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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-000947-MR

DEREK BRYAN WORKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CR-01181

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR JUDGE.¹

POTTER, SENIOR JUDGE: Derek Works appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error in the trial court's denial of the motion, we affirm.

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On June 9, 2002, following a high-speed chase, Works was apprehended and, due to his erratic behavior, was taken to a hospital in Adair County. It appears that the episode was brought about because Works was distressed over the conduct of his fiancée, and because he had taken an excessive dosage of insulin. Following his capture, Works was sedated and transferred to Eastern State Hospital in Lexington, Kentucky.

On June 11, 2002, in an apparent security lapse by Eastern State, Works escaped from the Hospital through an unlocked door. Upon exiting the building, Works forcibly took a vehicle, causing the vehicle owner physical injury; intentionally struck the vehicle owner and another individual with the vehicle; and intentionally rammed two vehicles.

Because there was reason to believe that Works was not mentally capable of understanding the charges against him, on July 23, 2002, the trial court entered an order pursuant to Kentucky Revised Statutes (KRS) 504.110 directing that Works be taken to the Kentucky Correctional Psychiatric Center (KCPC) for treatment and examination. On September 4, 2002, Licensed Clinical Psychologist Steven J. Simon issued a Report stating that Works was competent to stand trial. The Report also stated that "it is this evaluator's opinion that Mr. Works does not meet criteria for 'insanity' for the charges emanating after his escape from Eastern State Hospital,

although, on the other hand there does appear to be some mitigating circumstances involved such as blood sugar deregulation, acute distress over relationship problems, as well as severe personality disorder."

On November 13, 2002, Works was indicted for first-degree robbery, KRS 515.020; second-degree assault, KRS 508.020; three counts of first-degree criminal mischief, KRS 515.020; operating a motor vehicle on a suspended license, KRS 186.620; and first-degree persistent felony offender, KRS 532.080.

On April 9, 2003, in connection with a plea agreement with the Commonwealth, Works filed a Petition to Enter a Plea of Guilty. Pursuant to the Plea Agreement, Works would plead guilty but mentally ill to each of the indicted charges (except that each of the three first-degree criminal mischief charges would be amended to second-degree criminal mischief). The agreement provided that the Commonwealth would recommend sentences totaling 25 years on the felonies and recommend that another Fayette County indictment be dismissed.

On April 14, 2003, the trial court entered judgment in accordance with the plea agreement, but postponed and suspended sentencing pending a pre-sentence investigation. Works subsequently became dissatisfied with his appointed trial counsel and requested replacement counsel. The trial court ordered that he receive new counsel. After receiving new

counsel, Works decided to proceed with the plea agreement. On May 23, 2003, the trial court entered Final Judgment and Sentencing sentencing Works to a total of 23 years to serve.

On June 7, 2004, Works filed a pro se motion for post-conviction relief pursuant to RCr 11.42. Counsel was appointed, following which, on October 7, 2004, a supplement to the motion was filed. On February 5, 2005, the trial court entered an order denying Works' motion for post-conviction relief. This appeal followed.

Works contends that his conviction was in violation of Section 2 of the Kentucky Constitution and the Fourteenth Amendment of the Federal Constitution because the State (Eastern State Hospital is an arm of the Commonwealth) permitted his escape from the Hospital, and but for this failure of the State, he would not have committed the ensuing crimes. In his brief, Works phrases his argument as follows:

[T]he Commonwealth failed in its duty to provide a secure environment to Mr. Works to avoid becoming a danger to himself or other individuals. More specifically, the portion of Eastern State Hospital where Mr. Works resided was not kept locked and allowed him to escape. There is no accusation that Mr. Works used any force, or harm, or threat to staff at Eastern state Hospital in order to leave. But for this failure by E.S.H., he would not have been able to escape as he did in this case. All of the crimes to which he is alleged to have committed in this indictment were committed outside of the building to which he had been confined.

It is also clear, Mr. Works picked up where he left off and attempted to secure a motor vehicle for purposes of fleeing. This was a clearly foreseeable course of conduct.

. . . .

The Commonwealth, in this action, failed to provide Mr. Works with the secure environment that was necessary for his treatment. This is not a case where Mr. Works broke out of Eastern State Hospital, took someone hostage or engaged in conduct that was not reasonably foreseeable.

. . . .

. . . . However, but for the Commonwealth's violation of Mr. Works' rights under the 14th Amendment, Mr. Works would not have escaped as he did. The harm that he inflicted upon several individuals cannot be minimized. However, placing the blame on Mr. Works in the form of indicting him and exposing him to the possibility of spending the rest of his life in prison shocks the conscience and violates fundamental fairness. Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1942).

Moreover, Mr. Works' conviction and sentence violates Section 2 of the Kentucky Constitution which prohibits the Commonwealth's exercising absolute and arbitrary power over the lives, liberty and property of free men. In the case at bar, it is the Commonwealth that placed Mr. Works at Eastern State Hospital, not Mr. Works. It is the Commonwealth that recognized his need for being placed in a secure and locked portion of the hospital, not Mr. Works. It is the Commonwealth that determined that Mr. Works was a danger to himself or others and merited involuntary hospitalization, not Mr. Works. It is the Commonwealth that contrary to its own objectives and its treatment for

Derek Works, negligently provided him a means to leave Eastern State Hospital to engage in conduct very similar to that in which he engaged shortly before his escape. Mr. Works had not received the treatment that he needed for a return of custody to the Commonwealth of Kentucky in the form of a county jail or penal institutions. As such, it is fair to conclude he remained a danger to himself or others. The Commonwealth of Kentucky owed him a duty to protect him from engaging in conduct which could be harmful to himself or to others. The Commonwealth failed miserably in this regard.

The Commonwealth attempted to resolve this problem by seeking to punish Mr. Works in the criminal justice system and threatened him with the possibility of serving the rest of his life in prison. This constitutes arbitrary power over an individual that, but for the Commonwealth's own misconduct, he would in fact not have been able to engage in this conduct. The Commonwealth had a clear duty to prevent this from happening. Its failure is the direct cause for the tragedy that happened to the individuals whom Mr. Works admittedly inflicted injury upon [the victims] and their property, even though he did not know them personally.

"In a petition filed under RCr 11.42 the movant must show that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack." Lay v. Commonwealth, 506 S.W.2d 507, 507 (Ky. 1974).

The theory proffered by Works, that he should be absolved of the crimes charged in the indictment under Section 2 of the Kentucky Constitution and Amendment 14 of the Federal

Constitution because Eastern State negligently permitted him to escape, is not a valid defense. We construe Works' argument as analogous to a justification defense to an escape charge.

"Justification: it is generally recognized that irregularities in custody or detention do not constitute justification for escape. . . . Exceptions to the general rule against any justification for escape . . . are governed by the general provisions relating to criminal liability and justification. KRS 501.090 allows duress to be raised as a defense in any prosecution, and KRS 503.030 provides a defense of justification where the defendant believes himself compelled to commit a criminal act (e.g., escape) by the unlawful use of threat of force by another, if the evil avoided is greater than the evil of the criminal statute violated." KRS 520.020, Kentucky Crime Commission/LRC Commentary (1974). "In such exceptional circumstances a defendant should always be permitted to avail himself of these defenses and they should not be denied him by virtue of his incarceration." Id. Automatic denial of such defenses (e.g., Hinkle v Commonwealth, 66 S.W. 816, 23 KLR 1988 (1902)) is unreasonable and unduly harsh when a real threat of violence against a defendant exists. Id.

There was no duress, threat of harm, or other justification for Works' escape from Eastern State Hospital. It follows that the crimes committed by works following his escape

are not subject to a justification defense. We discern no defense, be it by constitutional right, statute, or common law, which supports the theory advanced by Works that any negligence by Eastern State which contributed to his escape absolves him of the crimes he committed following the escape. The trial court accordingly properly denied this grounds for relief.

Works also contends that he received ineffective assistance because trial counsel failed to advance the foregoing theory. As noted, the theory advanced by Works is not a viable defense to the crimes charged in the indictment, and trial counsel was accordingly not ineffective for not pursuing the theory.

Works also contends that he received ineffective assistance of counsel because trial counsel failed to raise as misconduct and as a conflict of interest the issue of Dr. Ruth acting as a psychiatric evaluator of both himself and one of his victims.

In a challenge arising from the entry of a guilty plea, the defendant claiming ineffective assistance of counsel must first prove that counsel's performance was deficient in that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. See Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky.App. 1986) (*citing* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,

2065, 80 L.Ed.2d 674 (1984)). The inquiry pertaining to deficient performance is whether counsel's assistance was reasonable considering all the circumstances. See Strickland, 466 U.S. at 688. Second, he must prove that he was prejudiced by the deficiency such that there exists a reasonable probability that but for those errors he would not have pleaded guilty and would have insisted on going to trial. See Taylor, 724 S.W.2d at 226 (*citing Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Despite the test having two components, however, a court deciding an ineffective assistance claim need not address both the attorney's deficient performance and prejudice to the defendant if the defendant makes an insufficient showing on one component. See Strickland, 466 U.S. at 697.

While Works raises this dual evaluation by Dr. Ruth as an issue, he does not explain how this amounts to a conflict of interest or how he was prejudiced by the occurrence of the dual evaluation. We discern no prejudice by the dual evaluation.

Finally, a movant in an RCr 11.42 proceeding is not entitled to an evidentiary hearing on the motion where the allegations contained in the motion may be resolved by reference to the record. Hodge v. Commonwealth, Ky., 68 S.W.3d 338

(2001). As the issues raised by Works in his motion may be resolved from the record, the trial court did not err by not conducting an evidentiary hearing on the motions.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Ray Myers
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky