RENDERED: March 5, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001182-MR

RAYMOND BERNARD BUTLER APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 98-CR-00206

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, and VANMETER, JUDGES.

MINTON, Judge. Raymond Bernard Butler appeals, *pro se*, from an order of the Laurel Circuit Court, entered on October 10, 2002, that denied his motion to vacate, set aside, or correct the judgment and sentence, pursuant to RCr 10.26, RCr 11.42, CR 0.02(f)/60.03. As grounds for his motion, Butler claimed that he had been denied effective assistance of counsel on his guilty pleas because his attorneys had failed to advise him of the possible defense of extreme emotional disturbance (EED). On

appeal, Butler also argues that the circuit court erred in failing to hold an evidentiary hearing and in refusing to appoint counsel. We affirm the circuit court.

On September 6, 1998, Butler shot and killed Bobby Howard and Marcella Jo Thompson, the brother and sister of his ex-girlfriend, Patricia Hacker. Butler and Hacker's relationship had ended acrimoniously about one week before, and a dispute continued between Butler and Hacker and her siblings over the ownership of a car.

On the evening before the shootings, Butler had argued with Thompson at a friend's house; and he alleges that she struck him on the head with a baseball bat. He also argued with Howard, and blows were exchanged between the two men. Butler claims that he called the police at that point but that they refused to help him. When Butler's sister, Mary, arrived to take Butler home, Howard and Thompson allegedly threatened her. According to Butler, he contacted the police again; but they continued to refuse to help him. When Butler got home, he claims he could not get into his apartment because Howard had taken his truck that had his apartment keys in it. In his statement to police after the shootings, he said that he then "sat around thinking." According to Butler's neighbor, Scott Lee, Butler forced him at gunpoint to drive him back to the Thompson residence. Lee stated that Butler told him he had "ten

or fifteen people to kill." Butler, however, insists that he had asked Lee to take him to Mary's house but that Lee dropped him off near the Thompson home instead. Butler took two rifles with him. Howard, Thompson, Hacker, and Hacker's young son were all at Thompson's residence.

When Butler walked into the home, he found Howard sleeping on the sofa; and he shot him in the back of the head. Thompson came running out of a bedroom and he shot her twice. Butler then shot and seriously wounded a neighbor, Homer Hensley, who came to investigate. Butler also shot into the home of Frank and Tammy Hasty who lived nearby. He then took Hacker into a bedroom and put a gun to her head in the presence of her seven year-old child. He also threatened to shoot himself. When the police arrived, Butler admitted that he had committed the shootings. He told police that Hacker did not have a gun and that he did not see a gun when he shot Hensley; although, he claimed that Hensley had had a gun when Butler saw him earlier the previous day.

On October 16, 1998, Butler was indicted in Laurel Circuit Court for the murders of Bobby Howard and Marcella Jo Thompson, the kidnapping of Scott Lee, first-degree assault against Homer Hensley, two counts of wanton endangerment of Tammy Hasty and Patricia Hacker, and burglary in the first

degree for entering Thompson's residence while armed with a deadly weapon.

On August 3, 1999, the Commonwealth made an offer on a plea of guilty, recommending imprisonment for twenty-five years without the possibility of parole for both counts of murder, fifteen years on an Alford plea on the kidnapping charge, twenty years for the first-degree assault, five years each on the wanton endangerment charges, and twenty years on the burglary charge. All the sentences were to run concurrently. Butler made a motion to enter a guilty plea on the same day.

Butler, thereafter, gave an interview which was published in a local newspaper on August 25, 1999, stating that he had had a "change of heart" regarding the guilty plea and was planning to ask his attorneys to file a motion rejecting the plea agreement and requesting a trial by jury. Butler said that he had been pressured by his attorneys and his family to plead guilty. He claimed that "[m]y attorneys told me if I didn't take this plea, I would spend the rest of my natural life in prison." Butler also accused his attorneys of wrongly advising him that he could not EED because too much time had elapsed between his altercations with Thompson and Howard and the shootings.

At his final sentencing hearing, however, Butler did not raise any of these issues. The circuit court entered a

final judgment and sentence on September 8, 1999, in accordance with the terms of the plea agreement.

On August 15, 2002, Butler filed a *pro se* "motion to vacate, set aside or correct judgment and sentence pursuant to the guidelines of RCr 10.26; RCr 11.42; CR 60.02(f)/CR 60.03." Butler claimed that he had been denied effective assistance of counsel because his defense attorneys had failed to advise him regarding EED and had failed to inform him of the elements of kidnapping, first-degree burglary, first-degree wanton endangerment and terroristic threatening. Butler claimed that if he had known the elements of these offenses, he would not have pleaded guilty. Butler also requested an evidentiary hearing and the appointment of counsel.

On October 10, 2002, the circuit court denied Butler's motion and his request for a hearing and for appointed counsel. Butler timely filed a notice of appeal on November 1, 2002. On November 5, 2002, he made a motion to proceed *in forma pauperis*. The circuit court denied the motion, and Butler appealed to this Court. On March 5, 2003, this Court entered an order affirming the decision of the circuit court. On April 4, 2003, Butler paid his filing fees for the appeal.

The Commonwealth has argued that Butler's appeal should be dismissed as untimely, pursuant to CR 73.02 and CR 76.38.

CR 76.38 is not applicable to this situation because it governs reconsideration of orders from this Court. Butler is not asking this Court to reconsider its ruling on the *in forma pauperis* issue.[1]

CR 73.02(1)(b) is applicable, however, and states, in relevant part, as follows:

> If timely tendered and accompanied by a motion to proceed *in forma pauperis* supported by an affidavit, a notice of appeal...shall be considered timely but shall not be filed until the motion to proceed *in forma pauperis* is granted or, if denied, the filing fee is paid. **If the motion to proceed *in forma pauperis* is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court.** Time for further steps in the appeal... shall run from the date that the notice of appeal is filed upon payment of the filing fee or the granting of the motion to proceed *in forma pauperis*. (Emphasis added.)

The Commonwealth argues that under this rule, Butler had ten days to pay the filing fee after this Court's decision to affirm the denial of his motion to proceed *in forma pauperis*. Butler did not pay the filing fee for thirty days.

Late payment of the filing fee does not necessarily require automatic dismissal of an appeal, however, under the doctrine of substantial compliance enunciated in Foxworthy v. Norstam Veneers, Inc., Ky., 816 S.W.2d 907 (1991). The

[1] The Kentucky Supreme Court denied Butler's motion for discretionary review of this Court's decision to affirm the circuit court's denial of his motion to proceed *in forma pauperis* on appeal. *See* 2003-SC-000259.

Foxworthy court held that failure to timely pay a filing fee was neither automatically fatal nor a jurisdictional prerequisite to filing a notice of appeal. *Id.* at 910; *see also,* Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., Ky., 37 S.W.3d 713, 715 (2000). Under the terms of CR 73.02(1)(b), Butler's notice of appeal was considered "timely" but was not actually filed until the payment of the filing fee. The rule does not specifically state that a party has ten days to pay the filing fee after this Court affirms the denial of a motion to proceed *in forma pauperis*. Under the doctrine of substantial compliance, and in consideration of the fact that Butler was acting *pro se*, we find that his appeal was timely.

Butler's first claim is that he was denied effective assistance of counsel because his attorneys failed to investigate and to advise him of the potential defense of EED.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. *See* Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366,

88 L.Ed.2d 203 (1985). An appellant must show that the attorney’s performance was deficient and that the attorney’s ineffective performance affected the outcome of the plea process. *See id.* “In other words, in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 370; Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 728 (1986).

The mere fact that counsel advises or permits a defendant to enter a plea of guilty does not constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236-37 (1983). In determining whether counsel was ineffective, a reviewing court 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, 315 (1998). We must look to the particular facts of the case and determine whether the acts or omissions at issue were outside the wide range of professionally competent assistance. *Id.*

Butler claims that at the time he shot his victims, he was suffering from EED that was triggered by the following events: on the evening before he committed the offenses, Marcella Jo Thompson had hit him in the head with a baseball

bat, he was punched in the forehead and side of the head by Bobby Howard, his pickup truck was stolen by Howard, various threats were made against him and his family by Howard and Thompson, and the police had refused to respond to his calls for help.

Butler claims that his attorney failed to explain the requirements of presenting an "EED" defense to him and incompetently informed Butler that "too much time" had elapsed between the events which caused his alleged EED and the commission of the criminal acts charged in the indictment. Butler asserts that his attorney's advice contradicted the holding in Springer v. Commonwealth, Ky., 998 S.W.2d 439 (1999), which stands for the proposition that there is no definite "time frame" between the event(s) triggering the EED and the killing, so long as the triggering event remains uninterrupted. Butler maintains that he would not have pleaded guilty to the murders of Howard and Thompson if he had known he could present a defense based on EED.

We are hampered in our review of this issue because the record, as designated, does not contain either a videotape or a transcript of the guilty plea proceedings, nor a tape of Butler's confession to police. When the complete record is not before us, we "must assume that the omitted record supports the

decision of the trial court." Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

In its order denying Butler's motion, the circuit court stated as follows:

> The Movant's claim that he would have benefited from an EED defense is conclusionary and not supported by specific facts. It is contradicted by the facts set out in the Commonwealth's offer on a plea of guilty which was signed by the Movant. It is also contradicted by the confession the Movant gave police in this case, and which is a part of the record herein. It is contradicted by the Movant's silence at his sentencing hearing as to any claim that EED was applicable in his case after having made such a claim to the media a few days before.
>
> At the time of entering his guilty pleas, the Movant advised the Court he had spoken with his counsel about fifteen times. The Movant expressed satisfaction with his attorney. Even after his newspaper interview, the Movant did not express any dissatisfaction with his counsel at his sentencing hearing.

KRS 507.020(1)(a) provides that:

> a person shall not be guilty [of murder] under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

We must first establish whether Butler's attorney's advice that an EED defense would be unsuccessful was a serious

error outside the wide range of professionally competent assistance. Simply because the Springer court stated that a considerable period of time may elapse between the event(s) triggering EED and the commission of the offense, does not mean that a jury may not consider the amount of elapsed time in assessing whether a defendant was acting under the influence of EED. Butler's own statement to police indicates that he spent some time "thinking" before he kidnapped Scott Lee and shot his victims. It was within the range of professionally competent assistance for Butler's attorney to advise him that this passage of time would be fatal to a defense based on EED. "This court has held that an attorney may, after making an adequate investigation, in good faith, and in the exercise of reasonable judgment, advise his client to plead guilty." Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1970), *citing* Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

This is particularly true in cases where a defendant could face the death penalty. "Counsel's advice was a strategy tailored to avoid the death penalty, and it was a strategy that worked." Phon v. Commonwealth, Ky.App., 51 S.W.3d 456, 460 (2001).

> When there is strong evidence of a charged crime,...and when the defendant's motives do not readily incite sympathy...it is entirely rational to plead guilty to a judge in the hope of receiving a more lenient sentence

> than from a jury. Indeed, it is not an uncommon trial strategy to avoid facing a jury in such circumstances." Johnson v. Commonwealth, Ky., 103 S.W.3d 687, 694-95 (2003).

Although EED could have been raised as a defense if Butler's case had gone to trial, his counsel's advice that it would not be successful due to the elapsed time did not constitute deficient performance.

Furthermore, as the circuit court noted in its order, at the time of his final sentencing, Butler was fully aware of the Springer case because he had mentioned it in his newspaper interview, yet he never raised the matter before the circuit court or tried to withdraw his guilty plea.

Butler's second argument is that the EED defense could have been used to mitigate the first-degree assault charge against the neighbor Homer Hensley. *See* KRS 508.040. The same analysis we applied to Butler's first claim is relevant here. Butler's attorney's performance was not deficient when he advised him that the amount of time that had elapsed would undermine a defense to first degree-assault based on EED.

Butler's third argument is that his counsel misadvised him to enter a plea of guilty to kidnapping when the elements of such a charge were not present.

KRS 509.040 provides, in relevant part, as follows:

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
>
> > (a) To hold him for ransom or reward; or
> >
> > (b) To accomplish or to advance the commission of a felony; or
> >
> > (c) To inflict bodily injury or to terrorize the victim or another; or
> >
> > (d) To interfere with the performance of a governmental or political function; or
> >
> > (e) To use him as a shield or hostage.

Butler informed his defense counsel that he merely asked his neighbor, Scott Lee, the alleged victim of the kidnapping, to drive him to the Thompson residence and that Lee willingly agreed to do so. Butler insists that obviously not a single element necessary to prove kidnapping was present; and, therefore, his attorney erred in advising him to plead guilty to the charge. The police report, however, states that Scott Lee told police that Butler initially asked to be taken to the Thompson residence. When Lee refused, Butler forced him to do so at gunpoint, stating that he had "ten or fifteen people to kill." In light of this highly damaging evidence, it was not deficient performance on the part of Butler's counsel to advise Butler to plead guilty to kidnapping.

Butler also makes the related argument that his attorney failed to advise him of the doctrine of exemption, pursuant to KRS 509.050.

KRS 509.050 states as follows:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

Butler claims that under this doctrine, he could not have been found guilty of kidnapping because Lee was not the victim of any offense committed by Butler, nor was Lee unlawfully restrained for any purpose. Butler appears to misunderstand the doctrine of exemption. Exemption is used to prevent defendants from being additionally prosecuted for kidnapping when kidnapping forms an integral part of the offense with which they are being charged. *See* Gilbert v. Commonwealth, Ky., 637 S.W.2d 632, 634-35 (1982), *cert. denied*, 459 U.S. 1149, 103 S.Ct. 794, 74 L.Ed.2d 998 (1983). As explained in the commentary to the statute,

> The necessity for this provision arises out of the fact that many of the crimes defined in this Code have as an essential element, or as an incidental element, a restriction on another's liberty. For example, offenses of robbery and forcible rape are defined in such a way as to always involve physical restraint. Other offenses may involve a restriction of someone's liberty because of the manner in which they are committed. Because of this fact, a prosecutor could misuse the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses than are otherwise available. KRS 509.050, Commentary (1974)

Exemption does not apply to the kidnapping in this case because Butler was not charged with committing any other offense against Lee of which kidnapping could have formed an integral part.

Butler’s fourth argument is that his defense counsel did not explain the elements of first-degree burglary or criminal trespassing before he advised him to plead guilty. KRS 511.020 states, in relevant part:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or

> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Butler claims he did not intend to commit a crime when he went to the Thompson residence; that he informed his counsel that he did not remember shooting Howard or Thompson; and that, in fact, he "thought the world" of Howard and would not have shot him. Butler claims that had he known intent to commit a crime was an element of burglary, he would not have pleaded guilty. Butler also argues that his EED would have provided a defense to the burglary charge.

The record contains plentiful evidence, however, that Butler went to the Thompson residence with the intent to commit a crime. He took two rifles with him, told Lee he had people to kill, and then immediately shot the sleeping Howard without provocation. Indeed, the earlier disputes over the car with Thompson and Howard that Butler claims caused his EED could just as easily have been used by the Commonwealth to provide a motive for the shootings. The police report states that Butler told police that immediately before shooting Howard in the head, he said, "There you go [obscenity] you wanna steal my car, that's fine with me." The evidence overwhelmingly suggests that Butler went to the Thompson residence intending to commit murder, and it was not ineffective assistance of counsel for his attorney to advise him to plead guilty. In regard to Butler's argument

regarding EED as a defense to the burglary charge, we reiterate the points raised in our earlier discussion of EED as a potential defense to the murder charges.

Butler's fifth argument is that his counsel did not explain to him the essential elements of first-degree wanton endangerment and failed to advise him that terroristic threatening was a lesser-included offense before advising him to plead guilty to the charge.

KRS 508.060(1) states, in relevant part, as follows:

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

Butler asserts that there were no claims that he fired or pointed a gun at anyone other than the persons he actually shot. This claim is overwhelmingly refuted by evidence in the record. Patricia Hacker told police that after the shootings, Butler took her into the bedroom and told her he was going to kill her, stating, "[obscenity] look what you caused me to do" and then stuck the gun between her eyes. Butler also confessed to police that he shot into the home of neighbor Tammy Hasty. Sticking a gun between someone's eyes and shooting a rifle into an inhabited home are actions that a jury could have found created a substantial danger of death or serious physical

injury. Although it is conceivable that a jury might have found Butler guilty only of terroristic threatening, Butler's counsel was not ineffective for advising him to plead guilty to wanton endangerment.

Because we find that Butler failed to meet the first prong of the Strickland test on any of his claims of ineffective assistance of counsel, there is no need to analyze whether he met the second prong.

Butler's final argument is that the circuit court erred when it found that he was not entitled to an evidentiary hearing or to post-conviction counsel. An evidentiary hearing is required 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). Butler argues that he was entitled to an evidentiary hearing because the record does not contain any statements from his counsel regarding his advice on the EED defense. Because we have already determined that the record conclusively proves that Butler's counsel was not ineffective in advising him to plead guilty, no material issues need to be resolved. In regard to his claim that he was wrongfully denied post-conviction counsel, we note that there is not a constitutional right to an attorney in a proceeding under RCr 11.42 because such a proceeding is a post-conviction

collateral attack as opposed to a direct appeal. *See* Fraser, 59 S.W.3d at 451; Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 339 (1984). However, counsel must be appointed when requested if an evidentiary hearing is required on a RCr 11.42 motion. *See* Fraser, 59 S.W.3d at 453. Because Butler was not entitled to an evidentiary hearing on his motion, the circuit court was not required to appoint counsel.

For the reasons discussed above, we affirm the Laurel Circuit Court's denial of Butler's motion for RCr 11.42 relief and for an evidentiary hearing.

ALL CONCUR.

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