel rendered reasonably effective professional assistance. See Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed. 302 (1986). Essentially, appellant must identify specific errors and demonstrate that they were objectively unreasonable under the circumstances at the time of the trial, rebut the very strong presumption that the actions were taken as a result of trial strategy, and demonstrate that the errors prejudiced the right to a fair trial and that there is a reasonable probability of a different verdict, but for the errors. See generally, Strickland, supra; Martin v. Mitchell, 280 F.3d 594 (6th Cir. 2002); and Taylor v. Commonwealth, 63 S.W.3d 151 (Ky. 2002).

Certainly, the Sixth Amendment to the United States Constitution guarantees reasonable competence, but not perfect advocacy judged with the benefit of hindsight. Yarbrough v. Gentry, 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). The purpose of the Sixth Amendment is simply to ensure that criminal defendants receive a fair trial. Willoughby has failed to meet the standards required to prove ineffective assistance of defense counsel in each of the claims he raises here.

II. Testimony of Dr. Schwartz

Willoughby argues that his counsel was ineffective because he called Dr. Charles Schwartz to testify during the guilt phase of the trial. Among the reasons he presents is that his counsel was a victim of burnout because of overwhelming caseload. The circuit judge decided against such a theory noting that, among other things, the

testimony from defense counsel indicated that he had adequate time to prepare for the case. An examination of the record indicates that the caseload was lightened when he was assigned this case; that he had every afternoon available to work on the case; that he had exclusive use of an investigator; and that he went to the DPA offices to discuss the case and review their materials.

The allegations of the overload of cases must be considered in the context of the 1983 trial. Trial counsel indicated that it was much tougher to get experts in 1983 as compared to 1998. He was able to hire Dr. Robert Granacher who was a well known forensic psychiatrist frequently referred to as the “best in the field” with specific “expertise” in drug problems. Dr. Granacher had a reputation for being a good defense witness. Unfortunately for Willoughby, the testing done by Dr. Granacher did not yield favorable results. He was not called to testify, largely because he confirmed the conclusion of Dr. Schwartz that Willoughby suffered from antisocial personality disorder and that he could conform his conduct to the law on the day of the shootings. In addition, Dr. Granacher found no mental illness or biological condition that could be used as a defense.

It was not unreasonable for trial defense counsel to call Schwartz as a witness. No prejudice arose from the testimony on cross-examination regarding the personality disorder. The personality evidence was cumulative because Willoughby himself testified that he was discharged from the Navy because of “unsuitability, personality disorder.” A second psychiatrist, Dr. Atcher, testified in the mitigation phase of the trial. He was cross-examined by the Commonwealth and also gave clinical information regarding the anti-social personality disorder.

At trial, Dr. Schwartz provided favorable testimony. The testimony of Dr. Schwartz regarding intoxication at the time of the arrest complimented testimony from Willoughby, law enforcement and jail personnel. Trial counsel admitted that the testimony of Dr. Schwarz regarding intoxication was not as strong as he had hoped as compared to the pretrial interview.

The contention that trial counsel overlooked the diagnosis of Dr. Schwartz regarding personality disorder is without merit. There is no doubt that counsel realized that his client had personality problems. Moreover, Willoughby's mother also testified that she gave defense counsel the Navy discharge paperwork which reflected some personality disorders.

The mere fact that the Schwartz testimony was not as helpful as counsel may have hoped is not the basis for relief. Based on his analysis of the interview, trial counsel determined that Schwartz would give valuable testimony. Such a decision was reasonable and is particularly understandable insofar as the pretrial interview was more favorable than the testimony at trial.

Any complaint that defense counsel should be found ineffective simply because a witness does not ultimately testify as favorably as when that witness was interviewed prior to trial is not required by Strickland. Here, counsel reasonably investigated the entire matter and made a strategic choice to call the witness. He was not ineffective.

Defense counsel made a reasonable investigation and a strategically correct selection to call Dr. Schwartz in regard to the intoxication defense theory and mitigator in this case. It is not ineffective assistance simply because some of the testimony contains unfavorable information. See Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991).

III. Preparation and Investigation/Mitigation Phase

Willoughby now contends that his defense counsel inadequately prepared and investigated the mitigation phase of the case. He alleges that defense counsel did not begin preparing for mitigation until conviction and that he did not investigate the defendant's life history.

Willoughby asserts that his attorney inadequately investigated and prepared the mitigation case. His complaint is based almost entirely on part of an answer from the ineffectiveness hearing. He argues that trial counsel testified that he did not begin to prepare for mitigation of penalty in Willoughby's trial until after the jury convicted. This statement was taken out of context in argument and ignores other parts of the testimony by trial counsel. The record clearly demonstrates that this contention is without merit. Defense trial counsel's statement was in effect that he placed as much mitigation evidence as possible into the guilt phase. As noted in Harper v. Commonwealth, 978 S.W.2d 311 (Ky. 1998), when a jury sits in both phases of a capital murder trial, all evidence introduced in the guilt phase may be considered by the jury during the penalty phase. Trial counsel observed that his goal in the case was first to get a sentence less than death. In his four previous capital cases, this strategy had been successful. In 1983, it was a common practice to introduce mitigation evidence in this manner. It should be obvious that trial counsel did not wait until the penalty phase to prepare for the mitigation of the penalty. There is no basis for an ineffective assistance of counsel claim.

Evidence was presented in both the penalty and mitigation phases in regard to intoxication, self-defense, emotional disturbance, mental state/depression, youth, remorse, good family and lack of sleep. A careful examination of the record indicates

that the defense counsel at trial put forth one of the best possible mitigation cases that was available to him.

Willoughby also maintains that additional mitigation evidence should have been presented. The majority of the alleged additional evidence is from interview summaries attached to the CR 59.05 motion after the denial of the RCr 11.42 motion. As such, the motion did not present a proper basis for a grant of relief pursuant to CR 59.05. See Gullion v. Gullion, 163 S.W.3d 888 (Ky. 2005). The witness summaries were comprised essentially of communications to DPA counsel, all without the benefit of cross-examination or any analysis as to the potential unfavorable testimony within the summaries. These summaries were not presented at the RCr 11.42 hearing and do not indicate any misdeed by defense trial counsel in not presenting these witnesses. See Tinsley v. Million, 399 F.3d 796 (6th Cir. 2005). The so-called life history documents were also simply attached to the CR 59.05 motion and never presented at the RCr 11.42 hearing.

We must conclude the trial counsel was not ineffective in presenting mitigating evidence. Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

A reasonable investigation is not one that the best defense lawyer blessed with not only unlimited time and resources, but also the inestimable benefit of hindsight would conduct. See Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). In any event, decisions relating to witness selection are normally left to the judgment of counsel and

will not be second-guessed by hindsight. See Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000); Morrow, 977 F.2d at 222. The true test is whether the performance by defense counsel is so deficient that it renders the result unreliable. See Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Here, the evidence claimed by Willoughby as additional mitigation was cumulative to the central mitigation issues. Presentation of a social life history would have created not only duplicitous and cumulative evidence. Defense trial counsel was not deficient in his performance and was not ineffective in the investigation and presentation of mitigation evidence.

IV. Presentation of Expert Testimony

Willoughby complains that his trial counsel was ineffective in presenting expert testimony particularly by the failure to provide life history records to Dr. Granacher. Four psychological evaluations were performed on Willoughby. The claim is that deficient performance was obvious and that Willoughby was prejudiced because the jury never heard any of the mitigating evidence that could have been adduced in a competency report, such as the one rendered by Dr. Peter Schilling. The argument also relies on a summary of the testimony given by Stephen Bright, a lawyer and law professor.

The Bright testimony regarding the reasonableness of defense counsel was offered generally. He never specified that the gathering of records to supply experts was a standard at the time of this trial. Actually, he acknowledged during his testimony that the ABA Guidelines he was using for his opinions were adopted in 1989, six years after Willoughby's trial. The effectiveness of defense counsel is considered based on the professional requirements in existence at the time of the trial. The fact that experts

were found who would testify favorably as long as twenty years later in some cases, is irrelevant. Horsely v. Alabama, 45 F.3d 1486 (11th Cir. 1995). Defense counsel does not perform unreasonably merely by not ruling out every possible psychological mitigator through specialized evaluations. Carter v. Mitchell, 443 F.3d 517 (6th Cir. 2006). Here, the conclusion by Dr. Schilling involved an objective diagnosis model that was 14 years from existence at the time of the trial. This case is clearly distinguishable from Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998). In the Bean case, the penalty phase was described as cursory and disorganized. In that case, counsel also ignored recommendations by two mental health professionals that had examined the accused in the early stages of the case and strongly recommended further testing to evaluate the organic brain damage suffered by Bean.

None of the records were introduced at the RCr 11.42 hearing. The only evidence of their contents was based on statements made by defense counsel when questioning Bright and Dr. Schilling. Such records were available prior to the RCr 11.42 hearing and their contents should not be considered at this time.

Under all the circumstances, the insufficient testimony of Bright, as well as the failure to introduce any of the records, is not a proper ground to demonstrate that defense trial counsel was ineffective or deficient or that the outcome of the trial was in any way prejudiced.

V. Cumulative Impact

Willoughby argued before the circuit court about the interdependence of the three prior claims of ineffectiveness as they relate to the verdict in the penalty phase. He states that trial counsel's effectiveness should be considered as a whole. We certainly agree. However, as previously stated in this opinion, the defense trial lawyer

was not ineffective. As noted in Sanborn v. Commonwealth, 975 S.W.2d 913 (Ky. 1998), “in view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect.” That is the situation here.

VI. Adequacy of Funding

Although, as the Commonwealth argues, the claim for investigative funding was not adequately raised in the circuit court, nevertheless, we will review it at this time.

Willoughby contends that there were nine witnesses who would have testified regarding the adequacy of funding as to the meaningful exercise of his right to post-conviction relief. Among the witnesses who would or could have testified but did not do so were his grade school teacher; a friend who would have testified that he was doing drugs “like crazy” and was not sleeping; a co-worker who could have testified that he was a good worker; a cousin who would have testified that he was her favorite in her husband’s family and was a caring person; a fellow inmate from Blackburn Correctional Complex who could have testified that there were no disciplinary problems while in prison and that he was a good and easy going person; and two other inmates from the Fayette County Jail who would have testified that he was in bad shape and looked like he was going to die.

Two other individuals testified at trial but Willoughby now claims that defense counsel did not ask the witness about Susan Hutchens and Leif Halvorsen, the codefendants in the original murder trial who could have testified that Hutchins was a wild person, and another witness who testified at trial that he grew up with Willoughby and that he only met with the defense counsel briefly just before taking the stand and did not feel that he got an opportunity to say everything that he wanted to say.

This Court has consistently held that in post-conviction collateral attacks, the only purpose is to provide a forum for known grievances and not the opportunity to search for grievances. See Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005); Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003); Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001).

The requirement to provide funds to indigent defendants for necessary experts as held in Binion v. Commonwelath, 891 S.W.2d 383 (Ky. 1995), has not been extended to post-conviction matters. The complaint that the trial judge erred by not granting funds is unconvincing.

VII. Evidentiary Hearing on Additional Mitigation Witnesses

Willoughby asserts that it was error to fail to hold an evidentiary hearing regarding additional mitigation witnesses contained in a CR 59.05 motion. He claims that the inability to put on additional witnesses was directly attributable to the lack of investigative funds. He further contends that the reason the additional evidence did not come out at the hearing was because his then post-conviction counsel was ineffective.

Willoughby acknowledges that Murray v. Capital Giarratano, 492 U.S. 1 (1989) and Pennsylvania v. Finley, 481 U.S. 551 (1987), direct that there is no right to effective assistance of counsel in a post-conviction proceeding. However, Willoughby relies on Coleman v. Thompson, 501 U.S. 722 (1991), which he says left undecided whether effective assistance of counsel attaches to a proceeding in which constitutional claims can, for the first time, be raised.

CR 59.05 provides that a motion to alter, amend, or vacate a judgment, or enter a new one, shall be served not later than ten days after the entry of final judgment. It has been held that the new grounds for relief may not be asserted for the first time in a

CR 59.05 motion in the absence of a showing of newly discovered evidence that could not have been discovered earlier with the exercise of due diligence. See Gullion, supra; accord United States v. Battle, 272 F.Supp.2d 1354 (N.D. Ga. 2003), a death penalty case rejecting an attempt under F.R.C.P 59(e) to present new evidence after a collateral attack motion had been denied.

Here, the witness's summary of additional mitigation witnesses was part of a large group of documents provided by Dr. Schilling in preparation of the RCr 11.42 hearing. Applying the standards of Gullion, we find no basis for the claim of error.

Reliance on Coleman, supra, and Evitts v. Lucey, 469 U.S. 387 (1985), is unpersuasive. This Court, as well as the United States Supreme Court has rejected the argument in Lucey, supra, or equivocal arguments that apply to collateral attack proceedings. Cf. Hodge, supra. As has been stated many times, a collateral attack is not a substitute for an appeal. The principles governing direct appeals are not applicable to such motions. Hodge, supra.

Here, Willoughby was not denied any of his federal or state constitutional rights to effective assistance of counsel or due process. The decision of the trial judge is affirmed.

All concur except McAnulty and Minton, JJ., who concur in result only

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