

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000694-MR

DANNY RAY GLASCOCK

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, SENIOR JUDGE
ACTION NO. 96-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND LAMBERT, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Danny Ray Glascock appeals from the denial by the Mason Circuit Court of his RCr 11.42 motion, following his conviction for attempted murder and burglary in the first degree. For the reasons stated below, we affirm.

The factual background of this case is as follows. Glascock was indicted by a Mason County Grand Jury on November 1, 1996, for attempted murder, burglary in the first degree, and stalking in the first degree. On February 19, 1997, Glascock was

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

convicted by a jury in Mason Circuit Court on all charges. He was sentenced to forty-five years' imprisonment. On March 11, 1999, the Kentucky Supreme Court affirmed in part and reversed in part Glascock's conviction.² The Supreme Court affirmed the convictions for attempted murder and burglary in the first degree but reversed the conviction of stalking in the first degree.

On October 30, 2000, Glascock filed a *pro se* motion to vacate his conviction pursuant to RCr 11.42 alleging ineffective assistance of counsel. The Mason Circuit Court appointed a public advocate to assist and supplement Glascock's motion by an order entered on November 9, 2000. Glascock's case was not assigned a public advocate until August 22, 2001. A supplemental motion and memorandum of law in support of Glascock's *pro se* RCr 11.42 motion was filed on October 4, 2006, by his court appointed counsel. The Mason Circuit Court denied Glascock's RCr 11.42 motion for relief and request for an evidentiary hearing by an order entered on February 13, 2007, holding that the motion was untimely, and in the alternative, Glascock had received effective assistance of counsel. This appeal followed.

Glascock raises several issues on appeal: that his RCr 11.42 motion is not untimely; that the trial court erred by denying his *ex parte* motions for expert funds; that his counsel failed to request an independent competency evaluation; that his counsel failed to pursue an extreme emotional disturbance defense and to request expert funds; and that his counsel failed to pursue a general defense at trial.

RCr 11.42 (10) states: "Any motion under this rule shall be filed within three years after the judgment becomes final...." Glascock's judgment became final on March 11, 1999, and his original RCr 11.42 motion was filed on October 30, 2000, well

² Glascock v. Commonwealth, 1997-SC-0210-MR (not to be published).

within the three year time limit. This original motion was not disposed of until after Glascock's second or supplemental RCr 11.42 motion was filed. Therefore, we disagree with the trial court and hold that Glascock's RCr 11.42 motions were timely.

Glascock claims that the trial court erred by denying his *ex parte* motions for expert funds to help him prepare his RCr 11.42 motion. The threshold requirement for a post-conviction indigent petitioner to receive funds under KRS 31.185, the Kentucky statute that governs such matters, is if the allegations set forth are "sufficient to necessitate an evidentiary hearing." *Hodge v. Coleman*, --- S.W.3d ---, 2008 WL 199833 (Ky. 2008).³ Since we find no error in the trial court's decision to deny Glascock's motion for an evidentiary hearing, *see infra*, we also find no error in the trial court's denial of Glascock's motions for expert funds.

Glascock next asserts that his trial counsel made a number of errors, depriving him of his right to effective assistance of counsel. The basis of Glascock's argument is that his counsel failed to request an independent psychological evaluation of Glascock, as well as, to investigate, prepare, and pursue an extreme emotional disturbance defense and a general factual defense of the alleged crimes at trial.

The legal standard which must be met to show ineffective assistance of counsel under RCr 11.42 was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001):

The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to

³ This decision clarifies the conflicting holdings of *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005) and *Commonwealth v. Paisley*, 201 S.W.3d 34 (Ky. 2006), which was the case law regarding expert funds for post-conviction indigent petitioners.

deprive a defendant of a fair trial and a reasonable result. . . .
“Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so ineffective that defeat was snatched from the hands of probable victory. *Haight*, 41 S.W.3d at 441.

Applying these principles to the facts of this case, we find no error in the circuit court’s ruling.

Glascock argues that he was not competent to stand trial and that his counsel was ineffective for failure to request an independent competency evaluation on the matter. In his brief, Glascock states “[i]n the present case, the circumstances were more than sufficient to raise a question in trial counsel’s mind as to [his] competency to stand trial.” We agree with this statement. Glascock’s competency was a pre-trial issue that culminated in a competency hearing conducted on February 11, 1997, after Glascock’s counsel requested a competency determination. The hearing determined that Glascock was competent to proceed with trial.

Glascock asserts, “a further development of the existing facts could have more clearly highlighted this problem...” In support of his argument, Glascock presented an affidavit of Dr. Eric Drogin, who stated that Glascock’s mental condition, at the time of his evaluation, “may have been considerably more severe than reflected in the incomplete data made available to the court at the time of trial.” However, Drogin’s conclusion is speculative; he simply conjectures that Glascock’s mental state “may” have been more severe than reflected. Drogin makes no claim that Glascock was incompetent at the time of trial. Considering that Glascock’s trial counsel requested a competency hearing and a continuance to prepare more thoroughly for such hearing, we can find no

error by trial counsel, in regards to Glascock's competency, that would render counsel ineffective.

Glascock also argues that his trial counsel should have presented an extreme emotional disturbance defense to mitigate the charges against him in an attempt to receive a lesser offense instruction. In addition, Glascock claims his counsel failed to request funds for a mental health expert, which could have aided jurors in evaluating the reasonableness of his emotional disturbance. After reviewing the record, it appears that the actions of the defense counsel were the result of trial strategy and the alleged errors did not prejudice Glascock. The basis of this extreme emotional disturbance defense is a series of events: first, Glascock's wife left him and took their daughter away; second, his son was shot and killed; and finally, he had to file bankruptcy. However, Glascock's wife, who is the victim of his attempted murder charge, testified that Glascock knew the child was not his daughter. This testimony combined with the Commonwealth's introduction of evidence of a long history of physical abuse against the victim by Glascock supports his counsel's decision to not present this defense at trial.

As the lower court noted, such a decision "was well within the parameters of sound trial strategy." Further, "it is not the function of [an appellate court] to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000). Therefore, we agree with the trial court that Glascock did not receive ineffective assistance of counsel because an extreme emotional disturbance defense was not presented at trial.

Glascock's next alleged counsel error is failure to investigate, prepare, and pursue a general defense of the alleged crimes at trial. He argues that his attorney failed

to present any kind of “factual defense” because his attorney did not call any witnesses to “refute the dismal picture of [him] drawn by the prosecution.” However, Glascock only identifies two possible character witnesses, one of which was his girlfriend at the time, who could have “painted a much more favorable picture” of him. Glascock does not argue that either of these alleged character witnesses could actually offer any facts that could have helped his case, such as alibi testimony.

The Kentucky Supreme Court has previously held in *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), that:

As noted in *Strickland*, no particular set of detailed rules for counsel’s conduct can satisfactorily take into account the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct and to evaluate the conduct from counsel’s perspective at the time.... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect. (citation omitted).

Accordingly, we agree with the trial court that the fact that Glascock did not like the outcome of his case does not mean that his attorney acted ineffectively in defending him. Considering the overwhelming evidence of guilt, including the testimony

of the victim, we hold that Glascock has failed to meet the burden of proof that his attorney failed to exercise reasonable professional judgment.

Finally, Glascock argues that his request for an evidentiary hearing should have been granted by the trial court. A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if the issues raised in that motion reasonably require such a hearing for a determination. On the other hand, a defendant is not entitled to such a hearing if the motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965). Our review of the record indicates that all of the issues raised by Glascock, which go to the question of the effectiveness of his counsel, are either refuted by the record or have no merit on their face. Therefore, he was not entitled to an evidentiary hearing. *Maggard v. Commonwealth, supra; Fraser v. Commonwealth, supra.*

For the reasons set forth above, the order of the Mason Circuit Court is affirmed.

ALL CONCUR.

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