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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002044-MR

MARY COOK

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 00-CR-00287

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND SCHRODER, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

JOHNSON, JUDGE: Mary Cook has appealed from an order entered by the Hardin Circuit Court on September 20, 2004, which denied her pro se motion to vacate or set aside her sentence pursuant to RCr² 11.42, without holding an evidentiary hearing. Having concluded that the circuit court did not err in rejecting Cook's claim of ineffective assistance of counsel on the basis of the court record without holding an evidentiary hearing, we affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

On August 16, 2000, Mary Cook's husband, John Cook IV, was stabbed to death in his home by Guy David England, Mary Cook's "lover". Cook and England were indicted by a Hardin County grand jury on one count of complicity to commit murder.³ England pled guilty to murder and was sentenced to life in prison without the possibility of probation or parole for 25 years and testified against Cook at her trial. Following a six-day trial, the jury convicted Cook of complicity to commit murder and authorized a sentence of life in prison without the possibility of probation or parole for 25 years. On November 5, 2002, the trial court sentenced Cook in accordance with the jury verdict. Our Supreme Court affirmed the judgment and sentence in an unpublished Opinion on May 20, 2004.⁴

On September 2, 2004, Cook filed a pro se motion for post-conviction relief pursuant to RCr 11.42 to vacate or set aside the judgment entered against her. The motion raised ten grounds for relief. On September 20, 2004, a circuit court judge, who was not the judge who tried the case, entered an order denying Cook's motion without holding an evidentiary hearing. This appeal followed.

Although Cook's motion raised ten grounds for relief, her brief in this appeal is limited to only eight of those

³ KRS 502.020 and 507.020.

⁴ Cook v. Commonwealth, 2002-SC-1021-MR.

claims. Cook claims that defense counsel rendered ineffective assistance: (1) by failing to request a change of venue; (2) by withdrawing a pretrial motion to suppress statements Cook made to police; (3) by failing to request a jury instruction on facilitation as a lesser-included offense; (4) by failing to object to opinion testimony offered by the police regarding her credibility and England's credibility; (5) by failing to object to evidence bolstering England's testimony; (6) by misunderstanding parole eligibility requirements; (7) by failing to request a competency hearing; and (8) due to defense counsel's cumulative errors.

The standards which measure ineffective assistance of counsel are guided by Strickland v. Washington,⁵ which established a two-prong test:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."⁶

⁵ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

⁶ Gall, 702 S.W.2d at 39 (quoting Strickland, 466 U.S. at 687).

An evidentiary hearing is not required on the motion if the issues raised are refuted by the record of the trial court.⁷ Further, conclusory allegations that are not supported by specific facts do not justify an evidentiary hearing "because RCr 11.42 does not require a hearing to serve the function of a discovery deposition."⁸ A hearing is only required if the motion "raises a material issue of fact that cannot be determined on the face of the record."⁹

Cook's first contention is that defense counsel was ineffective by not moving the trial court for a change of venue from Hardin County. Cook asserts that she was denied due process and a fair and impartial trial because John Cook IV's father was a deputy jailer at the Hardin County Detention Center and had close relationships with judges and police officers in Hardin County which might have affected the trial. Additionally, Cook asserts there was extensive publicity about the case in the local newspaper prior to and during the trial.

KRS 452.210 requires a change of venue in a criminal action when it appears the defendant or the Commonwealth cannot receive a fair trial in the county where the case is pending. KRS 452.220(2) requires that a defendant seeking a change of

⁷ Strickland, 466 U.S. at 687.

⁸ Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998) (citing Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993)).

⁹ RCr 11.42(5); Stanford, 854 S.W.2d at 742.

venue file a petition stating the reasons why a fair trial cannot be obtained in the county where the action is pending accompanied by at least two affidavits from credible persons verifying that the reasons contained in the petition are true. The trial court then has wide discretion in whether to grant the petition.¹⁰

Cook contends that an evidentiary hearing should have been held to determine how the victim's father's relationships with judges and police officers in Hardin County might have affected her trial and to determine the nature of pretrial publicity.

During the preliminary voir dire of the 32-person venire empanelled for the trial of this matter, the trial judge introduced Cook to the panel, advised them of the charges against her, and inquired if any of them knew Cook or had any knowledge of the case other than what the trial judge had told them. One juror stated that he thought he might be kin to Cook and he was excused from the panel and replaced. None of the other panel members expressed having any knowledge of the case beyond the information told to them by the trial judge.

During the voir dire by the defense, counsel specifically asked if any members of the panel had read any newspaper articles concerning the case or if they had seen or heard anything about it on television or radio. Again, not one

¹⁰ Campbell v. Commonwealth, 788 S.W.2d 260, 263 (Ky. 1990) (citing Payne v. Commonwealth, 623 S.W.2d 867, 876 (Ky. 1981) cert. denied, 456 U.S. 909, 102 S.Ct. 1758, 72 L.Ed.2d 167 (1982)).

member of the panel expressed that they could recall having heard or read anything about the case. Defense counsel advised the panel that John Cook IV had been murdered more than two years prior to the trial of this matter and specifically asked if anyone recalled reading about the case in the newspaper at that time.¹¹ Again, not one member of the panel recalled anything about the case. Thus, this claim of ineffective assistance of counsel is refuted by the trial court record and there was no reason for the trial court to hold an evidentiary hearing on Cook's claim of entitlement to a change of venue based on pretrial publicity.

The venire panel was also asked by the Commonwealth during its voir dire if anyone knew John Cook III, who was to testify on behalf of the Commonwealth. None of the panel members indicated they had any knowledge of him. In her brief, Cook asserts that John Cook III's position as a deputy jailer should have been explored during voir dire by her counsel; however, all members of the panel had already indicated that they did not know John Cook III. Thus, defense counsel's failure to inquire about Mr. Cook's position as a deputy jailer certainly did not constitute ineffective assistance of counsel, and this claim is also refuted on the face of the record.

¹¹ The trial court record contains copies of three articles published in The News-Enterprise, Hardin County, Kentucky, on August 17, 18, and 20, 2000.

Accordingly, Cook has failed to identify any affirmative evidence to support her bare allegations that defense counsel was ineffective by failing to move the trial court for a change of venue and an evidentiary hearing was not required for the purpose of inquiring as to counsel's reasons for not moving to change venue. The trial court record, particularly voir dire, is clear that there was no need to change venue in this case. As noted, none of the jurors indicated any knowledge about the case other than what they learned in voir dire, nor did any of the jurors indicate they knew or had any relationship with John Cook III. In fact, only 36 jurors were required to obtain a qualified panel of 32. The unrefuted record indicates that Cook was tried by a "panel of impartial, 'indifferent' jurors."¹²

Cook next contends that defense counsel was ineffective by withdrawing a pretrial motion to suppress statements Cook made to police following her arrest. Defense counsel filed a motion to suppress the statements on July 18, 2001, on the grounds that the statements were not made voluntarily, knowingly, or intelligently. Additionally, the motion stated that Cook was "badgered, threatened, and intimidated" while giving her statements and that any waiver of her rights under Miranda v. Arizona,¹³ was not voluntarily, knowingly, or intelligently

¹² Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

¹³ 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

given. A hearing on the motion was scheduled for August 29, 2001. At the scheduled hearing on the suppression motion, the trial record is clear that defense counsel withdrew the motion and stated that she was doing so on the basis that Cook was going to testify in her own defense at trial and for "various other trial strategies."

Cook now asserts that an evidentiary hearing is necessary to ensure that the decision to withdraw the suppression motion was a "reasonable trial strategy rather than lack of knowledge, work ethic, or any other appropriate reason." "[T]he purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances" [emphasis added].¹⁴ Additionally, "[t]rial strategy will not be second guessed in an RCr 11.42 proceeding."¹⁵ Cook's allegation fails to overcome the presumption that counsel's conduct in withdrawing the suppression motion "falls within the wide range of reasonable professional assistance[.]"¹⁶ The trial record clearly indicates the motion was withdrawn on the basis that Cook was going to testify, and for other reasons of trial strategy.

¹⁴ Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003) (citing Gilliam v. Commonwealth, 652 S.W.2d 856 (Ky. 1983); and Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001)).

¹⁵ Hodge, 116 S.W.2d at 473 (citing Hibbs v. Commonwealth, 570 S.W.2d 642 (Ky.App. 1978)).

¹⁶ Hodge, 116 S.W.3d at 469.

We decline to second-guess the reasonableness of that strategy after it has proven unsuccessful.

Cook next asserts that defense counsel was ineffective by failing to request an instruction on the lesser-included offense of criminal facilitation.¹⁷ Criminal facilitation reflects a mental state of one that is "wholly indifferent" to the actual completion of a crime.¹⁸ Whereas complicity requires proof that the defendant specifically intended for another person to commit the charged offense.¹⁹

Although an instruction was not requested at the trial, Cook raised this issue in her direct appeal on the basis that the trial court has a duty to instruct on the whole law of the case. Our Supreme Court concluded on direct appeal that the evidence at trial did not demonstrate that Cook was indifferent to England murdering her husband, but rather her intention was to receive monetary benefits as a result of his death. "An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel."²⁰ Further, the Court found that the decision not to seek a facilitation instruction was trial strategy, and this is

¹⁷ KRS 506.080.

¹⁸ Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995).

¹⁹ Harper v. Commonwealth, 43 S.W.3d 261, 266 (Ky. 2001).

²⁰ Sanborn, 975 S.W.2d at 909 (citing Brown v. Commonwealth, 788 S.W.2d 500 (Ky. 1990); and Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993)).

clearly supported by the trial court record. Accordingly, Cook did not receive ineffective assistance of counsel by defense counsel failing to request an instruction on criminal facilitation.

Cook next alleges that her counsel was ineffective by failing to object to opinions offered by the police regarding her and England's credibility. Although this issue was unpreserved for review on direct appeal, our Supreme Court considered the issue for palpable error pursuant to RCr 10.26. The Commonwealth asserts that because the issue was raised on direct appeal it may not be relitigated in these proceedings.²¹ However, the standard of review for palpable error under RCr 10.26 is different from the showing required for a claim of ineffective assistance of counsel. Review of an unpreserved issue for palpable error on direct appeal does not preclude an ineffective assistance of counsel claim based on the unpreserved issues in a collateral attack proceeding.²²

Regardless, Cook's claim that her counsel was ineffective for failing to object to the allegedly inadmissible opinion evidence offered by the police is misplaced. Although it was reviewing the issue for palpable error, our Supreme Court held on direct appeal that there was no error of any kind in

²¹ Sanborn, 975 S.W.2d at 909.

²² Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998).

admitting the testimony as it merely provided context for the jury to consider the reasonableness of Cook's responses and was not impermissible opinion testimony. Because the testimony was properly admitted, defense counsel cannot be said to have been ineffective by failing to object to its introduction at trial.

Next, Cook contends that defense counsel was ineffective by failing to object to allegedly improper evidence bolstering England's testimony. As with her previous assertion, this issue was raised on direct appeal as an unpreserved error and reviewed by our Supreme Court for palpable error. As set forth above, the Commonwealth's contention that such review precludes raising this issue in these proceedings is misplaced. However, the decision of our Supreme Court on this issue again precludes Cook's claim that the failure to object to the testimony by her defense counsel amounted to ineffective assistance.

The Supreme Court noted that while generally a witness's testimony cannot be corroborated by showing that he made prior consistent statements there are exceptions to the rule such as when the statements are offered to rebut an expressed or implied claim of recent fabrication or improper influence or motive. The Court then held that because cross-examination of England by defense counsel implied that England was testifying falsely to obtain a more lenient sentence, the testimony of the

detective concerning England's statement given to police on the morning of the murder was admissible pursuant to KRE²³ 801A(a)(2). Again, because there was no error with the admission of the evidence, Cook's claim that defense counsel was ineffective by failing to object to the testimony is without merit.

Next, Cook alleges that she received ineffective assistance of counsel when defense counsel misunderstood the parole eligibility requirements during the penalty phase of her trial. At trial a probation and parole officer testified that Cook was a violent offender and would have to serve 85% of her sentence if sentenced to a numerical term of years. However, a violent offender must serve 85% of the sentence imposed, or 20 years, whichever is less.²⁴ For example, a violent offender given a sentence of 30 years must only serve 20 years before being eligible for probation or parole rather than 25.5 years (85% of 30). Defense counsel did not correct the error of the officer through cross-examination and stated to the jury in her argument that a sentence for a term of years could actually be longer than a life sentence which has parole eligibility after serving 20 years.

²³ Kentucky Rules of Evidence.

²⁴ Hughes v. Commonwealth, 87 S.W.3d 850, 854-56 (Ky. 2002).

Cook presented this issue on direct appeal and the Supreme Court, pursuant to RCr 10.26, found that there was no palpable error. Now, Cook asserts that counsel was ineffective by erring in understanding the parole eligibility requirements. Even if we agreed with Cook that counsel was ineffective by misunderstanding the parole eligibility requirements and failing to correct the testimony of the officer, we cannot find that Cook was prejudiced by any such error.

Under Strickland, the appropriate test for prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁵ Here, Cook was sentenced to life without probation or parole for 25 years after the jury found beyond a reasonable doubt that the evidence supported the aggravating circumstance that Cook committed the offense of complicity to commit murder for the purpose of receiving money or any other thing of monetary value or for profit. Regardless of any misinformation concerning the parole eligibility requirements, the jury clearly knew that under the sentence imposed Cook would not be eligible for parole or probation for a period of 25 years. We decline Cook's invitation to speculate as to whether the jury was trying to give her a more lenient sentence. The jury's sentence is unambiguous.

²⁵ Strickland, 466 U.S. at 694.

Cook next alleges that defense counsel was ineffective in not requesting a competency hearing. Under Kentucky law, "the standard of competency is whether the defendant has a substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate in his defense."²⁶ In her motion for post-conviction relief Cook asserts that at the time of her trial she was taking Zoloft for depression which caused her to "exhibit a nonchalant, everything will be okay, nothing really matters type of attitude and demeanor." She also alleges that she was taking Seroquel which "causes drowsiness and impairs ones reflexes and responses." Finally, Cook states that these drugs caused her "to present herself in such a way as to illicit a negative response from the jury."

Such allegations, even if true, would not fall below the standard of competency for Cook to stand trial. There are no allegations that the drugs caused her to be unable to comprehend the nature and consequences of the proceedings against her or prohibited her from participating in her defense. In short, the allegations do not meet the specificity requirement of RCr 11.42 and the trial judge correctly denied relief without conducting an evidentiary hearing.

Lastly, Cook contends that she is entitled to relief on the basis of defense counsel's "cumulative errors." "In view

²⁶ Alley v. Commonwealth, 160 S.W.3d 736, 739 (Ky. 2005) (citing Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964)).

of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect."²⁷

Based upon the foregoing, the order of the Hardin Circuit Court denying RCr 11.42 relief is affirmed.

ALL CONCUR.

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²⁷ Sanborn, 975 S.W.2d at 913 (citing McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986)). See also Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997).