

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002072-MR

RUSSELL B. HILL

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 02-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Russell B. Hill appeals pro se from an order entered by the Owen Circuit Court denying his motion seeking RCr 11.42 relief based on allegations that he was afforded ineffective assistance of counsel at trial. For the reasons stated hereafter, we affirm.

Hill and his wife, Cassandra Hill (Tessy), experienced marital difficulties and Tessy became romantically involved with a coworker, Paul Sharon. Hill and Sharon had verbal encounters and both men contacted Sheriff Zemer Hammond several times to

---

<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

seek advice and to advise him that the intensity of their dispute was escalating.

On the evening of February 23, 2001, Tessy went to Sharon's house to play cards with Sharon, his wife and a cousin. After a break, during which the cousin allegedly observed Sharon and Tessy kissing, Hill suddenly entered the house, where he shot and killed Sharon. Hill and Tessy then remained in the house overnight after the other occupants ran away. Hill apparently asked to speak with Hammond, who traveled to the scene. Hill subsequently spoke with Hammond and several other people by telephone throughout the night. The next morning, Hill voluntarily left the house and entered Hammond's custody. Hammond testified that he had no specific discussions with Hill regarding the shooting, and that he was never involved in the investigation of the crime.

At trial, Hill did not deny the shooting but he presented an intoxication defense and a claim of extreme emotional disturbance. The jury convicted him of murder, first-degree burglary, and first-degree wanton endangerment. In accordance with the jury's recommendation, he was sentenced to life in prison without the possibility of parole. The Kentucky Supreme Court affirmed on appeal.<sup>2</sup>

---

<sup>2</sup> *Hill v. Commonwealth*, unpublished slip op. 2002-SC-0923-MR, rendered May 20, 2004.

Hill then sought RCr 11.42 relief on the ground that he was afforded ineffective assistance of counsel. The trial court denied the motion without conducting an evidentiary hearing. This appeal followed.

Hill first contends that the trial court erred by failing to find that he was afforded ineffective assistance when trial counsel did not seek to have Hammond's daughter-in-law dismissed from the jury venire panel for cause. In these particular circumstances, we disagree.

It is well established that a defendant who seeks reversal of a conviction based on a claim of ineffective assistance of counsel must satisfy both portions of a two-part standard.<sup>3</sup> First, "the defendant must show that counsel's performance was deficient," as demonstrated by a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>4</sup> Second, "the defendant must show that the deficient performance prejudiced the defense" as demonstrated by a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."<sup>5</sup>

---

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Unless both showings are made, the defendant is not entitled to reversal on grounds of ineffective assistance of counsel.<sup>6</sup>

Moreover, the defendant must overcome the presumption that counsel's challenged action could be considered sound trial strategy under the circumstances of the case.<sup>7</sup>

Here, although the record on appeal does not include a copy of the official trial transcript, Hill's appellate brief includes documents which purport (and appear to be) excerpts from that transcript, including both the voir dire of Hammond's daughter-in-law and Hammond's testimony. We do not address whether those pages are properly before us or whether the appellate record could have been supplemented with the official trial transcript. Instead, having considered the tendered pages in the interest of judicial economy, we are compelled to conclude that Hill was not prejudiced by counsel's alleged error and is not entitled to relief on appeal.

During voir dire Hammond's daughter-in-law volunteered that she was related to the sheriff, but in response to the court's inquiries she asserted that she could hear the case and give Hammond's testimony "the same weight as anyone else's[.]" She also stated that she did not know and had not heard "anything about it." Hill's counsel did not object or move to

---

<sup>6</sup> *Id.*

<sup>7</sup> *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

strike the daughter-in-law, and she ultimately was chosen as the jury's foreperson. This type of relationship between a juror and a witness certainly raises concerns regarding the juror's possible bias. However, in this particular case it is clear from a review of the transcripts provided by Hill that he suffered no prejudice.

It is undisputed that Hill sought Hammond's advice several times before the shooting. It is also undisputed that Hill shot Sharon, and that he later spoke with Hammond numerous times before peacefully surrendering to him. Further, Hammond testified that he was not involved in the investigation of the crimes, and that he never discussed the circumstances of the shooting with Hill. It appears that Hill does not dispute any portion of Hammond's testimony, and we have found nothing to suggest that there was any animosity between the men or any negative testimony by Hammond. Moreover, although Hill asserts that the juror indicated bias and dishonesty by claiming not to have heard "anything about it," there is nothing in the record to support a conclusion that the juror's statement was meant to convey that she was ignorant of the extensive media coverage of the case, rather than simply unfamiliar with Hammond's involvement.

Given the absence of any indication that Hammond's testimony reflected negatively on Hill's defense, we cannot say

that Hill showed that he was deprived of a fair trial as a result of counsel's failure to object to the retention of Hammond's daughter-in-law as a juror even though Hammond was a witness for the Commonwealth. Indeed, the juror's retention may have been a sound tactical decision by counsel since, according to Hill, the juror worked in the local public defender's office.

Hill also contends that the trial court erred by conducting an evidentiary hearing without providing advance notice to him, and that the court erred by failing to make findings and conclusions as required by RCr 11.42(6). However, the record shows that the court entered an order on July 27, 2005, overruling Hill's motion for an evidentiary hearing after specifically finding "that all material issues of fact and allegations in Movant's Motion are clearly determined by the face of the record[.]" Despite Hill's contention, it is clear from the court's order that the court conducted only a hearing on the record, rather than an evidentiary hearing. Thus, Hill was not entitled to personally attend the hearing or to have counsel appointed to represent him.<sup>8</sup> Further, since the trial court did not conduct an evidentiary hearing, it follows that it was not obligated to make "findings determinative of the material issues of fact."<sup>9</sup>

---

<sup>8</sup> *Odewahn v. Ropke*, 385 S.W.2d 163 (Ky. 1964). See also RCr 11.42(5).

<sup>9</sup> RCr 11.42(6).

The Owen Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell B. Hill, pro se  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky