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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000835-MR

JOHN WESLEY SNOW — APPELLANT

v. — APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY FROHLICH, JUDGE
ACTION NO. 04-CR-00619 AND 05-CR-00249

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES, SENIOR JUDGE.[1]

GRAVES, SENIOR JUDGE: John Wesley Snow appeals from an order of the Boone Circuit Court denying his petition for post-conviction relief pursuant to RCr[2] 11.42. For the reasons stated below, we affirm.

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[1] Senior Judge John W. Graves, 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.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2004 Snow was released from prison after having served 15 years for first-degree manslaughter for the death of his former girlfriend. In the months following his release Snow became friends with Patricia Volpenhein.[3]

On September 12, 2004, the body of Volpenhein was found wrapped in a tarp in a field on the corner of Amsterdam Road and Route 8 in Boone County. The cause of death was two gunshot wounds to the head. She also had knife wounds to her neck. Volpenhein was last seen alive the previous day by her mother and sister leaving her home and getting into a pick-up truck being driven by Snow. As part of the investigation, a rape kit test was performed, and seminal fluid was found in Volpenhein's vagina.

On November 1, 2004, in Case NO. 04-CR-00619, Snow was indicted for murder (KRS 507.020); tampering with physical evidence (KRS[4] 524.100); and second-degree persistent felony offender (PFO) (KRS 532.080(2)). After DNA testing established that the source of the seminal fluid found in Volpenhein's vagina was Snow, on April 19, 2005, in Case No. 2005-CR-00249, Snow was indicted for first-degree rape (KRS 510.040) and second-degree persistent felony offender.

Following the return of the rape indictment, the Commonwealth filed notice of its intent to seek the death penalty with the rape being the aggravating circumstance to the capital murder charge.

Snow provided notice of his intent to introduce evidence of mental illness at the time of the offenses, and the Commonwealth subsequently filed a motion to have Snow evaluated concerning his competency to stand trial at Kentucky Correctional

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[3] The victim's surname is also spelled "Volpenheim" in the record.

[4] Kentucky Revised Statutes.

Psychiatric Center (KCPC). Following the evaluation, a competency hearing was held on September 9, 2005, and on December 21, 2005, the trial court entered an order finding that Snow was competent to stand trial.

On January 12, 2006, Snow entered into a plea agreement with the Commonwealth under which he entered a guilty plea to all charges in Case No. 2004-CR-00619 and an *Alford* plea[5] in 2005-CR-00249. Pursuant to the plea agreement, in Case No. 2004-CR-00619 Snow would receive life without the possibility of parole for 25 years for the murder charge and five years for the tampering charge, enhanced to 10 years under the PFO charge; in Case No. 2005-CR-00249, Snow would receive 20 years on the rape charge, enhanced to life imprisonment under the PFO charge. On January 30, 2006, final judgment and sentencing was entered by the trial court consistent with the plea agreement.

On February 5, 2007, Snow filed a motion for post-conviction relief pursuant to RCr 11.42 in both Cases 04-CR-00619 and 05-CR-00249. Snow also filed motions for appointment of counsel and for an evidentiary hearing. On April 6, 2007, the trial court entered an order denying the motions. This appeal followed.

VOLUNTARINESS OF GUILTY PLEA

Snow contends that he is entitled to have his convictions and sentences vacated because his guilty plea was not voluntary because the trial court failed to inform him of the essential elements of each crime he was charged with.

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct.

[5] *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and RCr 8.09

1709, 1711, 23 L.Ed.2d 274 (1969). However, “the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.” *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978) (citing *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986).

In his Motion to Enter a Guilty Plea signed by Snow in both cases on January 12, 2006, Snow stated “I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed, and I understand, the charges and any possible defenses to them.”

In his motions, Snow also stated as follows: “I declare my plea of ‘guilty’ is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.”

The Plea Agreement itself, also signed by Snow, contained the following explanation of the charges:

> On Saturday, September 11, 2004, the Defendant picked Patricia Volpenhein up at her residence in Covington, and her body was found wrapped in tarps on River Road in Boone County on Sunday, September 11, 2004. The Defendant intentionally caused her death by shooting her in the head two times and/or stabbing her in the throat. The Defendant disposed of evidence, including, but not limited to, the body of Patricia Volpenhein, blood evidence, a gun, a knife, etc. Evidence demonstrates recent sexual contact between the victim and the Defendant, and physical evidence exists that supports the charge of sexual intercourse by forcible compulsion. NOTE: The Defendant denies commission of a rape, but does not dispute commission of the remaining three

charges. . . .

Moreover, at the plea agreement hearing Snow testified, under oath, that his attorneys had explained the nature of the charges to him; that he fully understood his "legal situation"; that he had read the motions to enter a guilty plea and plea agreement before signing them; that he and his attorneys had reviewed the motions and plea agreement with him and that they had explained the documents to him; and that he fully understood the documents.

With regard to Snow's specific allegation that the elements of the crimes were not explained to him; nevertheless, the indictment and plea agreement, which Snow testified under oath that he had read, fully explained the nature and factual background of the charges, and implicit within such was an explanation of the elements of the crimes.

Most importantly, however, Snow does not explain why, presumably now knowing the elements of the crime, his lack of knowledge at the time was relevant to the voluntariness of his guilty plea. In other words, he does not explain why, if the elements of the crimes had explicitly been explained to him, that would have affected his decision to plead guilty. Hence this argument is not fully developed in any event.

In summary, the record refutes Snow's allegation that his plea was not knowingly and voluntarily entered into.

INEFFECTIVE ASSISTANCE OF COUNSEL

Snow contends that he received ineffective assistance of counsel because trial counsel failed to inform him of the essential elements of each crime he was charged with; failed to discuss with him the availability of defenses to the crimes, including the defense of extreme emotional distress; and failed to adequately investigate the charges against him.

STANDARD OF REVIEW

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the Strickland test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

Further, the mere fact that counsel advises or permits a defendant to enter a plea of guilty does not constitute ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

FAILURE TO INFORM OF ELEMENTS OF CRIMES

Snow contends that trial counsel provided ineffective assistance because they failed to explain the elements of the crimes charged.

We have substantially addressed this argument in our discussion of Snow's prior argument. So here we only note that Snow does not explain why, if he had known the elements of the various crimes, he would not have pled guilty but, instead, would have gone to trial. As there is not, we believe, a reasonable probability that he would have, this allegation of ineffective assistance fails under the *Hill v. Lockhart* test.

FAILURE TO ADVISE OF DEFENSES

In this allegation of ineffective assistance Snow contends that trial counsel failed to advise him of the defense of extreme emotional disturbance (EED). Snow argues that based upon previous psychological testing, EED would have been a viable defense to the charges against him.

EED is a defense to murder which reduces the offense to first-degree manslaughter. *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006), cert. denied ___ U.S. ___, 127, S.Ct. 1157, 166 L.Ed.2d 1001 (2007). Extreme emotional disturbance is "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky.1986). This requires a "triggering event"

that leads to the extreme emotional disturbance. *Whitaker v. Commonwealth*, 895 S.W.2d 953, 954 (Ky. 1995). However, the trigger is not limited to sudden or intense events, such as were sufficient to produce the common law "sudden heat of passion": "it is possible for any event, or even words, to arouse extreme mental or emotional disturbance." *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2000) (quoting *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980)).

Snow does not identify any triggering event which would make an EED defense a viable defense to the murder charge. Snow appears to argue that previous psychological testing reflects psychological disorders which would support the defense. However, such test results are outside the scope of the EED defense which, again, requires a triggering event. As such, this allegation of ineffective assistance is without merit.

Lastly, Snow contends that he received ineffective assistance because trial counsel failed to adequately investigate the charges against him. He particularly alleges that trial counsel failed to investigate the autopsy report and the charge of rape.

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). First, it must be determined whether a reasonable investigation should have uncovered the defense. *Id.* If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. *Id.* Counsel's tactical choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Id.* If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result

would have been different. *Id.*; *See also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

However, "RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule." *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (footnotes omitted).

Snow has failed to identify any particular witnesses who would have been helpful to his defense who were not interviewed by trial counsel, what information they may have regarding the case, or what their testimony would have been. Nor has he identified with particularity any evidence which may have been discovered by additional investigation. Consequently, this allegation of ineffective assistance amounts to no more than a fishing expedition, and the claim is outside the scope of RCr 11.42. *Mills*, *supra*.

ENTITLEMENT TO HEARING AND APPOINTMENT OF COUNSEL

Snow also contends that he is entitled to an evidentiary hearing on his RCr 11.42 motion and appointment of counsel. A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. A hearing is required only if there is a material issue of fact that cannot be conclusively resolved; i.e., conclusively proved or disproved, by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky.2001). If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. *Coles v. Commonwealth*, 386 S.W.2d 465 (Ky. 1965). If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record." *Fraser* at 453.

In this case all allegations can be resolved from the face of the record, and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, the appellant is not entitled to an evidentiary hearing. Moreover, since an evidentiary hearing is unnecessary, the appellant is not entitled to the appointment of counsel. *Id.*

CONCLUSION

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

ALL CONCUR.

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