IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

MODIFIED: JANUARY 20, 2011
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FINAL
DATE 1-20-11 Ent'd Court, D.C.

Supreme Court of Kentucky

2009-SC-000557-MR

WILLIAM EUGENE THOMPSON — APPELLANT

V.

ON APPEAL FROM LYON CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, SPECIAL JUDGE
NO. 86-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal in a death penalty case from an order denying Eugene Thompson's RCr 11.42 motion alleging ineffective assistance of counsel. Thompson argues that his trial counsel was ineffective because counsel mentioned in his closing argument the possibility that Thompson could be released on parole after twenty-five years, when Thompson had already received a serve-out on his previous life sentence. From our review of the record, we adjudge that the trial court properly found that Thompson's trial counsel did not render ineffective assistance. Thus, we affirm.

While serving a life sentence for a 1972 murder committed in Pike County, Eugene Thompson was transferred in April 1986 from the Kentucky

State Reformatory to the Western Kentucky Farm Center in Lyon County, a minimum security prison that operated a dairy farm. On May 9, 1986, while Thompson was working on the dairy farm with corrections officer Fred Cash, Thompson bludgeoned Cash to death with a hammer; stole his wallet, keys, and a knife; and fled in a prison dairy truck. Thompson drove to the nearby town of Princeton, where he purchased a ticket and boarded a bus bound for Madisonville. Thompson was apprehended by authorities in Madisonville.

Thompson's original conviction, for which he was sentenced to death, was reversed by this Court on direct appeal, and remanded for a new trial. *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993). Thereafter, Thompson pled guilty in 1995 to murder, robbery in the first degree, and escape in the first degree, and was sentenced on the non-capital offenses to two consecutive terms of imprisonment totaling twenty years. A new jury trial was held in Graves County (on motion for change of venue) only on sentencing for the murder conviction. Pursuant to this trial, which was held on February 2 - 11, 1998, Thompson was again sentenced to death.

On direct appeal, this Court remanded the case to the trial court for a retrospective competency hearing. *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001). After holding the competency hearing, the trial court found that Thompson was competent to enter his guilty plea. On his subsequent direct appeal, this Court affirmed the convictions and death sentence. *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004).

On May 18, 2006, Thompson filed an RCr 11.42 motion to vacate his sentence, alleging several claims of error, including ineffective assistance of counsel and that the jury improperly considered extra-judicial information in deciding his sentence. Finding that an evidentiary hearing on the matter was not warranted, the trial court denied the motion on May 15, 2009. This appeal followed.

Thompson's chief claim of error is that his trial counsel was deficient for mentioning in his closing argument the possibility that Thompson could be released on parole after twenty-five years. The record established that in 1993, Thompson received a serve-out by the Kentucky Parole Board on his prior life sentence for the 1972 murder. In Thompson's closing argument, defense counsel stated as follows:

> We have a case now where it is not necessary to take a life. He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him? Because he doesn't even think about the P word – the Parole Board – until he is about seventy-five years of age. That is twenty-five New Years. Twenty-five Thanksgivings. Twenty-five Christmases. I'd like to think and I will be retired by then, we may have a colony on Mars by then. Twenty-five years.

Thompson argues that when his trial counsel referred to the possibility that he could be paroled in twenty-five years, he left the jury with the false impression that he could someday be released on parole and thus made it more likely that the jury would give him the death penalty. The trial court rejected this argument, reasoning that it was a matter of trial strategy and that the court would not second-guess defense counsel's trial strategy.

In an RCr 11.42 proceeding, the movant bears the burden of establishing that he was deprived of effective assistance of counsel. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007). To prevail on a claim of ineffective assistance of counsel, the movant must first show that counsel's performance was deficient, meaning that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the movant must demonstrate that counsel's deficiency prejudiced the defendant. *Id.* This requires a showing that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Id.* at 694. We have also stated this standard as a determination of whether, absent counsel's errors, the jury would have had reasonable doubt with respect to guilt. *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008).

"In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. In considering an RCr 11.42 motion based on ineffective assistance of counsel claims, the trial court must evaluate counsel's performance in light of the totality of the circumstances and the trial as a whole. *Strickland*, 466 U.S. at 695. In an appeal from a decision on an

RCr 11.42 claim, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

During Thompson's sentencing trial, Thompson himself testified as follows on direct:

> Defense counsel: Do you . . . . do you understand that you are going to be staying in prison the rest of your life?
>
> Thompson: I will die in prison. I have been in now for almost twenty-seven years. I have no chance of ever getting out. I finally went up for parole on the life sentence that I was originally doing in November of 1993 and at that time, the Parole Board give me a serve-out on a life sentence which means that I will die in prison.

The four authorized penalties for capital murder at the time of Thompson's trial were: imprisonment for a term of twenty years or more, life, life without the possibility of parole for twenty-five years, and death. As evidence that the jury relied on defense counsel's remark about the possibility that Thompson could be released on parole in deciding to sentence Thompson to death, Thompson filed an affidavit of one of the jurors in the record in 2005. The affidavit stated that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence." The affidavit also stated that the jury "did not necessarily want to sentence Mr. Thompson to death" and that "[a]n option of life without parole would have been preferable to the death penalty."

The comment in question that Thompson "doesn't even think about the P word – the Parole Board – until he is about seventy-five years of age" was made in the context of arguing against the imposition of the death penalty. It was clearly made more to emphasize the probability of Thompson never getting out of prison than the possibility that he could someday be released from prison. Nevertheless, in reviewing the record, we can see there were strategic reasons justifying defense counsel's reference to the possibility of Thompson being paroled after twenty-five years. *See Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003), *overruled on other grounds by Leonard*, 279 S.W.3d 151 (Tactical decisions "will not be second guessed in an RCr 11.42 proceeding.").

Had defense counsel brought up the serve-out on Thompson's prior life sentence, that would have likely drawn more attention to Thompson's prior conviction for the 1972 murder for hire, and emphasized the fact that not only was this Thompson's second murder, but he committed it while in prison for the prior murder. Further, the only defense offered by Thompson was that the murder of Cash was a spontaneous act, and not a calculated, premeditated act. In support of this defense, defense counsel argued that Thompson was getting close to possibly being paroled on his prior conviction and therefore had nothing to gain from planning and carrying out the murder of Cash. Presenting evidence of the serve-out on Thompson's prior conviction, although it was not ordered until 1993, would have confused the issue for the jury.

Also, at the time Thompson received the serve-out on his prior murder conviction, the Parole Board could have subsequently revisited the serve-out decision. 501 KAR 1:030, § 4(1)(d) (1993). Hence, there was still a possibility that Thompson could be paroled on the prior conviction.

Defense counsel argued strongly and passionately to the jury to consider the mitigating factors and not to impose the death penalty in his closing argument in this case. During his closing argument he stated,

> The Commonwealth knows it is not necessary to kill because Eugene Thompson will die in prison. . . . He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him?

In his opening statement, he stated unequivocally, "Eugene Thompson will die in prison and over the next several days, you will decide and the weight is on you to decide whether God will take him or the State will take him." As noted earlier, the responses elicited by defense counsel in his questioning of Thompson clarified that he had received a serve-out on his prior life sentence in 1993 and that he would "die in prison."

As for the affidavit of the juror claiming that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence" and "did not necessarily want to sentence Mr. Thompson to death," RCr 10.04 provides that a "juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, the self-serving affidavit produced over seven years after the trial cannot be used to establish Thompson's claim of ineffective assistance of

counsel. *See Gall v. Commonwealth*, 702 S.W.2d 37, 44 (Ky. 1985) (rejecting juror's testimony as basis for defendant's claim that jurors improperly considered parole).

Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. *Strickland*, 466 U.S. at 689; *see also Haight v. Commonwealth*, 41 S.W.3d at 442. From our review of the totality of the circumstances in this case, we cannot say that defense counsel's single remark regarding the possibility of Thompson being paroled constituted ineffective assistance of counsel in this case.

Even if defense counsel's performance was deemed deficient for mentioning the possibility of Thompson being released on parole, given that Thompson killed Cash and escaped while he was incarcerated, it is unlikely that additional evidence of Thompson's serve-out would have held much sway in trying to convince the jury that Thompson being in prison for the rest of his life would be adequate to protect the public from Thompson. In fact, the Commonwealth argued this exact point - that being incarcerated did not stop Thompson from killing an innocent man in 1986 – in its closing argument.

Further, the Commonwealth presented strong evidence of aggravating factors in this case, and the jury specifically found the following aggravating factors: the prior conviction of murder, the murder was committed while Thompson was incarcerated, and the victim was a corrections officer engaged in the performance of his duties at the time of his murder. Thus, we believe

that the jury would still have recommended the death penalty in this case absent his counsel's mention of the possibility of parole.

Thompson's second argument that the jurors considered improper outside information in deliberating Thompson's sentence is not a proper ground for an RCr 11.42 motion. Issues that could have or should have been raised on direct appeal cannot be raised in a motion pursuant to RCr 11.42. *Leonard*, 279 S.W.3d at 156 (quoting *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972)).

Finally, Thompson argues that he was at least entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. When a movant has raised an allegation of ineffective assistance of counsel, the trial court need not always conduct an evidentiary hearing. "Even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Whether an RCr 11.42 movant is entitled to an evidentiary hearing is determined under a two-part test. First, the movant must show that the "alleged error is such that the movant is entitled to relief under the rule." *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001). In other words, the court must assume that the factual allegations in the motion are true, then determine whether there " 'has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.' " *Id.* (*quoting Lay v. Commonwealth*, 506 S.W.2d 507, 508 (Ky. 1974)). "If that answer is yes, then an evidentiary hearing on a defendant's

RCr 11.42 motion on that issue is only required when the motion raises 'an issue of fact that cannot be determined on the face of the record.' " *Hodge*, 68 S.W.3d at 342 (quoting *Stanford*, 854 S.W.2d at 743-44). To do this, the court must "examin[e] whether the record refuted the allegations raised." *Hodge*, 68 S.W.3d at 341. "An evidentiary hearing is not required to consider issues already refuted by the record in the trial court." *Haight*, 41 S.W.3d. at 442. "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds by Leonard*, 279 S.W.3d 151.

In this case, Thompson did not raise an issue of fact relating to his claim of ineffective assistance of counsel that could not be determined on the face of the record. As discussed above, the record affirmatively refuted Thompson's claim. Hence, Thompson's RCr 11.42 motion was properly denied without an evidentiary hearing.

For the reasons stated above, the order of the Lyon Circuit Court is affirmed.

Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., sitting. All concur. Cunningham, J., not sitting.

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Supreme Court of Kentucky

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

The Appellant's Petition for Rehearing is **DENIED**; the Memorandum Opinion of the Court rendered October 21, 2010, is **MODIFIED** on its face by substitution of the attached pages 1, 6 and 8 in lieu of pages 1, 6 and 8 of the original opinion. The modification does not affect the holding of the original Opinion rendered by the Court.

Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., concur. Cunningham, J., not sitting.

ENTERED: January 20, 2011.

CHIEF JUSTICE