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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000853-MR

ERIC LLOYD HERMANSEN — APPELLANT

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
INDICTMENT NO. 96-CR-00013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

DYCHE, JUDGE: Eric Lloyd Hermansen appeals from an order of the Gallatin Circuit Court denying his post-conviction motions to vacate his 1997 murder conviction and sentence. We affirm.

In 1997, a jury convicted Hermansen of first-degree murder after finding that he shot and killed Harry Lee Jones. The Kentucky Supreme Court affirmed this murder conviction in an unpublished opinion rendered September 28, 2000[1]. Prior to the

[1] Hermansen was also convicted of two counts of wanton endangerment. The Supreme Court, however, reversed the wanton endangerment convictions after finding no evidence that the actions constituting wanton endangerment actually occurred in Gallatin County.

Supreme Court's decision, Hermansen filed a collection of motions with the trial court, including motions pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. In his motions, Hermansen argues that trial counsel provided ineffective assistance, that the grand jury never considered this matter, and that his conviction was based on perjured testimony. Hermansen also asserts that he could "show and prove" that the shots he fired did not contribute to Jones's death. The trial court denied these post-conviction motions. This appeal followed.

Hermansen brings forth several arguments for our review. We first turn to Hermansen's argument that adequate appellate review was thwarted by the Gallatin Circuit Clerk's refusal to certify the record from his murder conviction. On April 24, 2003, we ordered the Gallatin Circuit Court to certify and forward to us all materials contained in the record concerning Hermansen's murder conviction. We have received and thoroughly reviewed the record from Hermansen's murder trial. Accordingly, this argument is moot.

Next, Hermansen argues that the trial court erred by not making specific findings of fact under CR 52.01. We find this argument to be completely without merit. Findings of fact and conclusions of law are required under CR 52.01 only if issues of fact are tried before the court: rulings on motions

are exempt. Clay v. Clay, Ky., 424 S.W.2d 583 (1968). The court was not required to make findings of fact herein.

Third, Hermansen argues that the trial judge was required to recuse himself from considering these post-conviction motions. In his brief, Hermansen asserts that the trial judge displayed personal bias by submitting an affidavit to the Kentucky Bar Association stating that Hermansen's trial counsel aggressively defended Hermansen at trial. We disagree.

KRS 26A.015(2) provides in pertinent part as follows:

> Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;
>
> . . .
>
> (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

It is our responsibility to review the record to determine whether disqualification was required. Clearly, the provisions of KRS 26A.015 are mandatory. However, "[a] party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." Webb v. Commonwealth, Ky., 904 S.W.2d 226, 230 (1995)(citation omitted).

Further, this Court has held that the trial judge is in the "best position to determine whether questions raised regarding his impartiality [are] reasonable." Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416, 417 (1997). Finally, Kentucky law recognizes that "[r]ecusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse himself." Marlowe v. Commonwealth, Ky., 709 S.W.2d 424, 428 (1986) (quoting United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980)). Thus, to warrant recusal, there must be some showing of personal bias or prejudice against the party or knowledge of disputed evidentiary facts obtained from an extra-judicial source. Bare speculation is never enough. Marlowe, 709 S.W.2d at 428.

Here, Hermansen presents no evidence of bias or prejudice. He merely speculates that the trial judge must be prejudiced against him simply because the judge cooperated with the KBA during its investigation into a complaint Hermansen filed against his trial counsel. In his affidavit to the KBA, the trial judge stated that counsel "aggressively advocated for his client in both a professional and ethical manner throughout this action" despite overwhelming evidence. Further, the trial judge noted that Hermansen never complained about counsel's performance. At no time in his affidavit to the KBA did the

judge provide an opinion concerning the merits of Hermansen's post-conviction motions. In fact, after a review of the voluminous record before us, it is clear that the evaluations contained within the judge's affidavit concerning Hermansen's trial counsel appear to be correct. Moreover, despite his assertions that the trial judge based his affidavit on extra-judicial knowledge, Hermansen fails to identify the knowledge the trial judge acquired extra-judicially. Thus, we find Hermansen's claim that the trial judge was biased to be mere speculation. Therefore, the trial judge did not err by refusing to recuse himself from the post-conviction proceedings.

Hermansen next argues that the trial court erred in dismissing his motions to vacate because perjured grand jury and trial testimony, misleading testimony, evidence demonstrating that his shots did not fatally wound Jones, and the alleged unconstitutional actions of numerous officers of the court entitled him to a new trial. We reject this argument.

CR 60.02 allows defendants to raise issues that "were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court." Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998) (quoting Young v. Edward Technology Group, Inc., Ky. App., 918 S.W.2d 229, 231 (1995)). CR 60.02 provides relief that is not available by direct appeal

or in post-conviction relief proceedings. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). This remedy is not intended to give defendants additional opportunities to challenge a judgment. Id.

All but two[2] of the claims listed in Hermansen's brief under the heading "Preservation of All Specified Issues Therein Appellant's Motions to Vacate by Presentation For Exhaustion Purposes Under Federal Habeas Corpus, 28 U.S.C. § 2254" were known to Hermansen at the time of his trial and at the time of his direct appeal. Hermansen did not present these issues on direct appeal. Moreover, Hermansen does not allege that he only recently discovered the issues concerning perjury, evidentiary matters and improprieties committed by court personnel that he can "show and prove." Hence, Hermansen cannot present these claims in a CR 60.02 motion.

We now address Hermansen's arguments regarding ineffective assistance of counsel. Hermansen contends that trial counsel provided ineffective assistance by conceding his guilt during trial. We reject this argument.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland

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[2] The remaining two claims listed in this section of Hermansen's brief concern the argument that trial counsel provided ineffective assistance.

v. Washington, 466 U.S. 668 (1984). There is, however, a presumption that the challenged actions of counsel might be considered reasonable trial strategy. Id., 466 U.S. at 689. The burden is on the movant to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998) (quoting Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969)).

Our review of the record indicates that defense counsel's strategy, in light of Hermansen's taped admission to law enforcement officers that he shot Jones, was to portray his client as a young man who, as a result of his anger in losing his girlfriend to Jones, lost control of his emotions and ultimately killed Jones as a result of his extreme emotional disturbance. The extreme emotional disturbance defense was consistent with the evidence presented at trial, which included testimony given by a witness present during the shooting, Hermansen's own taped confession, and the testimony of several law enforcement officers who investigated this incident.

Effective assistance of counsel does not deny counsel the freedom of discretion in determining the means of presenting his client's case. Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642 (1978). Having reviewed the record in great detail, we conclude that Hermansen failed to overcome the presumption that counsel's actions were other than sound trial strategy.

Accordingly, the trial court correctly rejected appellant's claim of ineffective assistance.

Finally, we reject Hermansen's assertion that he is entitled to an evidentiary hearing on his post-conviction motions. An evidentiary hearing is not required unless the defendant raises material issues of fact that cannot be conclusively resolved by an examination of the record. Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001). Since the issues raised herein are clearly resolvable after an examination of the record, the trial court properly denied Hermansen's post-conviction motions without holding an evidentiary hearing.

The judgment of the Gallatin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric Lloyd Hermansen, pro se
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

William L. Daniel, II
Assistant Attorney General
Frankfort, Kentucky