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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001433-MR

JAMES CECIL — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 95-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: James Cecil appeals pro se from the Hardin Circuit Court's order denying his motion for RCr 11.42 relief subsequent to an evidentiary hearing. For the following reasons, we affirm.

In its opinion on direct appeal, the Kentucky Supreme Court set forth the underlying facts as follows:

> Cheryl Gabow and her domestic companion, David Brangers, hired James Cecil

[1] Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and Samuel McMillen to kill Gabow's husband, Frederick Gabow. On February 17, 1995, McMillen shot and killed Frederick Gabow at Mr. Gabow's residence in Radcliff, Kentucky. McMillen, Cecil, Brangers and Cheryl Gabow all confessed to their respective involvements in the killing and all were indicted for murder. Prior to trial, Brangers was allowed to plead guilty to criminal facilitation of murder and to accept a sentence of five years in prison in exchange for his testimony against the others. The charge against McMillen was severed when a question arose as to his mental competency to stand trial. James Cecil and Cheryl Gabow were then tried jointly and both were convicted of murder and sentenced to life in prison without benefit of probation or parole for twenty-five years. They appeal to this Court as a matter of right. Ky. Const. § 110(2)(b).

I. FACTS.

David Brangers was the only participant in the conspiracy who testified at trial. According to Brangers, Cheryl and Frederick Gabow were in the process of a divorce; and Cheryl believed that if her husband died before the divorce became final on February 20, 1995, she could collect the proceeds of his $200,000.00 National Guard life insurance policy. Cheryl Gabow agreed to pay Cecil and McMillen $10,000.00 of the life insurance proceeds to kill Frederick Gabow. On the night of February 17, 1995, local police officers came to the Brangers/Gabow residence and advised that Frederick Gabow had been shot and was at the hospital. On February 18th, Cecil and McMillen came to the Brangers/Gabow residence and described how McMillen had shot Frederick Gabow through a window of his residence, then entered the residence and shot him again. According to Brangers, Cheryl was upset that her husband was still alive (he died the

next day), because “he was not supposed to suffer.”

In her confession, Cheryl Gabow admitted hiring Cecil and McMillen to kill her husband so that she could collect the life insurance proceeds. However, she also claimed that several days before the murder, she advised both Cecil and McMillen that she “didn't want it to happen, that she didn't want them to do anything,” and that she did not see Cecil again until the day after the murder. Later in her confession, she claimed to have had a subsequent conversation only with Cecil, in which she repeated her renunciation and in which Cecil also renounced any further interest in the plot. Cecil's confession does not mention a renunciation either by himself or by Cheryl Gabow. His version of this conversation was that he told Cheryl that McMillen had gotten drunk and disappeared with the gun; that Cheryl told him that “it needed to be done” before Monday because she was going to sign the divorce papers on Monday or Tuesday; and that he (Cecil) promised her it would be done before Monday. Brangers claimed to have been present during this conversation. He testified that upon being advised that McMillen was drunk and had disappeared with the gun, Cheryl remarked that things were getting “sticky” and “maybe we should back off,” whereupon Cecil responded that the job would be done even if he (Cecil) had to stab Mr. Gabow to death with a knife.

In their confessions, Cecil and McMillen admitted that they agreed to kill Frederick Gabow in exchange for payment of $10,000.00; that Cecil obtained the murder weapon from a friend of his brother; and that Cecil drove McMillen from Elizabethtown to the victim's residence in Radcliff where McMillen shot and killed Gabow. At trial, the Commonwealth relied primarily on the testimony of Brangers and the redacted confessions of McMillen, Cecil and Cheryl

> Gabow. McMillen's confession was redacted to delete any reference to either Cecil or Gabow; Cecil's confession was redacted to delete any reference to Gabow; and Gabow's confession was redacted to delete any reference to Cecil. Thus, the confessions of both Cecil and Gabow were redacted to delete any reference to the conversation in which Gabow claimed to have renounced her role in the conspiracy.
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> At the conclusion of the Commonwealth's case-in-chief, Gabow announced her intention to introduce her own unredacted videotaped confession, including the portion pertaining to her claimed renunciation. Since Gabow's unredacted confession inculpated Cecil, the trial judge bifurcated the remainder of the trial per Kinser v. Commonwealth, Ky., 741 S.W.2d 648 (1987) so that Cecil's case could be tried to a conclusion before the introduction of Gabow's defense. Cecil was convicted and his trial proceeded to the penalty phase, during which he was permitted to introduce his own unredacted videotaped confession, presumably in support of his claim of the accomplice mitigating factor. KRS 532.025(2)(b)5. At the conclusion of the penalty phase of Cecil's trial, the guilt phase of Gabow's trial was resumed and her case was tried to a conclusion. Gabow did not testify in her own behalf, but introduced her unredacted videotaped confession in support of her defense of renunciation.[2]

The supreme court proceeded to affirm Cecil's sentence on appeal after reviewing the following issues:

> (A) denial of his right to a speedy trial; (B) failure to sever his trial from that of Gabow; (C) admission at trial of the

[2] *Gabow v. Commonwealth*, 34 S.W.3d 63, 67-69 (Ky. 2000) (footnotes omitted).

> confessions of McMillen and Gabow; (D) failure to instruct on criminal facilitation of murder as a lesser included offense; (E) separation of jurors and ex parte communication between the judge and jurors during jury deliberations; and (F) ineffective assistance of counsel.[3]

Cecil subsequently filed a pro se motion for the trial court to vacate its judgment pursuant to RCr 11.42, alleging several instances of ineffective assistance of counsel. This motion was later supplemented by his appointed counsel. During an evidentiary hearing, Cecil focused exclusively upon the allegation that he was afforded ineffective assistance at trial because his trial counsel did not introduce the defense/mitigating evidence of Cecil's intoxication. In support of this theory, Cecil offered his testimony that he had been "binge drinking" from December until February previous to the commission of the murder, that he had popped pills during the same time, that he sometimes had blackouts that lasted five to ten minutes, and that his trial attorney would not listen to or present his intoxication theory. Further, Cecil's friend, Cheryl Chadwell, testified that during the time surrounding the murder, she was often visited at home by a drunken Cecil.[4] Nevertheless, the trial court denied Cecil's 11.42 motion,

[3] *Id.* at 69. The court did not reach the merits of Cecil's claim of ineffective assistance of counsel, finding that the issue was not ripe because it had not been presented to the trial judge. *Id.*

[4] Chadwell also testified during the penalty phase of Cecil's trial, but the issue of his drinking habits was not raised at that time.

finding that the evidence regarding Cecil's drinking was not compelling and that a different sentence would not have resulted had the testimony been presented. This appeal followed.

Cecil argues on appeal that the trial court erred in denying him a full and fair RCr 11.42 evidentiary hearing. In support thereof, Cecil proffers that while his motion raised a host of ineffective assistance of counsel issues, the court failed to adequately address each of his claims during the evidentiary hearing. We disagree.

The events of the RCr 11.42 hearing in this matter, as set forth above, make it clear that Cecil was afforded a full and fair hearing with regard to his allegation of ineffective assistance of counsel and intoxication. As to the substance of this issue, the trial court reached its decision utilizing "[t]he two-pronged test for ineffective assistance of counsel . . . (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."[5] We will not disturb the trial court's decision unless it is clearly erroneous.[6]

[5] *Fraser v. Commonwealth*, 59 S.W.3d 448, 456-57 (Ky. 2001) (citing, inter alia, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

[6] *Robbins v. Commonwealth*, 719 S.W.2d 742, 744 (Ky.App. 1986), *overruled on other grounds by Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001).

Cecil was convicted of complicity to commit murder pursuant to KRS 502.020 and KRS 507.020, which required a showing that Cecil intended the death of the victim. Thus, a showing of voluntary intoxication could have served to negate the requisite showing of this intentional mental state and afforded Cecil a defense to the crime.[7] The Kentucky Supreme Court has made clear,

> [h]owever, evidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing.[8]

At the 11.42 hearing, Cecil merely proffered testimony that he was intoxicated for several months surrounding the murder. Assuming, arguendo, that it may be inferred from this testimony that Cecil was intoxicated when he agreed to kill the victim, obtained the murder weapon, and even drove McMillen to kill the victim, Cecil offered no evidence that he was so intoxicated on these occasions that he did not know what he was doing. Thus, to the extent that Cecil proffers that he was denied effective assistance because counsel did not offer his intoxication as a

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[7] *See* KRS 501.080(1); *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (Ky. 1997).

[8] *Springer v. Commonwealth*, 998 S.W.2d 439, 451 (Ky. 1999).

defense during the guilt phase of his trial, the trial court did not err in denying Cecil's 11.42 motion.

Cecil next contends that his counsel was ineffective in not emphasizing evidence of Cecil's intoxication during the sentencing phase of the trial. Pursuant to KRS 532.025(2)(b)(7), intoxication may be introduced during the presentence hearing in a capital offense case as a mitigating factor, to the extent that it impairs a defendant's capacity "to appreciate the criminality of his conduct to the requirements of law[,]"[9] even if the impairment "is insufficient to constitute a defense to the crime[.]" Again, however, Cecil offered no evidence that he was so intoxicated during the events leading to his conviction that he could not appreciate the criminality of his conduct. Therefore, the trial court did not err in denying Cecil's 11.42 motion in that respect.

With regard to Cecil's other allegations of ineffective assistance of counsel, we recognize that neither the evidentiary hearing nor the trial court's opinion specifically addressed these issues. The Commonwealth urges us to find that

[9] "This is an obvious error in syntax originating in the L.R.C.'s original version in The Kentucky Acts and repeated when the statute was officially codified. The phrase no doubt intended is: '... to appreciate the criminality of his conduct or to conform the conduct to the requirements of law was impaired....'" *Bowling v. Commonwealth*, 873 S.W.2d 175, 184 n.1 (Ky. 1993) (Leibson, J., dissenting).

Cecil waived these issues by not reiterating them at the evidentiary hearing, but we decline to do so.

A trial court may grant an evidentiary hearing on some but not all of the issues in a defendant's RCr 11.42 motion, because such a hearing is not "an all or nothing proposition[.]"[10] Rather, a trial court may grant a hearing as to some issues, resolve others based on the record alone, and determine that still other allegations, even if true, do not warrant relief.[11] Although the trial court did not express that this was the course it took, we note that the record reflects some confusion regarding the scheduling and subject of the hearing, and believe that this must have been the trial court's process. After all, even if a court grants an RCr 11.42 hearing with regard to only some issues, it is "still required to rule on all of the issues raised in [the defendant's] motion."[12] Thus, we must determine whether the trial court erred in dismissing Cecil's other allegations of ineffective assistance of counsel without a hearing.

Cecil contends that he was denied effective assistance because his counsel abandoned his right to a speedy trial. However, RCr 11.42 motions are "limited to the issues that were

[10] *See Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998).

[11] *Id.*

[12] *Id.*

not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel."[13] As Cecil's allegation that he was denied his right to a speedy trial was thoroughly addressed and ultimately denied by the Kentucky Supreme Court on direct appeal,[14] the trial court did not err in failing to consider any testimony on the issue at the hearing.

Next, Cecil contends that he was denied the effective assistance of counsel because of an alleged conflict of interest between his and Gabow's attorneys. We disagree.

The United States Supreme Court has held that prejudice may be presumed with regard to an allegation of conflict of interest "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance."[15] The Kentucky Supreme Court has echoed this proposition, stating that a circuit judge's failure to comply with RCr 8.30(1) is not presumptively prejudicial; rather, "[a] defendant must show a real conflict of interest in order to

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[13] *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001).

[14] *Gabow*, 34 S.W.3d at 69-70.

[15] *Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987) (internal citations omitted) (defendant alleged that two law partners representing coindictees was a conflict of interest).

obtain reversal."[16] Here, Cecil alleges that there was a conflict of interest because his attorney shared secretarial staff and an investigator with Gabow's attorney, and either shared or rented office space from him. However, we do not believe that these allegations meet the requisite showing of an actual or real conflict of interest, especially since the trial was bifurcated once Gabow expressed her desire to introduce her confession which inculpated Cecil. In addition, Cecil's motion below posits several questions such as "[d]id counsel for movant and Gabow upon having unauthorized intimate knowledge come to an understanding in trial strategy." The trial court did not err in finding that these hypothetical questions do not qualify him for relief or a hearing pursuant to RCr 11.42, as "[t]he purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances."[17]

Cecil's next assertion of ineffective assistance is that counsel failed to preserve numerous issues for appellate review. More specifically, Cecil asserts that trial counsel refused to take a stand on his pretrial rights, conducted no meaningful investigation of potential witnesses, refused to keep him abreast of any new trial strategy, made few objections

[16] *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001) (defendant alleged that two public defenders from the same office representing coindictees was a conflict of interest).

[17] *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003).

during trial, and failed to call any defense witnesses. However, Cecil admitted in his motion that he was "unable to fully list or accurately document these issues due to the unavailability of the record." Again, the trial court did not err in not holding a hearing on this issue since "[t]he purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances."[18]

Finally, Cecil contends that the trial court erred in failing to address several additional instances of ineffective assistance of counsel which he raised below. Three of these issues concerning counsel's failure to seek a writ of prohibition or to introduce evidence that the gun was not the actual weapon used in the crime, and whether counsel's errors cumulatively amounted to ineffective assistance of counsel, were not sufficiently presented to the trial court and thus do not warrant our discussion. Further, the issue of counsel's failure to object to the continuance of the trial was adequately addressed on direct appeal by the Kentucky Supreme Court in conjunction with the issue of Cecil's right to a speedy trial. The trial court did not err in failing to discuss these issues at the RCr 11.42 hearing.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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[18] *Id.*

BRIEF FOR APPELLANT:

James Cecil, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonego
Assistant Attorney General
Frankfort, Kentucky