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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 23, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000584-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2014-CA-001810
RUSSELL CIRCUIT COURT NO. 07-CR-00121

RONALD COPLEY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

On appellate review of a trial court's decision to deny a collateral attack on a final judgment under Kentucky Rule of Criminal Procedure (RCr) 11.42, a reviewing court will only set aside the trial court's factual determinations if they are found to be clearly erroneous or unsupported by substantial evidence. The Court of Appeals reversed the trial court's denial of Ronald Copley's RCr 11.42 motion despite findings of fact by the trial court that were supported by substantial evidence. We accepted discretionary review, reverse the Court of Appeals' ruling, and reinstate the trial court's order denying RCr 11.42 relief to Copley.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Copley shot and killed his wife, Pam, on the front porch of their home while law enforcement officers were on their way there in response to calls that Copley was chasing Pam with a firearm. The responding officer actually saw Copley fire two shots and observed Pam collapse on the porch as he approached the scene. Copley then fled in a pickup truck, which he quickly crashed. He continued his flight on foot, brandishing his weapon at pursuing officers. He ultimately broke into a mobile home, where he stabbed himself in the abdomen in a failed suicide attempt.

Copley was charged with murder, first-degree wanton endangerment, and first-degree burglary. He retained private counsel to represent him on these charges. Counsel's primary action in representing Copley was to attempt to suppress a note Copley wrote before killing Pam. The trial court denied suppression, and the Court of Appeals affirmed the ruling on appeal. Then, on advice of counsel and in accord with his desire to spare his family the ordeal of a jury trial, Copley entered a guilty plea. In exchange for pleading guilty to murder, the Commonwealth dropped the first-degree wanton endangerment and first-degree burglary charges. And Copley was also sentenced to the statutory minimum of twenty years' imprisonment.

A few years later, Copley filed a pro se motion to set aside the judgment under Kentucky Rules of Criminal Procedure (RCr) 11.42 for ineffective assistance of trial counsel. He argues the judgment should be set aside because trial counsel failed adequately to investigate or advise him on extreme emotional disturbance (EED) as a viable trial defense.

Copley's potential EED defense is premised primarily on his own testimony (supported by members of his family) that Pam was actively engaged in a number of extramarital affairs. He particularly points out two supposed sexual liaisons with younger men. This supposedly triggered intense bouts of depression in the weeks leading up to the murder, evidenced by Copley's suicide attempt one week before killing Pam. And if Copley could successfully assert EED as an affirmative defense, his murder charge could be reduced to first-degree manslaughter.

At the RCr 11.42 hearing, the trial court heard testimony from Copley's family and friends corroborating Pam's infidelities. They testified that she was increasingly more distant to Copley. She began drinking heavily and frequently. And she had been associating with teenage boys.

Trial counsel also testified at the RCr 11.42 hearing and assured the trial court he strongly pursued EED as a potential defense. He said he discussed this possibility with Copley on more than one occasion and asserted that he fully explained the nature of the defense. Counsel testified that he investigated many of the allegations surrounding Pam's actions in the weeks before the murder. He prepared jury instructions for EED in the event Copley's case went to trial.

As part of his investigation and preparation for a potential EED defense, trial counsel sought the services of Dr. Harwell Smith. Counsel presented Dr. Smith with case information and Copley's background, and instructed Copley to submit to Dr. Smith for evaluation. While Dr. Smith did say he was personally convinced Copley was in a "significant psychologically disturbed

state" at the time of the shooting, he could not testify that Copley acted under EED based on the evidence available.

Copley argues he was *never* instructed on the nature of EED or its possibility as a defense in his case. Counsel's testimony supported the opposite. Trial counsel asserted that not only did they discuss the defense, but he was prepared to pursue that theory at trial. But likewise, he was also blunt about Copley's likelihood of prevailing under an EED theory. Dr. Smith's statements, in addition to a potentially damning note Copley wrote before killing Pam, diminished his chances of success. As trial loomed, counsel maintained that the decision to enter a guilty plea was ultimately Copley's decision and based on his desire to spare his family the challenges of trial.

The trial court denied Copley's RCr 11.42 motion. The court issued the following findings of fact:

- Trial counsel testified that he had conversations with Copley about the possibility of EED, and the Commonwealth developed the issues showing that trial counsel did consider EED as a potential defense.
- Trial counsel had prepared jury instructions that included EED as a defense within the murder instruction and included the definition of EED. The trial court found it a "stretch of credibility" to believe counsel would have prepared EED instructions if it had never been discussed, investigated, or considered.

- Trial counsel did investigate and advise Copley of EED, but concluded there was not enough evidence to warrant taking the risk associated with trial.
- The evidence showed Copley instructed counsel to negotiate a plea deal with the Commonwealth because Copley did not want his children to go through a trial. When trial counsel planned to meet with Copley to finalize trial strategy, Copley instructed counsel to negotiate a plea.

Copley appealed the trial court's RCr 11.42 ruling to the Court of Appeals. Despite the trial court's extensive factual findings, the Court of Appeals reversed, vacated Copley's sentence, and ordered a new trial. In reaching its holding, a split panel determined that: (1) trial counsel caused a delay in the proceedings by appealing the trial court's denial of his motion to suppress evidence of the note; (2) trial counsel preempted the role of the jury by abandoning an EED defense; and (3) trial counsel failed to provide Copley with adequate information regarding EED.

The Commonwealth then sought discretionary review in this Court. We granted review to correct the Court of Appeals' puzzling decision to disregard the deference our jurisprudence affords to the trial court in making findings of fact.

II. ANALYSIS.

On appellate review of a trial court's decision to deny an RCr 11.42 motion, a reviewing court will only set aside the trial court's factual determinations if they are found to be clearly erroneous or unsupported by

substantial evidence.[1] This mirrors the command in Kentucky Rules of Civil Procedure (CR) 52.01, which specifically states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." And we also defer to a trial court's determinations in regard to witness credibility.[2] So on appellate review of an RCr 11.42 claim, we are highly deferential to the trial court's findings of fact.

In this case, the trial court thoroughly evaluated the testimony provided at the RCr 11.42 hearing and released extensive factual findings. The court determined that counsel did in fact converse with Copley about a possible EED defense. It also ruled that counsel prepared Copley's defense accordingly, as evidenced by prepared jury instructions including an EED defense. Counsel also obtained Copley's medical records, prepared memos referencing the defense, and retained the services of Dr. Smith to evaluate the viability of EED at trial. But ultimately, the trial court found as a matter of fact that Copley himself knowingly and willingly chose to enter a guilty plea to spare his family the trauma of a public trial by jury.

Despite this overwhelming factual evidence that Copley was indeed apprised of EED, the Court of Appeals reversed the trial court and ordered a new trial. In doing so, it disregarded the extensive fact-finding below and overlooked our well-established rule of deference. The panel majority below ignored the trial court's findings and inserted its own views of the fact instead,

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[1] *See Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008); *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

[2] *See Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

culminating in a ruling unsupported by the record. The Court of Appeals essentially deemed Copley a more credible witness and adopted his testimony, failing a due regard for the abundance of testimonial and documentary evidence to the contrary. We therefore are compelled to reverse the Court of Appeals' ruling and reinstate the trial court's order denying RCr 11.42 relief from the judgment.

III. CONCLUSION.

For the reasons stated above, we reverse the Court of Appeals and reinstate the trial court's ruling.

Minton, C.J.; Cunningham, Hughes, Keller, Venters and Wright, JJ., sitting. All concur. VanMeter, J., not sitting.

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