RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001834-MR

TERRY WEDDING — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 99-CR-00139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

MINTON, JUDGE: This is Terry Wedding's appeal from the circuit court's denial of his collateral attack under RCr 11.42[1] on a judgment of conviction and sentence. Since the trial court's record conclusively resolves the issues raised on the appeal, we affirm.

[1] Kentucky Rules of Criminal Procedure.

SUMMARY OF FACTS AND PROCEDURE

On the evening of June 26, 1999, in Muhlenberg County, Wedding drove his father to a local cemetery where he bludgeoned him to death with a baseball bat. Later that same day, he drove his mother to a secluded spot where he shot and killed her. Early the next morning, he shot and killed his cousin and the cousin's wife at their home. Later in the morning of June 27, 1999, he surrendered to the police.

Wedding was indicted on four counts of capital murder[2] and one count of theft by unlawful taking over $300.00.[3] At arraignment, the trial court appointed counsel to represent him and he pled not guilty. Also at arraignment, the Commonwealth filed notice that it would seek the death penalty. Wedding's attorneys immediately moved to have him evaluated for competency to stand trial. The trial court ordered that Wedding be sent to the Kentucky Correctional Psychiatric Center (KCPC). At KCPC, Dr. Frank DeLand, a staff psychiatrist, evaluated Wedding's competency to stand trial. Upon receipt of Dr. DeLand's report, the trial court conducted a competency hearing which resulted in a ruling that Wedding was competent to stand trial for the murders.

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[2] Kentucky Revised Statute (KRS) 507.020.

[3] KRS 514.030.

As the case proceeded toward a jury trial, the Commonwealth moved for a second evaluation at KCPC, this time on the issue of Wedding's criminal responsibility at the time of the commission of the offenses. And Dr. DeLand diagnosed Wedding with bipolar disorder. He noted that Wedding had been involuntarily hospitalized at least twice, once in 1998 and again in 1999. He was released from the last involuntary hospitalization on a court order just a few days before the murders. Dr. DeLand concluded that Wedding was not criminally responsible because he was insane when he committed these murders. Later, two other experts, Dr. Peter Schilling, a licensed psychologist, and Dr. Susan McElroy, a psychiatrist, echoed Dr. DeLand's diagnosis and opinion regarding Wedding's lack of criminal responsibility.

Trial counsel made a motion for a change of venue which was denied. Wedding then accepted the Commonwealth's offer and entered a plea of guilty but mentally ill. In exchange for the plea, the Commonwealth recommended that the theft charge be dismissed and that Wedding receive a life sentence on each count without the possibility of parole. Prior to sentencing, the trial court ordered Dr. DeLand to evaluate Wedding a third time to determine whether he was competent to be

sentenced.[4] Finally, after considering Dr. DeLand's last evaluation, the trial court sentenced Wedding to life without the possibility of parole.

Nearly two and half years after sentencing, Wedding filed a motion to vacate, set aside, or correct his sentence under RCr 11.42. First, Wedding argued that the trial court improperly sentenced him for the crime of murder under KRS 507.020 when that statute specifically excludes guilt under that statute if the actor is acting under the influence of extreme emotional disturbance (EED). As argued by Wedding, the reports from the mental health experts confirming his lack of capacity establish EED. Wedding argued that three mental health experts' opinions were legally binding and that fact precluded him from being convicted of murder; thus, his sentence was void.

Second, Wedding asserted that his two trial attorneys rendered ineffective assistance of counsel in two ways. The first way, he argued that his counsel failed to appeal from the trial court's interlocutory order that denied his motion for change of venue. The second way, building on the improper sentence judgment argument discussed above, he asserted that his attorneys rendered ineffective assistance by advising him to plead guilty and accept the Commonwealth's offer of life without

[4] KRS 504.140.

the possibility of parole in the face of three unrefuted expert opinions that he was not criminally responsible for his actions.

Third, he argued that the trial court violated KRS 504.140 when it sentenced him. KRS 504.140 states:

> If a defendant is found guilty but mentally ill, the court may appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition at the time of sentencing.

Contrary to the statute's language, Wedding insisted that KRS 504.140 required a hearing to be held to determine if he were competent to be sentenced. Wedding insisted that prior to sentencing he was not examined by an expert nor was he given an evidentiary hearing. Thus, he concluded that his sentence for murder was void. Wedding also requested appointed counsel and an evidentiary hearing on his RCr 11.42 motion.

The trial court denied Wedding's RCr 11.42 motion without appointing counsel or conducting an evidentiary hearing. On appeal to this court, Wedding argues that the trial court erred in denying RCr 11.42 relief: (1) when it did not appoint counsel to represent him; (2) when it did not hold an evidentiary hearing; (3) when it sentenced him under KRS 504.020; (4) when it failed to determine that his trial counsel were ineffective; (5) when it failed to hold a competency hearing before final sentencing; and (6) for cumulative errors appearing in the proceedings.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In cases where ineffective assistance is alleged to attack a guilty plea, the applicable standard is enumerated by the United States Supreme Court in Hill v. Lockhart.[5] Hill essentially restated the two-pronged analysis of Strickland v. Washington[6] but modified it slightly. While the first prong of the analysis remains whether counsel's performance was not "within the range of competence demanded of attorneys in criminal cases,"[7] the second prong (*i.e.*, the "prejudice" showing) requires that the defendant demonstrate 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."[8] Limiting this statement, however, is the proposition that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."[9]

Wedding repeats on appeal the argument that his attorneys were ineffective because they failed to appeal from

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[5] 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[6] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[7] Hill, 474 U.S. at 56, *quoting* McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

[8] *Id*. at 59.

[9] *Id*.

the interlocutory order in which the trial court denied Wedding's motion for a change of venue. This allegation does not satisfy the tests set forth in Strickland and Hill. The trial court's order, which denied Wedding's motion for a change of venue, was interlocutory. According to KRS 22A.020(4), only the Commonwealth can file an appeal from an interlocutory order in a criminal case. This statute does not provide for an interlocutory appeal by a defendant in a criminal case.[10] Thus, Wedding's attorneys were not ineffective on this point because they were precluded from filing an appeal from the trial court's interlocutory order which denied a change of venue.

For the first time on appeal, Wedding argues that his attorneys were ineffective because they failed to present mitigating evidence at sentencing that he was not criminally responsible. Since Wedding did not present this issue for consideration by the trial court, he has failed to preserve it for appellate review.[11] Since it is not preserved, this Court will not address it.

Wedding has failed to mention on appeal an issue he raised in his RCr 11.42 motion related to ineffective assistance of counsel: that his attorneys were ineffective when they advised him to plead guilty and accept the Commonwealth's offer

[10] Evans v. Commonwealth, Ky., 645 S.W.2d 346, 347 (1982).

[11] Parker v. Commonwealth, Ky., 465 S.W.2d 280, 287 (1971).

of life without the possibility of parole despite three unchallenged expert opinions that he could not be held criminally responsible for his actions. As a general proposition, an appellant's failure to present an argument to the appellate court that he has raised before the trial court waives that argument on appeal.[12] But this Court does not hold a prisoner, who is acting *pro se*, to the same standard as an attorney.[13] So we have considered this issue, his failure to raise it on appeal notwithstanding.

We see from our review of the record that not only has Wedding omitted this issue on appeal, but also that he did not allege in his RCr 11.42 motion that but for this alleged error by counsel that there is a reasonable probability that he would not have pled guilty but instead would have insisted on going forward with the jury trial to face a possible death sentence. Wedding actually argues in his motion below that his decision to plead guilty upon the urging of his lawyers came as a result of the denial of his motion for a venue change. He felt that he could not get a fair trial so he was forced to accept the Commonwealth's offer. Moreover, we have held that an attorney may, after making an adequate investigation, in good faith, and in the exercise of reasonable judgment, advise his client to

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[12] Personnel Board v. Heck, Ky.App., 725 S.W.2d 13, 18 (1986).

[13] Commonwealth v. Miller, Ky., 416 S.W.2d 358, 360 (1967).

plead guilty.[14] 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."[15]

VOID SENTENCE CLAIM

As he argued before the trial court, Wedding continues to argue that the trial court improperly sentenced him and violated KRS 507.020 and KRS 504.020. He believes that the opinions of Dr. DeLand, Dr. Schilling, and Dr. McElroy were legally binding and should have precluded the Commonwealth from prosecuting him. So he concludes that both his conviction and his sentences were void.

This argument is without merit. The opinions of Dr. DeLand, Dr. Schilling, and Dr. McElroy were just that, opinions. Such opinions are not legally binding on a trial court. Therefore, these opinions did not render either Wedding's conviction or his sentence void. Since the trial court was not bound by these opinions, it did not violate either KRS 507.020 or KRS 504.020 when it sentenced him.

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[14] Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1970), *citing* Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

[15] Phon v. Commonwealth, Ky.App., 51 S.W.3d 456, 460 (2001).

FAILURE TO HOLD COMPETENCY HEARING BEFORE SENTENCING

Wedding repeats the argument from below that the trial court violated KRS 504.140. He argues that the trial court did not consider a February 2001 report of Dr. DeLand before it sentenced him. Since he insists that he was not criminally responsible at the time he committed the murders, he concludes that he was not competent to be sentenced. Thus, Wedding concludes that his sentence is void.

Wedding has confused the concept of criminal responsibility with the concept of competency. The fact that three mental health experts opined that he was not criminally responsible at the time of the killings has no bearing on his competency to stand trial or to be sentenced. Dr. DeLand testified at a competency hearing that Wedding was competent to stand trial. And the record shows that Dr. DeLand evaluated Wedding again for competency prior to sentencing and found him to be competent to be sentenced. So the trial court did not violate KRS 504.140.

CUMULATIVE ERROR CLAIM

Wedding summarizes all of the issues mentioned in his brief with the concluding argument that these arguments taken together constitute cumulated error that results in a denial of due process. This argument is presented for the first time on

appeal. Again, since he has failed to preserve this issue by presenting it to the trial court for consideration, we will not review it on appeal.

FAILURE TO APPOINT COUNSEL AND CONDUCT AN EVIDENTIARY HEARING

In its order denying Wedding's RCr 11.42 motion, the trial court noted that the allegations presented in the motion were refuted on the face of the record. Wedding argues on appeal that he has raised issues that raise fact issues not resolved by the record. "An evidentiary hearing is not required to consider issues already refuted by the record in the trial court.[16] Conclusory 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 discovery."[17] We hold that the trial court did not err when it found that the issues raised in this RCr 11.42 were refuted by the record. Consequently, there was no requirement to appoint counsel.[18]

DISPOSTION

For the reasons discussed in this opinion, we affirm the circuit court's order denying Wedding's RCr 11.42 motion.

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16 Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

17 *Id.*

18 Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 451 (2001).

ALL CONCUR.

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