

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002022-MR

STEVEN ESTEP

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 97-CR-00165

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Steven Estep (hereinafter "Estep"), proceeding *pro se*,¹ has appealed from the Pike Circuit Court's August 19, 2002, Findings of Fact and Order denying his RCr 11.42 motion for relief. Estep had previously been convicted for the January 24, 1997, murder of his ex-wife, Kathy Bowling, for which he

¹ By order entered February 3, 2003, this Court granted the Department of Public Advocacy's motion to withdraw as counsel and allowed Estep to proceed *pro se* in his post-conviction appeal.

received a life sentence without the possibility of parole for twenty-five years, and was also convicted on counts of kidnapping, wanton endangerment and burglary. The main issue in this appeal is whether Estep received ineffective assistance from his trial counsel, Haroyln Howard. Having reviewed the parties' briefs, the record and the applicable case law, we affirm.

For purposes of this opinion, we shall adopt as our own the statement of facts as set forth in the Supreme Court of Kentucky's April 20, 2000, opinion affirming Estep's direct appeal from his conviction:²

For the third time in one day, Estep entered a local drug store where the victim, his ex-wife, worked. After entering the store, he immediately sought her out and was heard speaking with her. Shortly thereafter, another store employee heard a noise from the back of the store, investigated, and found the victim lying face down on the floor with Estep standing over her pointing a gun at her. Estep, seeing the other employee, redirected the gun towards her and told her that she better leave.

When police arrived, they discovered that Estep had barricaded himself and the victim in the restroom. During the negotiations to get him out, he repeatedly told the police that the victim was in good condition. After approximately a three-hour stand-off with the police, Estep surrendered. He had shot the victim eight times and she died of multiple gun shot

² Appeal No. 1998-SC-0662-MR.

wounds to the head, chin, upper chest, and forearm.

Estep was indicted for intentional murder, kidnap[ping], and single counts of first-degree wanton endangerment and first-degree burglary. A jury convicted him on all counts and [he was] sentenced to Life without the possibility of parole for 25 years for murder, sixty years for kidnap[ping], twenty years for burglary, and five years for first degree wanton endangerment. The sentences were ordered to run consecutively with each other, with the exception that all would run concurrently with the life sentence.

In his direct appeal to the Supreme Court of Kentucky, Estep argued, unsuccessfully, that he was entitled to an instruction on extreme emotional disturbance, that there was insufficient evidence to convict him of first degree burglary or kidnapping, that the victim's father was improperly allowed to sit at the Commonwealth's table during trial, and that the trial court improperly overruled his motion for a mistrial. As to his entitlement to an instruction on extreme emotional disturbance, Estep contended that the trial court improperly excluded psychological testimony that he suffered from a mental illness that made him fear abandonment to a pathological degree. The Supreme Court reviewed the issue and determined that Estep had failed to establish any evidence of a triggering event that temporarily disturbed his emotions, which is a necessary element pursuant to the applicable law.

On August 30, 2001, Estep, proceeding *pro se*, filed an RCr 11.42 motion to vacate his conviction and sentence. He argued that he received ineffective assistance from his trial counsel, citing three arguments: 1) his trial counsel stated she would be ineffective if she were not removed from the case; 2) his trial counsel failed to talk to Dean Blair, who Estep claimed would have shed light on both his and the victim's actions leading up to the shooting; and 3) his trial counsel failed to investigate his competency. The trial court appointed an attorney to supplement Estep's RCr 11.42 motion. The supplement, filed June 19, 2002, solely addressed Estep's claim that his trial attorney was ineffective for failing to sufficiently investigate and find exculpatory witnesses to present at trial regarding an alleged triggering event. Estep had allegedly been told just prior to the shooting that Kathy had been seen kissing Dean Blair in her car, which, coupled with her earlier statement to Estep that she was ending her relationship with him, provided the necessary triggering event to establish that he was operating under an extreme emotional disturbance.

The trial court held an evidentiary hearing on August 8, 2002, having determined that the allegations in Estep's motion could not be refuted on the face of the record. At the hearing, Estep relied solely upon the testimony of his mother,

Louise Estep (hereinafter "Mrs. Estep"). Mrs. Estep testified that she had spoken to her son three times on the day of the shooting. During the last conversation, which began at approximately 3:00 p.m., she claimed to have told Estep that she had seen Kathy kissing Blair in a parking lot a week previously. She testified that Estep made no response to that statement, and soon thereafter ended the telephone conversation. The shooting occurred between 3:30 p.m. and 4:00 p.m. that afternoon. Mrs. Estep went on to testify as that although she did not recall telling Estep's trial counsel about this conversation, she did recall asking her during trial, "What if I knew something that would have been a reason to cause Steve to go off like that?" According to Mrs. Estep, trial counsel indicated that she did not want to hear this reason because the trial court had already ruled that she could not introduce any evidence that Estep had been acting under an extreme emotional disturbance. Mrs. Estep also testified that she related her telephone conversation with Estep to her sister and daughter, who both testified at trial. Although she was subpoenaed by the Commonwealth, Mrs. Estep did not testify at trial.

On August 19, 2002, the trial court entered its Findings of Fact and Order denying Estep's RCr 11.42 motion, the relevant part of which we shall set out below:

* * *

The failure of adequate representation in this case is said to have occurred because the Defendant's attorney failed to find and present evidence of a triggering event. He offers his mother's testimony about telephone conversations he is alleged to have had with her on the day of the killing. He argues that had his trial counsel discovered evidenced of these phone calls, she could have presented it as the triggering event for his killing of Kathy Bowling. With a triggering event in evidence, he could have presented the expert psychological evidence and the jury would have been given the option of finding him guilty of First Degree Manslaughter.

FINDINGS OF FACT

On the day that the Defendant kidnapped and killed Kathy Bowling, his mother now claims to have spoken with him by telephone on three occasions with the last conversation having occurred less than one hour before the crime.³ The Defendant's mother testified that during the last telephone conversation, she told her son that she had seen Kathy Bowling kissing Dean Blair in a parking lot. According to the Defendant's mother, Bowling had been romantically involved with Dean Blair before she met the Defendant. She said that before, during and after their marriage, the Defendant and Kathy Bowling had argued about her prior, present and possible future involvement with Blair. It seems improbable that the last repetition of such an often repeated allegation could be considered a sudden event. However, the Defendant contends that this new evidence is proof of

³ (footnote 2 in original) Howard and the Defendant may have discussed the events of that day, but neither testified at the hearing. The only evidence of what had been told to Howard about these alleged telephone conversations is the testimony of the Defendant's mother.

a triggering event that would have allowed him to rely upon the defense of extreme emotional disturbance.

The Defendant's mother did not tell the police or her son's attorney about these telephone conversations that are said to have been made immediately before the killing. If Howard had spoken with the Defendant about the events of that day, it seems likely that he would have told her about telephone conversations he had with his mother shortly before he killed his ex-wife. It seems improbable that the Defendant and his mother would have kept such a significant event a secret from his attorney. This Court does not believe that these phone conversations took place.

However if you assume that evidence of the telephone conversations was available, Howard was not given an opportunity to discover it. The Defendant's mother met several times with Howard before and during her son's three week murder trial. At no time did she tell Howard about these alleged telephone conversations. It is her testimony that while she did not tell Howard about the telephone conversations she did offer the following hint during the trial by asking Howard, "What if I knew something that would have set him off?" To which Howard is said to have replied that she could not get into e.e.d. It seems improbable that Howard would not have pursued this hint of exculpatory evidence. During the three-week trial, this Court observed Howard energetically defend the Defendant. This Court believes that Howard would have seized any hint of evidence relating to the Defendant's claim of extreme emotional disturbance. This Court does not believe that this alleged conversation between Howard and the Defendant's mother took place.

Howard provided the Defendant with effective representation. Counsel had obtained the services of an expert witness and sought repeatedly to have the Defendant's mental condition placed into evidence during the guilt phase of the trial. She had many conversations with the Defendant's mother and appeared to be familiar with the record which included the statement that the Defendant's mother made to the investigating officers. There was no reason for Howard to have suspected that this woman would keep useful information from her. It is a weak suggestion of inadequate representation to complain about Howard's alleged failure to respond to the question "what if. . ." at the end of one day of a three-week trial. This Court believes that Howard had no obligation to have pursued this question asked in such a casual manner during such a stressful event.

OTHER GROUNDS

In his pro se motion, the Defendant stated two other grounds in support of his Motion to Vacate Judgment. Appointed counsel did not mention these other grounds in the supplemental memorandum or at the hearing. The first is that counsel stated that if she were not removed from the case, she would be ineffective. At the conclusion of the last hearing before trial, counsel addressed some health concerns with the Court. The Court observed Howard closely during the three-week trial. She was energetic and gave no hint that any of her physical ailments interfered with her performance. Her health concerns were unfounded.

The second ground raised by the Defendant pro se, but not addressed by appointed counsel is that Howard failed to address his competency despite having several head injuries. Howard had the Defendant examined by an expert chosen by

the Defense team. Apparently there was no basis for claiming incompetency to stand trial.

* * *

This appeal followed.

On appeal, Estep argues that he received ineffective assistance of counsel due to the trial court's failure to grant a continuance of the trial and due to his attorney's failure to seek review of the ruling not permitting him to introduce any evidence of his mental health problems. Furthermore, Estep argues that the attorney appointed to supplement his RCr 11.42 motion was ineffective in representing him during the post-conviction proceeding because of his conflict in interest. The Commonwealth disputes each of these arguments in its brief, and argues that the trial court properly denied Estep's RCr 11.42 motion.

It is well settled in this Commonwealth that in order to establish a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, 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). Because a defendant is only entitled to receive reasonable effective assistance, he must

establish that counsel's representation fell below an objective standard of reasonableness or the prevailing professional norms. The defendant making the motion bears the burden of proof and must overcome a strong presumption that counsel's performance was adequate. See Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). Where the trial court has held an evidentiary hearing, as in this case, the issue becomes whether the court below acted erroneously in finding that the defendant received effective assistance of counsel. Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506 (1983); Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980).

On appeal, Estep first argues that his trial counsel was ineffective when she failed to obtain a continuance and was therefore not prepared for trial. We first note that Estep did not raise this issue as to whether the trial court should have granted a continuance either in his direct appeal or in any of his RCr 11.42 pleadings. Because he did not raise this issue before the trial court, Estep has failed to preserve this issue for review. Additionally, the propriety of the circuit court's decision as to the granting of a continuance should have been raised in his direct appeal to the Supreme Court of Kentucky. In any event, Estep has failed to show that his counsel's

performance fell below any reasonable standard or that he was prejudiced in any way.

Next, Estep argues that his trial counsel was ineffective when she failed to seek review of the trial court's ruling not to allow the introduction of mental health evidence during the guilt phase. As the Commonwealth points out in its brief, this particular issue was raised in Estep's direct appeal to the Supreme Court of Kentucky. The Supreme Court thoroughly reviewed the issue and affirmed the trial court's decision to exclude such evidence because there was no showing of a triggering event. Therefore, Estep's allegation of ineffective assistance on this issue must fail because his alleged basis for the claim is false. We further note that Estep did not preserve this issue because he failed to raise this allegation of ineffective assistance before the trial court.

Finally, Estep argues that he received ineffective assistance from the attorney appointed to supplement his RCr 11.42 motion because he did not review a prehearing tape. Clearly, this issue is not preserved because Estep did not raise this issue before the trial court prior to arguing it on appeal. Further, we agree with the Commonwealth that RCr 11.42 cannot provide relief for ineffective assistance of appellate counsel. Bowling v. Commonwealth, Ky., 80 S.W.3d 405 (2002); Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998), cert. denied, 526 U.S.

1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999). Although attorney Gafford was not actually acting in an appellate capacity, we believe that the same reasoning applies and that Estep is therefore precluded from raising any issues relating to his performance in the present appeal.

Although Estep did not actually raise any issues from the trial court's RCr 11.42 ruling, we shall nevertheless review that order. We hold that the trial court did not commit any error in denying Estep any relief. Mrs. Estep's testimony regarding her alleged telephone conversations with her son on the day of the shooting was not believable, and, even if true, could not have formed a basis for establishing a claim for ineffective assistance of counsel. She admitted that she had never told Estep's trial counsel about the conversations and the possibility that she herself had provided the triggering event leading to the shooting. Estep did not provide any type of support for Mrs. Estep's testimony, such as testimony from her daughter and sister, or even from himself. We agree with the trial court that Estep failed to establish that his trial counsel was ineffective regarding the alleged triggering event information.

Finally, we find no error in the trial court's rulings regarding trial counsel's health and her actions regarding Estep's competency.

For the foregoing reasons, the Pike Circuit Court's order denying Estep's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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