RENDERED: NOVEMBER 24, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001716-MR

GEORGE GRIBBONS — APPELLANT

V.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
INDICTMENT NO. 00-CR-00058

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: George Gribbons brings this appeal from a July 18, 2003, Order of the Casey Circuit Court. Gribbons was convicted of wanton murder and sentenced to forty years' imprisonment. The Kentucky Supreme Court affirmed his conviction. Gribbons, subsequently, filed a Motion to Vacate Judgment and Sentence based on claims of ineffective assistance of counsel and judicial bias. He also filed a motion for an evidentiary hearing and appointment of counsel. The circuit court denied Gribbons's motions. We affirm.

SUMMARY BACKGROUND

Gribbons was indicted in September 2000 and charged with the intentional murder of Jerry Lee Evans. The indictment stemmed from an incident in which Gribbons fired a shotgun into a trailer he knew to be occupied by Evans and Gribbons's ex-wife, Arlene. One of the shots fired by Gribbons struck and killed Evans.

Prior to trial, the Commonwealth made a motion to amend the indictment to include the charge of wanton murder. The court granted the Commonwealth's motion, and the indictment was revised to include both the intentional murder and the wanton murder charges. Although defense counsel requested a continuance, the request was denied. The jury convicted Gribbons of wanton murder and he was sentenced accordingly.

Gribbons appealed his conviction to the Kentucky Supreme Court on grounds that the trial court erroneously allowed the Commonwealth to amend the indictment. On February 20, 2003, the Supreme Court affirmed Gribbons's conviction in an unpublished opinion.

Gribbons subsequently filed a Motion to Vacate Judgment and Sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He later filed a motion for an evidentiary hearing and appointment of counsel. The Casey

Circuit Court denied his motions on grounds that his claims were without merit. This appeal follows.

INNEFECTIVE ASSISTANCE OF COUNSEL

Gribbons first argues ineffective assistance of counsel. Gribbons makes two allegations: first, counsel failed to conduct an independent investigation of his case prior to trial and, therefore, did not prepare a defense to the wanton murder charge; and, second, counsel failed to properly consult with Gribbons regarding trial strategy. We disagree.

The presumption on appeal is that counsel was effective.[1] It is not this Court's duty to "turn back the clock and retry [] cases in an effort to second-guess what counsel should have or should not have done at the time."[2] Rather, "the burden is upon the accused to establish convincingly that he was deprived of some substantial right . . . ."[3]

The United States Supreme Court outlined the requirements for sustaining a claim of ineffective counsel in Strickland v. Washington.[4] The test requires a movant to prove

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[1] Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord*, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

[2] Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968).

[3] *Id*.

[4] Strickland, 466 U.S. at 690.

two prongs. He must first "show that counsel's performance was deficient," and, second, "that the deficient performance prejudiced the defense."[5] The proof must be sufficient to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[6]

If the movant is unable to prove both prongs of the Strickland test, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."[7] This test does not require that a defendant be provided with "errorless counsel."[8] Rather, counsel should be "reasonably likely to render and rendering reasonably effective assistance."[9]

Gribbons first alleges counsel failed to conduct a sufficient pre-trial investigation and, therefore, did not anticipate nor prepare for the wanton murder charge. In support of this claim, Gribbons asserts that had counsel been better prepared, she would have offered the defense of extreme emotional disturbance (EED).

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5 *Id.*

6 *Id.*

7 *Id.*

8 McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997).

9 *Id.*

We note at the outset that an EED defense is not applicable to a charge of wanton murder. In Todd v. Commonwealth, the Court held, "extreme emotional disturbance under our code affects one's formation of the *specific* intent to murder, but . . . it has no carry-over application to one's *wanton* behavior in creating a grave risk of death."[10] Therefore, Gribbons's claim regarding the EED defense is flawed.

Gribbons's contention that counsel should have anticipated the wanton murder charge is not without merit. The commentary to KRS[11] 507.020 specifically cites "shooting into . . . an occupied building" as an example of wanton murder. Since this is precisely the activity that precipitated Gribbons's arrest, counsel might have anticipated the Commonwealth's motion to include the wanton murder charge.

However, we do not believe counsel's error was "so serious that [she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[12] Although she may not have anticipated the wanton murder charge, counsel made sufficient effort at trial to remedy the situation. Gribbons notes in his brief that defense counsel "stridently" objected to the Commonwealth's motion to amend the indictment. Moreover,

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[10] Todd v. Commonwealth, Ky., 716 S.W.2d 242, 246 (1986).

[11] Kentucky Revised Statutes.

[12] *Id.*

counsel properly moved for a continuance, which was denied. As previously stated, this Court is not in the position to "second guess" what counsel should or should not have done at trial.[13] Gribbons has not met his burden of proving he was denied a substantial right by counsel's actions; therefore, we hold that counsel's failure to anticipate the wanton murder charge did not rise to the level of ineffective assistance.

Gribbons's second allegation of ineffective assistance of counsel is that counsel failed to properly consult with him regarding trial strategy. In support of this argument, Gribbons claims he only spoke with counsel once prior to trial. Gribbons claims that if counsel had conferred with him, he would have advised counsel to present the EED defense.

It is well settled that, "in the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior consultation with the defendant."[14]

Gribbons does not cite any exceptional circumstances that would preclude him from being bound by counsel's trial strategy. Gribbons claims he would have recommended the use of EED as a defense to wanton murder; however, as discussed, such a defense is not applicable. Thus, Gribbons has not established

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[13] Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968).

[14] Salisbury v. Commonwealth, Ky.App., 556 S.W.2d 922, 927 (1977).

that his advice would have had a profound effect on the approach taken at trial. Therefore, since counsel's trial strategy would not have differed even if she had consulted with Gribbons, we do not believe that counsel's assistance was ineffective.

JUDICIAL BIAS

Gribbons also argues that the trial judge should have disqualified himself because of the likelihood of bias and impartiality. In support of this claim, Gribbons makes the following allegations: first, the trial judge had previously presided over Gribbons's divorce proceedings; second, the trial judge had previously acted as Gribbons's counsel for a DUI case; and third, the judge participated in improper *ex parte* communications.

In Lovett v. Commonwealth,[15] this Court held, "absent a showing of bias or prejudice, there are no grounds for recusal." To substantiate a claim of impartiality, the movant must present "a statement of facts which not only shows bias, prejudice or personal hostility toward the accused, but that such is of a character calculated seriously to impair the judge's impartiality and sway his judgment."[16]

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[15] Ky.App., 858 S.W.2d 205, 208 (1993).

[16] Foster v. Commonwealth, Ky., 348 S.W.2d 759, 760 (1961).

Gribbons has not provided sufficient evidence to indicate any bias on the part of the trial judge. The fact that the trial judge who presided over Gribbons's murder trial was the same judge who presided over Gribbons's divorce does not indicate bias. Likewise, the trial judge's previous role as Gribbons's counsel at a DUI hearing does not establish lack of impartiality.

With regards to the allegations of *ex parte* communications, Gribbons offers no support for his claims other than the assertion that his friends and family members could testify on his behalf, if necessary.

Merely asserting that relevant facts *could* be discovered is insufficient to sustain a grant of an RCr[17] 11.42 motion. RCr 11.42(2) states that a motion to vacate a sentence "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The purpose of the rule "is to provide a forum for known grievances, not to provide an opportunity to research for grievances."[18] Gribbons has not provided any evidence to substantiate the allegations of *ex parte* communications. Therefore, granting the motion would merely give Gribbons the "opportunity to research for

[17] Kentucky Rules of Criminal Procedure.

[18] Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).

grievances."[19] To do so, would be in contravention of the purpose of the rule. Thus, Gribbons has not established sufficient evidence of judicial bias.

EVIDENTIARY HEARING

Finally, Gribbons argues his motion for an evidentiary hearing and appointment of counsel were erroneously denied. We disagree.

A request for an evidentiary hearing will not be granted "if [the] motion on its face does not allege facts which, if true, render the judgment void."[20] RCr 11.42 only requires an evidentiary hearing "'if the answer raises a material issue of fact that cannot be determined on the face of the record.'"[21]

Gribbons has not provided sufficient evidence on the face of his motion to render the judgment void. As established in our prior discussion of Gribbons's substantive claims, he has not raised a material issue of fact that cannot be resolved on the face of the record. Therefore, the circuit court's denial of his motion for an evidentiary hearing and appointment of counsel was proper.

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19 *Id.*

20 Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965).

21 Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 548 (1998).

For the foregoing reasons, the order of the Casey Circuit Court is affirmed.

ALL CONCUR.

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