

RENDERED: OCTOBER 15, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

2003-CA-002349-MR

GREGORY W. CHIPMAN

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 99-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

BARBER, JUDGE: The Appellant, Gregory W. Chipman, pro se, (Chipman), has appealed from an order entered by the Grant Circuit Court on October 17, 2003, denying his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without holding an evidentiary hearing. Chipman's underlying claims raise ineffective assistance of counsel with regard to the lack of jury instructions on extreme emotional disturbance (EED) and intoxication, and a denial of due process in the exclusion of evidence of the victim's intoxication. Having

concluded that the circuit court properly denied Chipman relief, we affirm.

On July 23, 1999, Chipman and his uncle, Barry Sowder, worked on a construction project at Chipman's home. They left the house mid-morning and spent most of the rest of the day drinking either at a bar or a friend's (the Nunnelly's) house. Late in the day Chipman left alone after arguing with Sowder over who was going to drive to the Chipman house. Once home Chipman took firearms outside and began shooting. He stopped at one point and called the bar to prevent Sowder from charging anything to his bar tab. When Sowder and the Nunnellys arrived at the Chipman residence, Sowder was shot and killed by Chipman. A jury found Chipman guilty of wanton murder pursuant to Kentucky Revised Statute (KRS) 507.020(1)(b). The circuit court sentenced him to life imprisonment in accordance with the jury's recommendation.

On direct appeal Chipman alleged error by the circuit court in refusing to give a jury instruction on manslaughter in the first degree under an extreme emotional disturbance theory. The Kentucky Supreme Court affirmed Chipman's conviction in an opinion rendered August 22, 2002, holding that the circuit court's failure to give the requested instruction was harmless error.

On September 30, 2003, Chipman filed a pro se motion to vacate the judgment pursuant to RCr 11.42. Counsel was appointed at his request. The pro se motion alleged ineffective assistance of trial counsel for (a) failing to impeach several prosecution witnesses; (b) insufficiently arguing against the exclusion of evidence of the victim's intoxication and a prosecution witness' ten year old felony; and (c) failing to request jury instructions on extreme emotional disturbance and intoxication. The circuit court denied Chipman's motion without holding an evidentiary hearing.

Chipman's appeal raises the following issues: (1) ineffective assistance of counsel and court error in failing to request or give a jury instruction on intoxication and (2) a denial of due process for the withholding of exculpatory evidence, specifically evidence of the victim's intoxication and omission of jury instructions on EED. Without making any supporting arguments, Chipman also lists as errors: (3) improper amendment of the indictment; (4) violation of the double jeopardy clause; (5) erroneous wanton murder instructions and (6) non-unanimous verdict. This Court will address arguments (1) and (2), the only two issues presented to the circuit court. Bowling v. Commonwealth, Ky. App., 80 S.W.3d 405, 419 (2002).

Chipman first asserts that his counsel was ineffective for failing to request an instruction on intoxication. A defendant's entitlement to a jury instruction on an intoxication defense is a matter which could have been raised by Chipman on direct appeal. It should not be re-characterized as a claim of ineffective assistance of counsel in order to be considered within the purview of an RCr 11.42 motion. "(T)he collateral attack authorized by RCr 11.42 . . . is limited to issues that were not and could not be raised on direct appeal." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001).

We have nonetheless considered trial counsel's failure to request an intoxication instruction. Chipman's testimony at trial is succinctly set forth in the unpublished Supreme Court opinion from the direct appeal (Gregory W. Chipman v. Commonwealth, 2000-SC-0902-MR, finality endorsed April 24, 2003):

According to Appellant's trial testimony:  
(1) upon his arrival home, his stepmother immediately questioned him as to what happened after she observed the red place on his head from where he hit his head on a rock during the scuffle with Sowder; (2) he explained at that time that "Barry just attacked me"; (3) while he was upset over the altercation, he was more hurt than mad over it; (4) he decided to "cool off" by doing some target shooting with his .410 caliber shotgun, but did not fire the weapon or yell in the direction of the Nunnelly home; (5) the .410 jammed after he fired it a few times, so he retrieved his 30/30 rifle

and continued his target practice; (6) he never fired his .357 handgun; (7) he was not angry with Sowder about the bar tab situation, and he only attempted to call the bar to cut off Sowder's access to alcohol in the hopes of sobering him up; (8) when the Nunnellys arrived with Sowder, he went outside to run Sowder off, and Sowder was accidentally killed when they grappled over the .45 caliber handgun Appellant took with him; (9) Appellant then fired a second shot in the air; and (10) after the Nunnellys left, he dragged Sowder's body into the barn.

To justify an instruction on voluntary intoxication, there must be evidence not only that the defendant was intoxicated but also evidence that the defendant was so intoxicated that he did not know what he was doing. Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 118 (1990).

"Intoxication . . . is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of intent(.)" McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994). Chipman has failed to allege specific facts that would have supported a voluntary intoxication instruction. While the record discloses that Chipman may have been drinking, it also shows that he was aware of his actions when he shot and killed Sowder. An intoxication instruction is proper where the defendant described himself as "real drunk" and was unsure of many of the details of the crime, such as the race of the victim or how many times the defendant struck the victim with the

weapon. Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 44 (2002).

The record does not contain any evidence that Chipman was so intoxicated that he did not know what he was doing.

In order to establish ineffective assistance of counsel, Chipman must satisfy a two part test by showing (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003), the United States Supreme Court reaffirmed its holding in Strickland that the petitioner must show that his trial counsel's errors prejudiced the defense and that, within reasonable probability, but for counsel's errors the results of his trial would have been different. The Supreme Court has defined reasonable probability as a probability sufficient to undermine confidence in the outcome. Id., quoting Strickland, 466 U.S. at 692. In light of Chipman's testimony, his counsel's decision not to pursue an intoxication instruction was not deficient under the first prong of the Strickland test. Because of the difficulties inherent in making a fair assessment of attorney performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" Id., 466 U.S. at 689. The record refutes Chipman's allegations of errors by counsel.

Chipman next asserts prejudice by the inability to present evidence of Barry Sowder's intoxication at the time of the shooting, characterizing it as a denial of due process for suppression of exculpatory evidence. An RCr 11.42 motion is not the proper forum for an issue that should have been presented on direct appeal. Haight, supra. Additionally, Chipman makes a passing argument of ineffectiveness on this particular issue, but concedes that counsel made a request for Sowder's medical treatment records to show his level of intoxication and that request was denied by the circuit court. Counsel thus attempted to use the intoxication evidence and therefore made no error. Chipman has failed to meet the Strickland test. Furthermore, evidence of the victim's alcohol consumption on the day of the shooting was presented to the jury, and Chipman's testimony that the shooting was an accident rendered irrelevant Sowder's specific level of intoxication.

Chipman lastly asserts error in the omission of jury instructions on EED. This issue was presented on direct appeal and this Court is now precluded from reviewing it. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990). Additionally, Chipman concedes that counsel made a request for this

instruction, but the court denied the request. Counsel made no error, thus Chipman has failed to meet the Strickland test.

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

ALL CONCUR.

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