

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000415-MR

JIMMY MATTHEWS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARTIN McDONALD, JUDGE
ACTION NO. 96-CR-001627

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Shortly before midnight on June 26, 1996, Jimmy Matthews, who was drunk, drove a vehicle the wrong way on Interstate 65 in Jefferson County and caused an accident that, fortunately, did not kill anyone. As a result of the accident, Matthews, who had five prior felony convictions and various misdemeanor convictions including DUI offenses, was convicted and sentenced to 50 years in prison. The 50-year sentence was affirmed by the Kentucky Supreme Court on direct appeal, and

Matthews filed a motion to vacate or set aside his convictions and sentences pursuant to RCr¹ 11.42. The circuit court denied the motion without granting an evidentiary hearing and without stating any reason for doing so. This appeal by Matthews followed.

The facts are that Matthews drove his vehicle the wrong way on I-65 in Jefferson County and collided with a pickup truck driven by Sharon Glover before smashing head-on into a car driven by Charlie Hatchell. Glover was not seriously injured, although she missed working for the next three weeks due to a stiff neck and was required to undergo physical therapy. Her pickup truck suffered significant damage.

Hatchell was not as fortunate. His injuries included a crushed heel, crushed joints between the ankle and heel, and a fractured kneecap. Fortunately, he was wearing his seatbelt, and the airbags in his car deployed upon the impact. His car was also significantly damaged. A third vehicle in which two persons were traveling was hit by debris from the accident.

The car driven by Matthews ended upside down after crashing into the Hatchell car. Special equipment was required to remove Matthews from his car, and he was transported by ambulance to a hospital. A blood alcohol test of Matthews revealed a result of .25%.

¹ Kentucky Rules of Criminal Procedure.

Following a jury trial, Matthews was convicted of DUI (4th offense), driving with suspended license due to DUI (2nd offense), first-degree assault, two counts of first-degree wanton endangerment, two counts of first-degree criminal mischief, and first-degree persistent felony offender (PFO). Due to enhancement for the PFO conviction, Matthews was sentenced to 20 years for DUI, 50 years for first-degree assault, 20 years on each count of first-degree wanton endangerment, and 20 years on each count of first-degree criminal mischief. His sentence for driving on suspended license was fixed at 12 months in the county jail. All sentences were ordered to run concurrently for a total sentence of 50 years. On his direct appeal to the Kentucky Supreme Court, all convictions and sentences were affirmed with the exception of one count of first-degree wanton endangerment. The reversal of that conviction and sentence did not affect the total sentence of 50 years.

Matthews thereafter filed a motion to vacate his sentence pursuant to RCr 11.42. He alleged the ineffective assistance of counsel, specifically counsel's failure to present Matthews' history of alcoholism as a defense. Matthews claimed that counsel failed to offer any expert testimony or scientific proof regarding alcoholism, its effect, and treatment options. In connection with these allegations, Matthews asserted that his

counsel totally failed to prepare, investigate, and offer reasonable and relevant defenses and mitigation.

The trial court summarily denied the motion without granting an evidentiary hearing.² Matthews then moved the court to alter, amend, or vacate its order pursuant to CR³ 59.05. He also moved the court to make specific findings of fact and conclusions of law in the event it denied his motion. The trial court summarily denied the motion but did not make specific findings of fact or conclusions of law. This appeal by Matthews followed.

The "two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as 'counsel' guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense." Fraser v. Commonwealth, 59 S.W.3d 448, 456-57 (Ky. 2001), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). See also Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985). An evidentiary hearing on an RCr 11.42 motion to set aside or vacate "is required if there is a material issue of fact that cannot be

² In denying Matthews' RCr 11.42 motion, the circuit court simply stated that "IT IS HEREBY ORDERED that the Defendant's Motion to Set Aside His Guilty Plea is DENIED." Although this order erroneously stated the nature of Matthews' motion, we assume the judge gave proper consideration to the motion and merely erred in this regard.

³ Kentucky Rules of Civil Procedure.

conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." Fraser, 59 S.W.3d at 452. See also Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky. 1970).

As we have noted, Matthews argues that his attorney should have investigated his background and history of alcoholism and should have procured an expert witness in psychology to testify in both the guilt or innocence and the sentencing phases of the trial. He maintains that this failure to investigate and raise available defenses and produce mitigating evidence amounts to the ineffective assistance of counsel. In support of Matthews' motion, he offered a report by a psychologist, Dr. Eric Drogin, detailing the extent of Matthews' history of alcoholism.

In the Strickland case, the U.S. Supreme Court stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. In O'Hara v. Wigginton, 24 F.3d 823 (6th Cir. 1994), the court stated that "a failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that

investigation was not warranted." Id. at 828. Finally, in Wiggins v. Smith, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003), the U.S. Supreme Court noted that the focus is on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable.

Under the facts in this case, we conclude that counsel did not render ineffective assistance by failing to pursue a defense based on Matthews' alcoholism. We cannot say that counsel's decision not to introduce evidence in that regard was unreasonable. First, Matthews' alcoholism was not a defense to the crimes. Second, his history of several prior DUIs, five prior felony convictions, several misdemeanor convictions, and the circumstances and facts of this case make it highly unlikely that the result of the trial would have been different. As the Kentucky Supreme Court noted in Norton v. Commonwealth, 63 S.W.3d 175 (Ky. 2002), a defendant seeking RCr 11.42 relief must not only demonstrate errors by counsel but must also demonstrate that there is a "reasonable probability" that the jury would have reached a different result. Id. at 177. Such a "reasonable probability" is lacking in this case. In short, we conclude that the circuit court properly denied Matthews' motion summarily and without granting an evidentiary hearing.

Lastly, Matthews contends that the court erred by not making specific findings of fact and conclusions of law pursuant

to his motion following the denial of the RCr 11.42 motion. RCr 11.42(6) requires findings determinative of the material issues of fact only when there has been an evidentiary hearing. The rule makes no mention of requiring fact-findings where the motion is summarily denied after a review of the trial record. Furthermore, we conclude that CR 52.01 does not apply to orders denying RCr 11.42 motions and, therefore, does not require the court to enter specific findings of fact and conclusions of law when denying such a motion.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Thomas Ruff
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky