

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-002287-MR

ROBERT HAYDEN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00371

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: Robert Hayden appeals from an order of the Kenton Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (RCr) 11.42. Hayden contends that he is entitled to have his convictions for murder and second-degree assault vacated because he received ineffective assistance of counsel at trial. For the reasons stated below we affirm.

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On August 7, 1998, Hayden was indicted for murder, Kentucky Revised Statute (KRS) 507.020, and attempted murder, KRS 507.020 and KRS 506.010. The charges resulted from the allegation that on May 30, 1998, Hayden caused the death of Girard Crosby by stabbing him to death, and that he attempted to cause the death of Jamie Crosby, Hayden's girlfriend and Girard Crosby's ex-wife, by attempting to stab her to death.

Following a jury trial Hayden was found guilty of Murder and second-degree assault. The jury recommended sentences of 30 years and 10 years, respectively, to run consecutively. Hayden filed a motion for a new trial, which was denied. On May 7, 1999, the trial court entered final judgment and sentence consistent with the jury verdict and sentencing recommendation. On August 24, 2000, the Kentucky Supreme Court rendered an opinion affirming Hayden's conviction and sentence.

On August 21, 2001, Hayden filed a pro se motion for post-conviction relief pursuant to RCr 11.42. On October 8, 2001, the trial court entered an order denying the motion. This appeal followed.

Hayden contends that, for various reasons, he received ineffective assistance of counsel. In order to prevail in an RCr 11.42 proceeding, the movant must first allege in the motion specific facts that if true would entitle him to relief. RCr 11.42(2). In order to establish ineffective assistance of

counsel, the movant must satisfy a two-part test showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Unless the movant makes both showings, he cannot prevail. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. The specific facts alleged in the motion must show that trial counsel's performance was deficient and that absent the errors by trial counsel there is a reasonable probability that the jury would have reached a different result. Norton v. Commonwealth, Ky. 63 S.W. 3d 175, 177 (2001). The burden of proof is upon the movant to show that he was not adequately represented by trial counsel. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

In determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second-guess must be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998). We must look to the particular facts of each case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id. For a motion to be denied without a hearing the record must

conclusively disprove the movant's allegations or otherwise prove that he is not entitled to relief. Fraser v. Commonwealth, Ky., 59 S.W. 3d 448, 452 (2001).

Hayden's first allegation of ineffective assistance is that trial counsel, after securing an instruction for extreme emotional disturbance (EED), conceded in closing arguments that EED was not applicable under the facts of this case. During closing arguments, trial counsel referred to the EED instruction and then made the statement, "I don't believe that that was what happened. I don't think anyone here is to argue that."

While an EED jury instruction to the murder charge was given, a review of the trial discloses that Hayden's principal, if not only, defense was self-protection. Hayden took the stand, admitted that he stabbed Girard Crosby to death, but alleged that he did so because he felt he was in a life-threatening situation. As noted by the Supreme Court in its opinion in the direct appeal "neither the Commonwealth nor Appellant argued extreme emotional disturbance at trial. Appellant relied on a self-defense justification." Hayden v. Commonwealth, 1999-SC-0472-MR, Slip Op. at 2 - 3.

It is not the function of this Court to usurp or second-guess counsel's trial strategy. Baze v. Commonwealth, Ky. 23 S.W.3d 619, 624 (2000). Further, it is well settled that judicial scrutiny of counsel's performance must be highly

deferential. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties inherent in making a fair assessment of attorney performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Strickland, 466 U .S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

Based upon the evidence as developed through the trial testimony, including Hayden's testimony, it was a legitimate trial strategy for trial counsel to emphasize self-protection as Hayden's principal defense. As part of this strategy, it was proper for trial counsel to de-emphasize the EED instruction for the purpose of directing the jury's attention to the self-protection evidence. Because trial counsel's statements in closing arguments amounted to legitimate trial strategy, there was not ineffective assistance of counsel.

Next, Hayden contends that he received ineffective assistance because trial counsel nullified the EED defense in closing arguments without his consent.

This argument is merely a rehash of the preceding argument, and we will not provide additional discussion of trial counsel's comments concerning EED during his closing argument

except to clarify that it was not necessary under the Strickland standards for trial counsel to consult with Hayden prior to pursuing this trial strategy.

Next, Hayden contends that he received ineffective assistance because trial counsel failed to secure an expert witness to review the blood evidence, the collection of the blood evidence, and the testing of the blood evidence.

The movant in an 11.42 motion must allege the grounds for relief with particularity. He must "state specifically the grounds on which his sentence is being challenged and the facts on which [he] relies." RCr 11.42(2); Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 748 (1993). Here, Hayden has made no attempt to show that an expert even exists who could establish factors relative to the blood evidence favorable to his defense. Conclusory allegations which are not supported by specific facts do not justify post-conviction relief under RCr 11.42. Sanders at 385. Further, RCr 11.42 is not intended to serve the function of a discovery deposition. Id. Hayden's allegation that trial counsel was ineffective because he failed to hire a blood evidence expert is without merit.

Next, Hayden contends that trial counsel was ineffective for failing to move for dismissal of the charges at the conclusion of the evidence.

We construe this argument to allege that trial counsel was ineffective for failing to move for a directed verdict at the conclusion of the Commonwealth's case and the defense case. Neither party provides us with the proper citations to the videotape trial; however, Hayden was not entitled to a directed verdict at the conclusion of the presentation of the evidence of either the Commonwealth's case or the defense case; so, even if this allegation is true, he was not prejudiced by the deficient performance.

Next, Hayden contends that trial counsel was ineffective because he failed to object to the presentation of additional proof by the Commonwealth after it had announced closed.

A review of the videotape citations supplied by Hayden discloses that the questions about which Hayden makes complaint were not asked after the Commonwealth announced closed. The record does reflect that at the conclusion of the proceedings on March 23, 1999, the Commonwealth passed a witness to the defense for questioning, but questioning by the defense did not commence that day. The following morning, at the commencement of the proceedings, the Commonwealth was permitted to ask a few additional questions concerning whether Hayden was right-handed or left-handed. Similarly, the Commonwealth passed a witness to the defense for questioning just prior to the lunch break on

March 24, 1999, but defense counsel did not commence questioning of the witness prior to lunch. When proceedings resumed after lunch, the Commonwealth was permitted to ask a few additional questions of the witness concerning whether anyone other than Hayden and the two victims had been at the residence and whether the kitchen door worked properly.

Trial counsel's acquiescence in permitting the Commonwealth to wind-up its direct examination of the witnesses was, in our estimation, a courtesy rather than deficient performance. Moreover, there is not a reasonable likelihood the result of the trial would have been different if trial counsel had objected, and Hayden was not prejudiced by the additional questioning.

Next, Hayden contends that trial counsel was ineffective for failing to call the lead detective as a witness.

Hayden has failed to allege facts regarding how he was prejudiced by the failure to call the lead detective. He identifies no exculpatory evidence the detective may have testified to, or any other advantage associated with calling the detective. "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." Foley v. Commonwealth, Ky., 17 S.W.3d 878, 885 (2000) (*quoting* Fretwell v. Norris, 133 F.3d 621, 627 (8th Cir. 1998))

In the absence of specific allegations regarding the prejudice Hayden suffered by trial counsel's failure to call the lead detective, this allegation of ineffective assistance is without merit.

Next, Hayden contends that if the individual allegations of ineffective assistance are insufficient for post-conviction relief then the cumulative effect of the errors in performance entitles him to relief.

Defense counsel was not ineffective as a result of cumulative error. In view of the fact that the individual allegations have no merit, they can have no cumulative value. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

Next, Hayden contends that the trial court erred by denying his motion in the absence of a response to his motion by the Commonwealth.

In reviewing an RCr 11.42 motion, first, the trial judge must examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001) (*citing* Odewahn v. Ropke, Ky., 385 S.W.2d 163, 164 (1964)). As disclosed by our discussion of the individual issues in this case, above, Hayden's motion did not specify grounds and supporting facts that would warrant relief,

and it was proper for the trial court to summarily dismiss the motion without a response from the Commonwealth.

Finally, Hayden contends that he was entitled to an evidentiary hearing on his motion.

A hearing is required only 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. Id. (*citing* 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) and Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

In this case there were no material issues of fact which could not be conclusively resolved by the record, and an evidentiary hearing was not required.

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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