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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001208-MR

ERRIC CURRY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
INDICTMENT NO. 00-CR-001222

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: After the Kentucky Supreme Court affirmed his conviction for first-degree assault and for being a first-degree persistent felony offender ("PFO I"), Erric Curry moved to alter, amend, or vacate his sentence under RCr[1] 11.42. The Jefferson Circuit Court denied his motion, ruling that Erric had

[1] Kentucky Rules of Criminal Procedure.

not met his burden of proof. We agree with the circuit court's ruling and affirm.

On April 10, 2000, Michael Cox and his friend, Michael Holman, were waiting for a bus at the corner of 4th and Oak Streets in Louisville when they were approached by Erric's uncle, Smythe Curry. Smythe asked Cox for 35 cents and a cigarette; but Cox refused and, instead, told Smythe to "get a job."

Soon, Duane Adams, another one of Cox's friends, drove by and offered Cox and Holman a ride. The men accepted and Cox got into the front passenger seat of Adams's car. But before Holman could enter the car, Smythe reappeared with Erric in tow. Smythe allegedly pointed toward Cox and prompted Erric to break a beer bottle, approach the passenger-side window of the car, and stab Cox in the neck with the fragment of the broken bottle. Blood spurted from the wound and Adams sped away.

Adams drove about one block before he found two police officers to whom he reported the incident. The officers called EMS and helped treat Cox's injury. Cox was taken to University Hospital where he underwent emergency surgery for a severed carotid artery.

Holman, who remained at the crime scene when Adams drove away, ran to where Adams, Cox, and the officers were

located and gave a description of the perpetrators. He was later able to identify Erric and Smythe.

Erric was indicted for first-degree assault and for being a PFO I. He was convicted in a jury trial on both counts and sentenced to twenty years' imprisonment.[2] His sentence and conviction were later upheld on appeal in an unpublished opinion.[3]

At the conclusion of the direct appeal, Erric filed an RCr 11.42 motion to vacate his sentence and conviction. In his motion, Erric claimed he received ineffective assistance of counsel during his trial. Specifically, Erric claimed counsel failed to request a jury instruction on the defenses of extreme emotional disturbance (EED) and involuntary intoxication. The circuit court denied his motion noting that Erric had failed to establish the necessary elements to prove ineffective assistance and failed to prove he was entitled to either an intoxication or an EED defense.

Erric makes two arguments in this appeal: first, that the Jefferson Circuit Court committed reversible error by citing the "shock the conscience" standard; and, second, that the court

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[2] Smythe was convicted of facilitation to first-degree assault and was sentenced to two years in prison.

[3] Curry v. Commonwealth, 2001-SC-0530-MR, Jan. 13, 2003.

erred by holding that he was not entitled to an EED instruction.[4] We disagree.

The presumption on appeal is that counsel was effective.[5] The United States Supreme Court outlined the requirements for sustaining a claim of ineffective counsel in Strickland v. Washington.[6] The test requires a movant to prove two prongs: first, he must "show that counsel's performance was deficient"; and, second, "that the deficient performance prejudiced the defense."[7] 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."[8] This test does not require that a defendant be provided with "errorless counsel."[9] Rather, counsel should be "reasonably likely to render and rendering reasonably effective assistance."[10]

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[4] Erric's argument regarding counsel's failure to seek a jury instruction on an intoxication defense was abandoned on appeal.

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

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

[7] *Id.*

[8] *Id.*

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

[10] *Id.*

In its Opinion and Order, the Jefferson Circuit Court stated that the issue presented in an RCr 11.42 motion was "whether or not trial [counsel's] conduct was such as to shock the conscience." The court continued by noting that under the decision in Strickland, "[u]ltimately, the issue is whether or not the results would have been different had counsel's performance not been deficient . . . [and] whether trial counsel was functioning as 'counsel' guaranteed a defendant by the Sixth Amendment."

Erric argues that the court abused its discretion by citing the "shock the conscience" standard.[11] He is correct when he states that this standard, which was used in conjunction with the "farce and mockery of justice" test, was abandoned by Kentucky courts in favor of the less stringent "effective assistance" test.[12] Erric contends that the trial court's use of this abandoned standard was "an unreasonable application of clearly established U.S. Supreme Court law."

We agree that the court mistakenly cited to the "shock the conscience" test. But this mistake was not fatal; rather, as the Commonwealth argued, it was simply an unfortunate misstatement that was adequately remedied when the trial court actually applied the right standard. Although the "shock the

[11] *See* Polsgrove v. Commonwealth, 439 S.W.2d 776 (Ky. 1969).

[12] *See* Ivey v. Commonwealth, 655 S.W.2d 506, 509 (Ky.App. 1983).

conscience" test was indeed mentioned as "the issue" that must be decided, the court then proceeded to frame the ultimate concern as whether the trial's outcome would have differed had counsel's performance not been deficient and whether counsel performed in accordance with the Sixth Amendment. This comports significantly with the requirements of Strickland. So any error the court may have committed by initially citing to the incorrect standard was harmless.

Moreover, regardless of the language used by the court, it is clear Erric failed to establish that counsel erred by neglecting to seek a jury instruction on an EED defense. Erric claims he was emotionally disturbed when he stabbed Cox. In support of this argument, he cites to the following triggering events: Cox's comment that his uncle Smythe was "a dumb ass bum and that he should get a job"; Cox's refusal to give Smythe money; and the alleged "heated argument" that ensued between Cox and Smythe. Erric claims these events enraged and angered him to a point at which he had no choice but to break a beer bottle and stab Cox in the neck with it.

EED is only established "by a showing of some dramatic event which creates a temporary emotional disturbance. There must be a 'triggering event,' which triggers an explosion of violence on the part of the defendant at the time he committed

the offense."[13] Evidence of mental illness does not suffice to prove EED, "[n]or will evidence of duress or gradual victimization by the environment or evidence that the defendant was 'uneasy' and 'upset' suffice."[14] Similarly, as noted in Talbott v. Commonwealth, "[e]vidence of mere 'hurt' or 'anger' is insufficient to prove extreme emotional disturbance."[15]

Upon review of the record, it is clear that the facts of this case do not warrant an EED defense. Curry was upset and offended by Cox's comments. But Cox's comments were not so incendiary as to constitute a triggering event for Curry's brutal act of violence. While referring to an individual as a "dumb ass bum" and refusing to give him money may lead to hurt feelings, it certainly does not serve as a basis for an EED defense. Therefore, counsel did not err by failing to seek an instruction on EED.

We hold that the Jefferson Circuit Court did not commit reversible error by mistakenly citing the "shock the conscience" standard. Furthermore, Erric did not successfully establish that his counsel was ineffective for failing to request an EED instruction. Therefore, the decision of the Jefferson Circuit Court is affirmed.

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[13] Baze v. Commonwealth, 965 S.W.2d 817, 823 (Ky. 1997).

[14] *Id.*

[15] 968 S.W.2d 76, 84-85 (Ky. 1998).

ALL CONCUR.

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