

RENDERED: April 15, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001923-MR

DENALI MARQUISE ANGLLEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
INDICTMENT NO. 98-CR-00444

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: On March 6, 1998, Denali Marquise Anglen went to the residence of Franco Boggs to purchase crack cocaine. Anglen and Boggs argued, and Anglen shot Boggs five times. Boggs died.

Anglen was indicted, tried, and convicted for murder. He was sentenced to twenty-two years' imprisonment, and his judgment of conviction was affirmed on direct appeal to the Kentucky Supreme Court in 2000. In 2003 Anglen sought RCr 11.42

relief in the Fayette Circuit Court, arguing that he received ineffective assistance of counsel at trial. The Fayette Circuit Court denied relief, and Anglen appeals, reiterating his arguments as well as claiming that the trial court erred in failing to hold an evidentiary hearing. We affirm.

Anglen does not deny that he shot and killed Boggs. In his memorandum of law in support of the post-conviction motion, Anglen conceded that "[t]he only real question for the jury in this case involved what degree of homicide it should be and the appropriate penalty that should be imposed." Anglen contends that, because his trial attorney did not adequately investigate appellant's mental health history and develop a mental illness defense,<sup>1</sup> he was ineffective in his representation of Anglen. Anglen further contends that he raised sufficient issues of fact that could not be controverted by the record, therefore the trial court erred in failing to hold a hearing.

We agree with neither of these contentions. The trial court correctly found that the factual issues were indeed capable of being "determined on the face of the record." RCr 11.42(5); Hodge v. Commonwealth, 116 S.W.3d 463, 469-470 (Ky. 2003). Trial counsel had specifically stated on the record that he did not intend to pursue a mental illness defense (and that

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<sup>1</sup> Anglen includes counsel's failure to hire an independent mental health expert, to insist on a competency hearing, and to present mitigating mental health evidence during the sentencing phase as instances of counsel's alleged neglect.

he had advised Anglen of this), seeking rather to establish that Anglen suffered from extreme emotional disturbance at the time of the incident. The burden is on Anglen to:

plead sufficient facts to establish that the conduct of defense counsel was objectively unreasonable and that a reasonable performance by counsel would have created a reasonable probability of a favorable result. Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. Conjecture that a different strategy might have proved beneficial is also not sufficient. *Baze* [23 S.W.3d 619 (Ky. 2000)]; *Harper v. Commonwealth*, 978 S.W.2d 311 ([Ky.] 1998). As noted by *Waters v. Thomas*, 46 F.3d 1506[, 1514](11th Cir.1995) (*en banc*): "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."

Hodge, 116 S.W.3d at 470. Here, even were we to assume for the sake of argument that trial counsel had committed the alleged errors, Anglen fails to satisfy the second prong that, but for the errors, he would have realized a favorable outcome. See Strickland v. Washington, 466 U.S. 668 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (1985).

The trial court correctly ruled to deny Anglen's RCr 11.42 motion without a hearing.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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