

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000742-MR

JAMES MARK DUNN

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 95-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: COMBS; CHIEF JUDGE; KNOPE AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant, James Mark Dunn, appeals from an order of the Garrard Circuit Court summarily denying his RCr 11.42 motion.

In 1995, Appellant and Eric Gill were indicted for murder and first-degree robbery for the death of Bradley Johnson. At trial both were convicted of the charges and sentenced to life without the possibility of parole for a minimum of 25 years for murder and 20 years for robbery in the

first degree. The trial court ordered said sentences to run concurrently. Appellant's convictions were affirmed by the Kentucky Supreme Court in an unpublished memorandum opinion rendered on August 26, 1999. (96-SC-406-MR)

Appellant argues in his RCr 11.42 motion that his trial counsel was ineffective due to incorrect, incongruous, and conflicting arguments before the trial court at the January 26, 1996 hearing on the defense's motion for a continuance. Further, Appellant asserts that he is entitled to appointment of counsel and an evidentiary hearing in that the record is insufficient to resolve whether the alleged acts or omissions were outside the wide range of prevailing professional norms¹ and whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.²

In Appellant's brief he asserts that his trial attorneys argued inconsistent reasons for a continuance for a mental health expert to complete an evaluation of appellant. The trial court had previously granted appellant funds to hire a mental health "consulting expert" to examine appellant's records and develop mental health defenses for both the guilt phase

¹ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

² Id. at 694.

(competency and insanity) and penalty phase of the trial. The trial was set for February 19, 1996. In the motion for a continuance filed January 22, 1996, defense counsel stated that an expert had personally evaluated appellant and two other experts had reviewed the materials, but additional evaluation from a qualified forensic expert was needed to prepare a defense for both the guilt phase of trial and the sentencing phase. The trial court held a hearing on the motion for continuance.

At the hearing, defense counsel Susanne McCollough asserted that appellant was entitled to more time for completion of the mental examination under Hunter v. Commonwealth, Ky., 869 S.W.2d 719 (1994). McCollough stated that appellant's request of a three month continuance was not an excessive amount of time to adequately investigate and prepare a defense, "in particular a penalty phase mitigation defense to the state's attempt to execute James Dunn."

The Commonwealth responded by citing Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985), and Jackson v. Commonwealth, Ky., 703 S.W.2d 883 (1986), for the proposition that appellant was not entitled to additional time, experts, or funding since he was not raising insanity or another mental health defense to the charges. The Commonwealth opined that the defense wanted more time to put together mitigation evidence for the penalty phase, not to develop a defense to the charges. The

Commonwealth further asserted that the facts of the case did not point to a defense such as a mental defect or extreme emotional disturbance, and therefore questioned the necessity of the experts and the relevance of their inquiry. McCollough responded:

I would like to point out that he is so concerned - this is nothing to do with the guilt phase. This is a death penalty case and we are entitled to put on mitigation evidence. If he doesn't want us to spend the time working that up, all Mr. Lockridge has to do is drop the death penalty and we can proceed on to trial. We don't have to fiddle around working up the mitigation evidence. But it is a death penalty case. It is different. There is an entirely different phase to it, and we are entitled to funds and the time to work it up.

The court denied the motion for continuance. Defense counsel Joseph Myers then asked to clarify the defense position. He stated that the defense had asserted in the motion for continuance all the defenses they wished to explore on appellant's behalf. He stated the fact that an insanity defense had not yet been asserted by filing a notice of intention to raise the defense did not mean that the defense did not intend to or was never going to assert it. The court declared that it would look at the issue again if appellant pled insanity.

On January 29, 1996, appellant filed notice of intention to introduce evidence of mental illness or insanity at

the time of the offense. The motion asserted that the defense was "in jeopardy" due to time constraints and concluded:

Finally, defense counsel cannot say at this time that the defendant's mental health status rises to the level of mental disease or defect, insanity at the time of the offense or mental illness as the defendant's mental health expert evaluation is incomplete as of this date.

The court entered a written order overruling appellant's motion for continuance on January 30, 1996.

On February 5, 1996, appellant filed a motion for an ex parte hearing to present evidence as to the prejudice he would suffer if not granted a continuance. The trial court granted the motion for a hearing, which was conducted ex parte on February 8, 1996. At the hearing, appellant submitted affidavits and called to the stand its consulting expert, Eric Drogin, a licensed clinical psychologist and licensed attorney. Dr. Drogin submitted an affidavit³ and summarized the work he had performed on the case, which included consulting a neuropsychologist who performed an evaluation of appellant.

Dr. Drogin declared that appellant still needed to retain a psychiatrist to deliver a competent forensic examination. He testified that a physician was needed to explore questions of brain injuries suffered by appellant due to multiple drug overdoses, sustained drug use, a near drowning as

³ We do not find any of the affidavits in the record.

a young child, and numerous blows to the head, one of which occurred a few days before the killing with which appellant was charged. Counsel Myers asked Dr. Drogin whether in his affidavit he had identified potential factors which might pertain to mitigation. Dr. Drogin responded that there were several factors a doctor could assess which would pertain to mitigation, but they would also be highly relevant in working up the case for the guilt phase. After this testimony, counsel renewed the motion for continuance. The court stated that defense counsel had shown more than competent trial preparation, and the court would decide whether it would be error not to let the defense explore further. Nevertheless, the trial court subsequently affirmed its denial of the motion for continuance.

On February 3, 1996, the Commonwealth asked the court to quash the notice of intention to introduce evidence of a mental illness defense. The Commonwealth asserted both that it was not timely and that the defense confirmed in the notice there was no determination that appellant's mental health status rose to the level of mental disease or defect, insanity at the time of the offense or mental illness. The trial court granted the motion to quash the notice of intent, but reserved the question whether such evidence could be used in the penalty phase. At trial, Appellant presented evidence of his mental condition only during the penalty phase.

Appellant now claims that he was deprived of effective assistance of counsel because his attorneys argued inconsistently in pretrial hearings and motions whether the evaluation was for a possible guilt phase defense or only the penalty phase. Appellant alleges these inconsistent arguments resulted in the trial court's denial of his motion for continuance and grant of the Commonwealth's motion to quash the notice of intention to introduce evidence of mental illness. He believes he was prejudiced by "fractured defenses," as in the Georgia case of Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990). In Ross, the Georgia Supreme Court found ineffective assistance of counsel in a capital case in which a defendant's two attorneys presented mutually exclusive defenses and also disagreed as to whether the defendant should take the stand in his defense. The defendant had retained counsel as well as appointed counsel who both actively represented him at trial, yet had never had a substantive discussion before trial about the theory of the case. In reversing, the Georgia Supreme Court found the defenses were "at odds," and there was a practical inability to advise the defendant on his decision to testify.

To prevail on a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient relative to current professional standards, and second, that but for counsel's deficient

performance there is a reasonable likelihood that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court must indulge a strong presumption that counsel's actions fall within the wide range of reasonable professional assistance and thus constitute sound trial strategy. Id. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 694-95 (citations omitted).

In the case at bar, the trial court concluded in its order below that counsel had conducted a reasonable investigation and made a tactical choice to use the expert for mitigation evidence alone. The trial court reasoned that if the defense had any evidence that appellant lacked the capacity to appreciate the nature and consequences of the charges, or that he could not participate rationally in his defense, Dr. Drogin would have testified as such at the hearing. Appellant, however, maintains that Myers' and McCollough's conflicting arguments show no such tactical decision was made.

We believe from the record that it is not clear that counsel had elected to pursue one or the other course as a tactical matter. On the one hand counsel stated that the experts were needed only for mitigation evidence, but counsel also asserted that needed investigation into mental health defenses at trial was ongoing. We note, however, that the arguments of counsel were not "at odds" to the same degree as in

Ross, since both worked toward the goal of obtaining a mental health evaluation by a psychiatrist prior to trial. We believe it was not possible to conclude from this record that the decision to argue inconsistently to the trial court was a tactical decision. While we are obligated to be highly deferential to an attorney's performance and indulge in a strong presumption that the attorney's performance was reasonable, we cannot determine from this record which decision of trial counsel formed the basis for the trial strategy.

We now turn to the other prong of Strickland, supra, that counsel's deficient performance prejudiced the defense, and but for said errors, the result would have been different. Appellant argues that his chance to explore guilt phase mental defenses was cut off by the performance of counsel, in particular McCollough, before trial. However, we believe appellant has not shown that the result would have been different if counsel's arguments had been unvarying. Even if the attorneys had been unified in arguing for a guilt phase mental health expert, the trial judge was not inclined under Kordenbrock or Jackson to grant any more time to explore mental health defenses. This was based on the fact that appellant had not identified any mental defect, but only the possibility of one. In this sense the case is distinguished from Hunter, wherein the defense had raised issues of extreme emotional

disturbance and inability to assist in the defense in a request for a continuance. Hunter, 869 S.W.2d at 721. Indeed, the court below in its order denying the RCr 11.42 stated that defense counsel's expert had not established any basis for a guilt phase defense which needed to be explored further. On appeal, appellant does not show that there was any actual basis for pursuing guilt phase defenses at trial. Thus, we find no indication that appellant was prejudiced by counsel's performance.

A hearing on a RCr 11.42 motion is unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998). In this case, even if we assume that a hearing would show that the attorneys made conflicting arguments in their requests for a mental health expert, their actions did not prejudice the defense in that they affected the outcome of the case. Thus, the trial court properly denied the motion without a hearing.

Therefore, the Garrard Circuit Court's order denying Appellant's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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