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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001732-MR

TREON McELRATH — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 98-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: Treon McElrath appeals from an order of the Hickman Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. McElrath contends that he received ineffective assistance of counsel in connection with his trial on charges of conspiracy to commit murder and six counts of wanton endangerment, and in his direct appeal following his conviction of the charges. For the reasons stated below we affirm.

On the evening of June 21, 1998, Corey Fitts and Natasha Wilson were sitting on the front porch of Natasha's grandmother's house. Fitts spotted a yellow Mustang convertible which he believed belonged to Treon McElrath. Fitts testified that he became alarmed by the presence of the vehicle because previously both he and Natasha had taken warrants out against Boykin. Fitts feared that Terrance Boykin was in the vehicle with McElrath and had come to retaliate because of the warrants. Upon Fitts' identification of the Mustang as McElrath's, Natasha went inside the house and made a 911 call to the police.

Fitts testified that after Natasha placed the 911 call she returned to the porch and that he stayed on the porch because Natasha had informed him that the police were going to pick up McElrath. Fitts testified that some twenty minutes thereafter he saw two armed men turn the corner of the house and approach the porch where he and Natasha were seated. At that point both Fitts and Natasha ran for the door and entered it about the same time. While Fitts escaped into the house, Natasha was shot and mortally wounded. At trial, Fitts positively identified the shooters as Boykin and Andra Devon Everett. Other witness testimony placed Boykin and Everett in the company of McElrath the night of the shooting. A search of Boykin's home by police produced the .45 caliber murder weapon.

McElrath, Boykin, and Everett were each charged with one count of complicity to murder and six counts of complicity to wanton endangerment. Following a jury trial McElrath, along with his codefendants, was convicted of the seven charges. McElrath received a sentence of twenty-two years on the complicity to commit murder charge and five years imprisonment on each of the complicity to wanton endangerment charges. Each of the sentences was ordered to run consecutively for a total of 52 years to serve. On September 28, 2000, the Supreme Court entered an unpublished opinion affirming McElrath's convictions and the associated sentences. See Case 1999-SC-0462.

On April 18, 2002, McElrath filed a motion for post-conviction relief pursuant to RCr 11.42. McElrath also filed motions for appointment of post-conviction counsel and for an evidentiary hearing. On July 16, 2002, the trial court entered an order denying the motions. This appeal followed.

First, McElrath contends that he is entitled to post-conviction relief for the reason that during the trial proceedings he was deprived of conflict-free counsel because trial counsel also represented codefendant Terrance Boykin. McElrath further argues that he was never advised of his right to conflict-free counsel by the trial court as required by RCr 8.30.

It is an established principle that the appellate Courts will not address an issue which was raised in a direct appeal or which should have been raised in a direct appeal. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990). It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court. Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972). A convicted defendant may not employ an RCr 11.42 motion as a means of trying or retrying issues which could and should have been raised in the original proceedings when the competency, adequacy, and effectiveness of his own counsel are not in good faith questioned, and where the grounds of his motion are matters which must have been known to him at the time of trial. Bronston v. Commonwealth, Ky., 481 S.W.2d 666, 667 (1972).

While trial counsel's multiple representation of Boykin and McElrath is an issue which, in the usual case, could and should have been raised on direct appeal and normally would not be reviewable in an RCr 11.42 proceeding, we recognize that trial counsel continued to represent McElrath as appellate counsel in his direct appeal to the Supreme Court. As such, appellate counsel had a conflict in raising this issue on direct

appeal because the issue, in part, involved his own conduct. We accordingly will address the issue on the merits.

The record demonstrates that trial counsel was aware of the potential for a conflict of interest as a result of his representation of both Boykin and McElrath. In his entry of appearance as counsel for Boykin trial counsel stated as follows:

> Said Entry of Appearance will be valid only until it is known whether or not there will be a conflict in defense between Treon McElrath and Terrance Boykin, in which case this attorney will file a Motion to Withdraw as attorney for Terrance Boykin.

As trial counsel continued to represent both Boykin and McElrath, there presumably, in his judgment, was not a conflict of interest in the multiple representation.

RCr 8.30 directly addresses the issue of an attorney's representation of multiple codefendants. RCr 8.30 is intended to protect defendants from the potential consequences of dual representation and assure that they are advised of potential conflicts of interest. RCr 8.30(1) prohibits dual representation of persons charged with the same offenses unless:

> (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interest on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and

> (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

It appears from the record that RCr 8.30 was not complied with in this case. In a pretrial hearing held on October 16, 1998, the following discussion occurred between defense counsel and the trial court:

> Defense Counsel: I represent Mr. Boykin and Mr. McElrath.
>
> Court: You represent two of them?
>
> Defense Counsel: Yes sir.
>
> Court: No conflicts? You got a . . .
>
> Defense Counsel: We have got everything signed on those two gentlemen.

Neither here, nor anywhere else in the record, is it demonstrated that the trial court complied with its obligation to inform McElrath of the potential consequences of a dual representation as required by RCr 8.30(1).

Though it does not appear that the trial court properly advised McElrath of the potential consequences of dual representation as required by RCr 8.30, the circuit court record

contains the following waiver of dual or multiple representation executed by McElrath:

> WAIVER OF DUAL OR MULTIPLE REPRESENTATION
>
> The Undersigned Defendant, TREON MCELRATH, being before this Court charged with the offense of Complicity to Murder, acknowledges that the Court has explained to him that he understands the possibility that a conflict of interest may exist on the part of his attorney, BENJAMIN J. LOOKOFSKY, in that what may be in the best interests of this Defendant may not be in the best interests of his Co-Defendant, TERRANCE BOYKIN.
>
> With the understanding the undersigned nevertheless desires that attorney, BENJAMIN J. LOOKOFSKY, represent him in this proceeding and that he has no objection to him continuing to act as counsel for the other Co-Defendant mentioned in this Waiver as being involved in a possible conflict of interest.

While the waiver contains the statement "the Court has explained to him that he understands the possibility that a conflict of interest may exist on the part of his attorney," the record does not support this. It appears, rather, that the trial court did not provide the required explanation. Thus McElrath is correct in his claim that RCr 8.30 was not complied with.

However, a violation of RCr 8.30 which does not result in any prejudice to the defendant does not entitle a defendant to post-conviction relief. Kirkland v. Commonwealth, Ky., 53

S.W.3d 71, 75 (2001); Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 183 (2001). In Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 1244, 152 L.Ed.2d 291 (2002), the United States Supreme Court concluded that such a failure on the trial judge's part "does not reduce the petitioner's burden of proof" to demonstrate that the potential conflict he alleges actually affected the representation he received in order to show a constitutional violation.

An alleged violation of RCr 8.30 simply opens the door for a case-by-case evaluation to determine whether a defendant was in fact prejudiced by such a violation. See Kirkland, 53 S.W.3d at 74. The failure of the trial judge to comply with RCr 8.30(1) is not presumptively prejudicial and does not warrant automatic reversal. Id. A defendant must show a real conflict of interest in order to obtain reversal." Kirkland, 53 S.W.3d at 75. See also Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (a defendant must show an actual conflict of interest adversely affected the performance of his lawyer).

In support of his claim of an alleged conflict, and consequent prejudice, the appellant states as follows:

> Here, counsel's "actual conflict" was revealed when he elicited the inadmissible hearsay that Corey Fitts had told police Treon McElrath was the shooter. Counsel elicited this evidence first from Officer

> Brian Morrison. Counsel then questioned Corey Fitts about the statement, but Fitts denied it. Counsel then elicited the statement once again from lead detective Steve Perry. This evidence was never brought out by the Commonwealth or by counsel for Mr. Evertt. Only Lookofsky elicited the out-of-court statement of Corey Fitts that "it was Treon." The jury would never have heard this evidence but for Mr. Lookofsky's questioning. Even if Lookofsky's strategy was to discredit Corey Fitts, this was not necessary to the defense of Treon McElrath, particularly in light of its obviously harmful potential. It is beyond cavil that this line of questioning would not have been pursued by an attorney dedicated solely to the defense of Treon McElrath.
>
> Lookofsky additionally failed to object to the introduction of the out-of-court statements of the non-testifying codefendants,[1] and failed to object to the introduction of inadmissible evidence linking Appellant to prior bad acts of Terrance Boykin.[2] Finally, Appellant suffered from counsel's failed attempt to portray Corey Fitts as the killer – an argument that may have been necessary to Terrance Boykin's defense but certainly was not necessary to Appellant's defense. The

[1] Here, the appellant included the following footnote: "The prosecutor introduced Terrance Boykin's statement to police, in which Boykin claimed to have been at home continuously from the early afternoon and all evening on June 21, 1998, and also introduced evidence that Treon McElrath and Terrance Boykin were stopped by police at 6:27 PM that day. In summation the prosecutor pointed to Boykin's patently false claim of being at home, arguing to the jury that "unfortunately for Mr. Boykin *and Mr. McElrath* and fortunately for the development of this case, at 6:27 they were pulled over . . . ." (Transcript citations omitted).

[2] Here, the appellant included the following footnote: "The prosecutor pointed to this evidence in summation as well, first summarizing the evidence that Boykin had assaulted Natasha Wilson on an earlier occasion, and then using Ms. Wilson's inadmissible out-of-court statement ("I don't know if [Treon McElrath] had anything to do with it or not but I wouldn't doubt it for a second") to link Appellant to Boykin's prior bad acts. (Transcript citations omitted).

> prosecutor ridiculed Lookofsky's defense theory in his summation. In a case where Appellant's defense hinged on distancing Appellant from Terrance Boykin, counsel's conduct and argument throughout the trial linked inextricable the two codefendants in the juror's minds. This was an "actual conflict." (Case and transcript citations omitted).

McElrath argues that conflict free counsel would not have elicited evidence concerning Fitts' statement the night of the shootings to the effect that "it was Treon." However, Everett's trial counsel also cross-examined Fitts regarding this statement, and to the extent trial counsel also elicited the statement there was no resulting prejudice. Moreover, conflict free counsel may have legitimately referred to this statement not for the purpose of identifying McElrath as a gunman, but for the purpose of impeaching Fitts as a confused, unreliable, or untruthful witness whose testimony should be discounted by the jury for all purposes. This isolated ambiguous statement by Fitts does not demonstrate adverse defenses as between Boykin and McElrath.

Further, trial counsel did not attempt to defend Boykin by identifying McElrath as Everett's co-gunman. The Commonwealth's theory of the case was that McElrath was the getaway driver, and trial counsel was not laboring under a conflict of interest in a controversy concerning which of the

other codefendants, Boykin or McElrath, was Everett's co-gunman. Moreover, there is not a reasonable probability that the jury convicted McElrath on the basis that it believed McElrath was one of the gunmen.

McElrath's arguments to the effect that trial counsel failed to object to the introduction of various inadmissible evidence likewise does not demonstrate an actual conflict of interest. The out-of-court statements of the codefendants were admissible as statements by a party opponent, so there was no prejudice as a result of trial counsel's failure to object. Kentucky Rules of Evidence (KRE) 801A(b). Further, the evidence that Boykin and McElrath were together about three hours prior to the shootings was admissible as relevant evidence, KRE 402, and was not excludable as a prior bad act under KRE 404(b) because the evidence was identified not to prove the character of the defendants, but to show that they were together shortly before the shootings. For these reasons trial counsel's failure to object to the admission of the evidence cited by the appellant does not demonstrate a conflict of interest.

The trial record demonstrates that trial counsel did not actively represent conflicting interests. Further, there is no evidence that McElrath was prejudiced by the dual representation. As such, the trial court's failure to comply with RCr 8.30 was not prejudicial, and McElrath is not entitled

to post-conviction relief as a result of the trial court's violation of the rule.

Next, McElrath contends that he is entitled to post-conviction relief because the Commonwealth violated its obligation to provide discovery material pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, McElrath contends that the Commonwealth failed to disclose the criminal record of Corey Fitts, the Commonwealth's only eye-witness to the shooting. McElrath alleges that this information was crucial for purposes of impeaching Fitts and his trial testimony.

As previously noted, issues which could have been raised in a direct appeal may not be raised by a subsequent RCr 11.42 motion. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990); Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972); Bronston v. Commonwealth, Ky., 481 S.W.2d 666, 667 (1972). As this issue could and should have been raised in McElrath's direct appeal, it is not a proper issue to be raised in this proceeding. We accordingly will not address this issue on the merits.

Next, McElrath contends that, for various reasons, he received ineffective assistance of counsel in connection with the trial proceedings.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in 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, 39-40 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 104 S.Ct. at 2065. To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695. It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding. Id.; Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002).

McElrath’s RCr motion filed in circuit court included seventeen specific allegations of ineffective assistance of counsel. However, McElrath addresses relatively few of those issues in his appellate brief. Normally, assignments of error not argued in an appellant's brief are waived. Smith v. Commonwealth, Ky. 567 S.W.2d 304, 306 (1978); Commonwealth v.

Bivins, Ky., 740 S.W.2d 954, 956 (1987). To the extent McElrath has not argued allegations raised to the circuit court in his appellate brief, those issues will be treated as waived. We will, however, address those allegations of ineffective assistance of counsel contained on pages 15 – 17 of McElrath's brief.[3]

McElrath contends that he received ineffective assistance of counsel because trial counsel failed to object to the jury instructions relating to the wanton endangerment charges. The wanton endangerment instructions omitted as a requirement the element that McElrath aided or assisted in the events "with the intention of promoting or facilitating the commission of" fist-degree wanton endangerment. See KRS 502.020(1).

Trial counsel's failure to object to the omission of the mens rea requirement in the wanton endangerment instruction was deficient representation and the error satisfies the first prong of Strickland.

However, we conclude that McElrath was not prejudiced by the error pursuant to the second prong of Strickland. The evidence presented at trial demonstrated that McElrath drove Boykin and Everett, and perhaps one other unknown individual,

[3] While we do not address issues of ineffective assistance of counsel not raised in McElrath's brief, we have reviewed the additional grounds concerning this claim as set forth in McElrath's motion. We conclude that none of the additional grounds entitle McElrath to post-conviction relief.

from Union County, Tennessee to Clinton, Kentucky in his vehicle on the night of June 21, 1998. Disinterested witnesses Eric and Sammy Hunter provided uncontradicted testimony that shortly before the shooting McElrath arrived unexpectedly at their father's residence, which was located about 760 feet from the crime scene, and that immediately after the shots were heard, McElrath hurriedly left the residence. McElrath's vehicle was then observed leaving the area. The evidence demonstrates that in the meantime Boykin and Everett traveled by foot to Natasha's grandmother's residence and shot and killed her. Hence, the circumstantial evidence presented at trial was overwhelming that McElrath was the getaway driver in Natasha's killing.

Properly instructed, the jury convicted McElrath of complicity in Natasha's murder. In light of this, and in light of the overwhelming evidence of McElrath's participation in the shooting as the getaway driver, there is not a reasonable probability that the outcome of the trial would have been different if the mens rea element had been included in the wanton endangerment instruction. Accordingly, the second prong of Strickland is not satisfied, and this claim of ineffective assistance of counsel is clearly refuted by the record.

McElrath next argues that he received ineffective assistance of counsel because trial counsel erroneously advised him to reject a five-year plea offer. McElrath alleges that on

February 4, 1999, trial counsel, without having reviewed the evidence in the case, encouraged McElrath to reject the offer. According to McElrath, trial counsel communicated the offer to him in a letter in which he wrote "I still do not believe based upon the evidence I have sent that they are going to be able to get a conviction against you." McElrath also asserts that in conjunction with the plea offer he was not informed of the full range of sentences he could have received, and that if he had been so informed he would have accepted the Commonwealth's five-year offer rather than go to trial. The Commonwealth denies that this offer was made.

There is a strong presumption that, under the circumstances, the actions of counsel might be considered sound trial strategy. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance and the tendency and temptation to second guess should be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id.

Assuming for purposes of this appeal that trial counsel advised McElrath that he did not believe that the

Commonwealth would be able to obtain a conviction against McElrath, nevertheless, advising a defendant to plead guilty does not, in and of itself, constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983). It follows that the converse of that is true, and advising a client not to plead guilty does not, in and of itself, constitute ineffective assistance of counsel.

We conclude that trial counsel's advice in February 1999, if such advice was in fact given, was legitimate trial strategy and that he did not act outside of the wide range of reasonable competent assistance by advising McElrath not to plead guilty at that time.

Next, McElrath contends that he received ineffective assistance of counsel because trial counsel failed to properly investigate the case. McElrath argues that because "the extent of counsel's pretrial investigation cannot be determined from the record, an evidentiary hearing is required." However, McElrath misconstrues the purpose of an evidentiary hearing in an RCr 11.42 proceeding. 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. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002).

McElrath's allegation that trial counsel failed to adequately investigate the case is merely a conclusory allegation. McElrath does not identify any witnesses or evidence which would have been discovered in the event of additional investigation or the strength of the additional evidence or testimony in the defense of the case. McElrath's request for a hearing on this issue amounts to a request for a discovery deposition, which is not the function of an RCr 11.42 hearing.

Finally, McElrath contends that he received ineffective assistance of counsel on the basis that trial counsel failed to object to the jury composition on the basis of a violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which prohibits the Commonwealth from using peremptory challenges to strike members of the jury pool on the basis of race.

In neither his RCr 11.42 motion nor in his appellate brief does McElrath identify any African-American who was struck by the Commonwealth by peremptory challenge. A defendant is not entitled to post-conviction relief in an RCr 11.42 proceeding based upon conclusory allegations which are not supported by specific facts. Sanders, supra. McElrath's allegation of a Batson violation is such a conclusory allegation not supported by specific facts.

Next, McElrath contends that he received ineffective assistance of appellate counsel in his direct appeal of his convictions and sentence to the Supreme Court. McElrath basis his allegation of ineffective assistance upon "the many errors alleged elsewhere in Appellant's RCr 11.42 motion."[4]

An RCr 11.42 motion cannot be used as a vehicle for relief from ineffective assistance of appellate counsel. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 318 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999); Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 421 (2002). As ineffective assistance of appellate counsel is not a proper issue to raise in an RCr 11.42 proceeding, we will not address this issue on the merits.

Finally, McElrath contends that he was entitled to an evidentiary hearing and appointment of counsel to represent him in the RCr 11.42 proceedings.

A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. 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. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

[4] Trial counsel also represented both Boykin and McElrath in the direct appeal proceedings.

If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. Coles v. Commonwealth, Ky., 386 S.W.2d 465 (1965). If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record." Fraser at 453.

In this case all allegations can be resolved from the face of the record and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, the appellant is not entitled to an evidentiary hearing. Moreover, since an evidentiary hearing is unnecessary, the appellant is not entitled to the appointment of counsel.

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

ALL CONCUR.

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