

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000858-MR

BILLY EUGENE GLODJO

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 94-CR-00594

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE. Billy Eugene Glodjo brings this appeal from an April 4, 2003, order of the Warren Circuit Court denying his motion to vacate, set aside or correct judgment and sentence pursuant to Ky. R. Crim. P. (RCr) 11.42. Glodjo asserts his conviction and sentence should be vacated because his rights under the United States and Kentucky constitutions were violated when his trial attorneys provided ineffective assistance during his trial. We affirm.

On November 2, 1994, a Warren County Grand Jury returned a four-count indictment against Glodjo. The indictment charged Glodjo with (i) the murder of his girlfriend, Cheryl Cherry by intentionally or wantonly causing her death after running over her with an automobile; (ii) first-degree wanton endangerment and second-degree assault arising from his conduct against Kenneth Chilson;¹ and (iii) being a persistent felony offender (PFO) in the first degree by virtue of two prior convictions for first-degree wanton endangerment. The trial court dismissed the wanton endangerment and assault charges against Glodjo. The murder and PFO charges proceeded to a jury trial.

On January 30, 1996, a jury found Glodjo guilty of first-degree manslaughter in connection with Cherry's death. Glodjo's defense throughout the trial was that Cherry's death was an accident. During the penalty phase of the trial, the jury recommended Glodjo be sentenced to twenty years in prison. This sentence was enhanced to life imprisonment upon the jury finding Glodjo to be a PFO. The trial court, on March 18, 1996, entered its judgment of conviction against Glodjo and imposed the jury's recommended sentence. On direct appeal, the Kentucky Supreme Court affirmed Glodjo's conviction in Appeal No. 96-SC-283-MR on September 4, 1997.

¹ Chilson pulled up in front of Cherry's house shortly after she was run over by Glodjo's automobile. Glodjo allegedly assaulted Chilson.

On August 31, 1998, Glodjo filed an RCr 11.42 motion to vacate, set aside or correct his judgment and sentence. In his motion, Glodjo alleges his trial attorneys, Stephen Todd and Phillip Kimbel, rendered ineffective assistance by their failure to do the following: (i) conduct an independent investigation into the underlying facts behind Cherry's death; (ii) examine the physical site of Cherry's death; (iii) find and produce evidence which would have contradicted testimony from two witnesses; (iv) interview potential witnesses; (v) effectively cross-examine prosecution witnesses; (vi) present a proper defense; (vii) make necessary objections; and (viii) move to suppress the admission of the factual content behind his prior felony convictions.

In a supplemental motion filed August 25, 2000, Glodjo asserted many of the claims raised in his original RCr 11.42 motion, but further asserted his trial attorneys were ineffective for not retaining an accident reconstruction expert and improperly investigating Glodjo's mental health history. Based upon all of these allegations, the trial court conducted an evidentiary hearing on January 12, 2001.

Glodjo called four witnesses, including Todd and Kimbel, at the evidentiary hearing. He further called an accident reconstruction expert and also testified on his own

behalf. On April 4, 2003, the trial court entered an order overruling Glodjo's RCr 11.42 motion. This appeal follows.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. Furthermore, "[a]n issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel." Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001)(citations omitted).

In Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003), the Kentucky Supreme Court enunciated the standards for claims of ineffective assistance of counsel:

The standards which measure ineffective assistance of counsel have been set out in 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). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. See Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001).

In this context, it should also be noted that RCr 11.42 is intended to provide a forum for known grievances, not to provide

an opportunity to research for grievances. Id., citing Gilliam v. Commonwealth, 652 S.W.2d 856 (Ky. 1983). Guided by this authority, we now turn our attention to the merits of this appeal.

First, Glodjo argues his trial counsel rendered ineffective assistance by failing to conduct an adequate independent investigation into facts and circumstances supporting his defense that Cherry's death was accidental. According to Glodjo, his trial attorneys relied too heavily upon discovery material provided by the Commonwealth instead of employing investigators to locate potential exculpatory witnesses and analyze the crime scene. We disagree.

Under the Strickland standard, a convicted defendant is obligated to establish what a more comprehensive investigation would have produced, what information would have been obtained from such investigation, what witnesses would have been discovered, what their testimony would have been, and how this information would have produced a different result at trial. Glodjo failed to present any evidence to support this claim at the evidentiary hearing. When an evidentiary hearing is held on an RCr 11.42 motion, the movant has the burden of proof to establish each element of every claim. Failure to do so amounts to a waiver of any such claim. Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). At the hearing,

Glodjo's trial attorneys both asserted that a more thorough investigation was unnecessary because they possessed more than enough evidence to present an accidental death defense to the jury. Glodjo failed to demonstrate at the hearing how a more thorough investigation would have aided his defense. Accordingly, we believe Glodjo failed to satisfy his burden with regard to this argument.

Next, Glodjo asserts his trial attorneys were ineffective by not retaining an accident reconstruction expert to testify at trial. Again, we disagree. At the time this case came to trial in January 1996, an expert's testimony on causation in a criminal case was precluded on the ground that it invaded the province of the jury. See Renfro v. Commonwealth, 893 S.W.2d 795 (Ky. 1995). This rule was later changed in Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997), after the trial of this case. Additionally, an expert could not have testified as to Glodjo's intent (or lack thereof) to drive his car over Cherry. In fact, the expert who testified for Glodjo at the RCr 11.42 hearing admitted he could give no opinion on Glodjo's intent to injure or kill Cherry at the time of the accident. For those reasons, we believe trial counsel was not ineffective for failing to retain a reconstruction expert.

Glodjo next contends his trial counsel provided ineffective assistance by failing to fully investigate the

relationship between two Commonwealth witnesses, Brandy Sanders and Bryan Cherry. Additionally, Glodjo asserts his trial attorneys failed to adequately impeach the testimony of Cherry's neighbor, Billy Benson. As previously noted, in attempting to obtain post-conviction relief, the movant must present facts with sufficient particularity to provide a basis for relief. Foley, 17 S.W.3d at 878. Glodjo, however, failed to provide any evidence to support these claims at the evidentiary hearing. Thus, Glodjo's arguments as to these issues are without merit.

Next, Glodjo asserts his trial attorneys were ineffective in their investigation of Glojo's mental health history. Glodjo believes if his attorneys had properly presented the jury evidence of his past medical diagnosis for post-traumatic stress disorder and alcoholism, the jury would have accepted his defense. We reject this argument.

Glodjo testified during the evidentiary hearing that he never discussed his medical or mental condition with his attorneys. In their testimony, neither Todd nor Kimbel recalled ever being informed that Glodjo had been diagnosed with post-traumatic stress disorder. Todd and Kimbel, however, were both aware of Glodjo's history of alcoholism. Prior to trial, Todd and Glodjo discussed the fact that Glodjo had been treated for alcohol abuse. After receiving this information, Todd suggested

the presentation of a temporary insanity defense at trial. Glodjo rejected this suggestion.

Kentucky law clearly prohibits trial counsel from presenting an insanity defense without the consent of the client unless the client lacks sufficient medical capacity to waive the insanity defense. Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994). Moreover, “[i]t is reasonable and necessary for counsel to place a certain reliance on its client. If the client, his family and friends impede counsel by concealing psychological problems that might have provided an alternative theory of mitigation, counsel cannot be faulted for not exploring the unknown.” Baze v. Commonwealth, 23 S.W.3d 619, 625 (Ky. 2000)(citations omitted). Under this authority, we conclude that Glodjo himself bore some of the responsibility for not bringing his mental health history to the attention of his attorneys. Notwithstanding, without an absolute defense such as insanity, the best result Glodjo could have hoped for was a conviction for first-degree manslaughter due to extreme emotional disturbance, which was the verdict in this case. Accordingly, we find no error of trial counsel on this issue.

Glodjo also argues he was denied effective assistance of counsel because his trial attorneys failed to object to inadmissible evidence introduced by the Commonwealth during the penalty phase of the trial. Specifically, he alleges that his

counsel failed to object to the deputy court clerk's reading of the indictments from his two prior felony convictions.

According to Glodjo, the deputy clerk asserted facts such as "assaulted" and "wanton" behavior, including acts Glodjo allegedly took against a police officer.

KRS 532.055(2)(a)(2) permits the Commonwealth in a sentencing hearing to introduce evidence regarding "[t]he nature of the prior offenses for which he was convicted."²

Additionally, in Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002), the Kentucky Supreme Court held that details of the indictment were admissible in the sentencing phase of the trial under this statute. Thus, we find this argument by Glodjo to be totally without merit.

Finally, Glodjo argues that the trial court improperly rejected his RCr 11.42 motion because trial counsel failed to warn him he could be cross-examined regarding his alleged assault upon Kenneth Chilson. Kentucky law clearly provides that, when an accused takes the stand in his own defense, he thereby subjects himself to cross-examination and waives the right against self-incrimination for all matters pertaining to the prosecution. Lumpkins v. Commonwealth, 425 S.W.2d 535 (Ky. 1968). Glodjo allegedly attacked Chilson after striking Cherry with his vehicle. Since this incident arose from the same set

² We observe that Kentucky Revised Statutes 532.055(2)(a)(6) was held unconstitutional in Manns v. Commonwealth, 80 S.W.3d 439 (Ky. 2002).

of facts as Cherry's death, we believe Glodjo was subject to cross-examination regarding that incident. If an error did occur, it was harmless given the charges against Glodjo pertaining to Chilson were dismissed prior to trial. Additionally, since Chilson had already testified for the Commonwealth, Glodjo has failed to show how he was prejudiced through his cross-examination regarding Chilson.

In sum, Glodjo has failed to demonstrate that counsel's performance was below the objective standard of reasonableness or that he was prejudiced to the extent of being denied a fair trial. Accordingly, for the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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