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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001476-MR

ERIC JEROME GILL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHELIA R. ISAAC, JUDGE
ACTION NOS. 02-CR-00196 AND 02-CR-00196-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

CLAYTON, JUDGE: On November 16, 2001, Jodi Toll was found shot to death
at the Sportsman Motel in Fayette County. During the murder investigation Eric
Gill became a person of interest after Deshawn Miller, Toll's boyfriend, and Teddy

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 Kentucky Revised Statutes (KRS) 21.580.

Hawkins, Miller's uncle, directed police to Gill. In December 2001, during an interview with Lexington police, Gill gave a detailed confession to Toll's murder. Gill claimed that Miller ordered him to kill Toll because Toll was pregnant with Miller's child. Gill also claimed that he owed both Miller and Hawkins money. After the interview, Gill was arrested and charged with Toll's murder.

Upon further investigation, police found no evidence linking either Miller or Hawkins to Toll's murder. In fact, police overheard a monitored phone conversation from jail in which Gill admitted that he lied to police about Miller and Hawkins' involvement. Neither Miller nor Hawkins was charged in connection to Toll's murder.

In February 2002, Gill was indicted by the Fayette County Grand Jury for Toll's death. In March 2003, Gill was tried for murder, tampering with physical evidence, possession of a handgun by a convicted felon and for being a first-degree persistent felony offender. He was convicted on all counts.

Gill appealed his conviction on a direct appeal to the Kentucky Supreme Court. The Court affirmed his conviction².

On April 10, 2006, Gill filed a motion under Kentucky Rules of Criminal Procedure (RCr) 11.42 in Fayette Circuit Court requesting that his conviction be vacated due to ineffective assistance of counsel. On July 5, 2007, the circuit court refused Gill's request for a hearing and denied his motion. Now

² *Gill v. Commonwealth*, 2006 WL 435424 (Ky. February 23, 2006).

Gill appeals, *pro se*, the Fayette Circuit Court's July 5, 2007, order refusing his request for RCr 11. 42 relief.

Gill claims that his defense counsel's performance was deficient in several ways: (1) That his counsel should have known not to point the finger at other potential suspects because the evidence clearly showed that Gill killed Toll; (2) Defense counsel failed to lay a proper foundation for the testimony of three witnesses; and (3) Defense counsel was under the influence of narcotics during the trial. In addition to the ineffective assistance of counsel claims, Gill argues that the trial court violated his due process rights by amending an order correcting his judgment. We shall discuss each argument in turn.

Defense counsel's performance is presumed competent unless the petitioner proves that counsel was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. Unless Collins shows that his defense counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance, it will be deemed competent. *Id.* at 687-90.

In his first argument, Gill claims that defense counsel erred by presenting the defense of "some other dude did it." Gill asserts that the defense strategy was unreasonable in light of the abundant evidence that proved he killed

Toll. Instead of pointing the finger at someone else, Gill claims that his counsel should have used the defense of duress³ by claiming that Gill was forced to kill Toll. Gill also claims that the defense presented forced him to falsely testify.

Counsel has the duty to conduct a reasonable investigation of potential defenses. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). “A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all circumstances.” (Citations omitted). *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001). The decision of whether to investigate and present particular defenses must be judged by a reasonableness standard. *Strickland*, 466 U.S. at 691. The Court must assess what a reasonable attorney in those circumstances would do, while maintaining profound deference to defense counsel. *Id.*

Moreover, under the second prong of the *Strickland* test, Gill also has the burden to show within a reasonable probability that a reasonable investigation would have changed the outcome of his trial. *Id.* While Gill maintains that his

³ KRS 501.090 provides: (1) In any prosecution for an offense other than an intentional homicide, it is a defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of, or a threat of the use of, unlawful physical force against him or another person which a person in his situation could not reasonably be expected to resist. (2) The defense provided by subsection (1) is unavailable if the defendant intentionally or wantonly placed himself in a situation in which it was probable that he would be subjected to coercion.

counsel should have presented a duress defense, he does not state how defense counsel could have built an affirmative defense by claiming that Gill murdered Toll because he was pressured to do so by Miller and Hawkins. Further, as previously stated, police overheard Gill claim that he lied to police about Miller and Hawkins' involvement.

Although Gill argues that counsel should have presented an affirmative defense rather than merely pointing the finger at others, Gill nonetheless fails to name any defense or strategy that would have negated or mitigated his culpability and thus potentially change the outcome. In *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), quoting *Strickland*, 466 U.S. at 669, the Kentucky Supreme Court held:

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 the 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.

Because Gill argues that his counsel presented an unreasonable defense and now suggests a potential defense, with no support that the outcome would have changed, he failed to show grounds for relief under RCr 11.42.

Even if defense counsel's strategy was unreasonable, as suggested by Gill, counsel is only deemed ineffective when, but for the attorney's egregious errors, the defendant probably would have not been convicted. *Haight*, 41 S.W.3d at 441. In light of Gill's confession, DNA match, and subsequent admission that

he lied to police about Miller and Hawkins, we cannot say that Gill would have been found not guilty but for the alleged error in strategy.

As for Gill's claim that the defense presented by counsel forced him to commit perjury by testifying, we agree with the trial court. Gill alleges that his counsel knew that he lied because he previously pled guilty in this case and later withdrew his guilty plea. Gill maintains that the testimonial portion of the plea was inconsistent with his trial testimony. However, Gill nonetheless fails to show if his attorney knew which version of the facts was correct. Furthermore, Gill fails to describe how he was pressured or forced to testify in any particular manner by his attorney. We agree that this claim is without merit because Gill provided no information concerning whether counsel encouraged or had knowledge that Gill would testify falsely.

Gill also argues that his trial counsel's performance was ineffective because counsel failed to lay a proper foundation to admit portions of testimonies of three witnesses, Daniel Edelen, the motel manager, Juan Gill, Gill's brother, and Cornelius Brown, Gill's friend. Gill appealed the admissibility of the testimonies to the Kentucky Supreme Court. The Court found that Edelen's proposed testimony may fall under Kentucky Rules of Evidence (KRE) 803(3), the "state-of-mind" exception to the hearsay rule. However, the Court found that any error in refusing to admit Daniel Edelen's testimony was harmless because the information sought by the defense was admitted through the testimony of another witness.

Therefore, the trial court's refusal to admit Edelen's proposed testimony did not prejudice the defense's case.

The Kentucky Supreme Court ruled that Brown's testimony constituted inadmissible hearsay that did not fall within an exception to the hearsay rule. As to the proposed testimony of Gill's brother, the Court found that the testimony lacked "the persuasive assurance of trustworthiness" as required by *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), to warrant admission.

These issues were previously raised on direct appeal. Gill cannot reargue the same issues by disguising them with an ineffective assistance of counsel claim. An issue raised and rejected on direct appeal may not be re-litigated in these proceedings by claiming that it amounts to ineffective assistance of counsel. *Brown v. Commonwealth*, 788 S.W.2d 500-01 (Ky. 1990). Whether Gill's trial counsel failed to lay proper foundations for the admission of the three testimonies is overshadowed by the inadmissibility of the two testimonies and overall lack of prejudice.

Gill's third argument in his claim of ineffective assistance of counsel is that his trial counsel was under the influence of narcotics during his trial. Gill's counsel was charged with a felony narcotics charge and suspended from the practice of law in 2006. Gill argues that his counsel's drug addiction prejudiced his case. As support for the argument, Gill suggests that counsel's strategy of pointing the finger at another suspect was evidence of counsel's drug problem.

Gill only alleges that his counsel was addicted to drugs at the time of his trial. Gill fails to provide any examples of counsel's behavior, demeanor, or appearance to support his allegations. During trial, Gill's counsel presented a defense, albeit not the defense that Gill now claims that he should have presented. Gill does not allege that defense counsel failed to make objections or that he failed to adequately handle procedural aspects of the case. There are no indications on the record that the judge, prosecutor, or court staff noticed peculiar behavior exhibited by defense counsel. Therefore, we find that defense counsel's alleged drug use did not prejudice his case.

In addition to his ineffective assistance of counsel claims, Gill alleges that the trial court erred in refusing his request for an evidentiary hearing on his RCr 11.42 motion requesting that his sentence be vacated due to ineffective assistance of counsel. As previously discussed, Gill failed to satisfy the second prong of *Strickland*, under which he must prove that his counsel's "deficient performance so prejudiced the defense that, but for the errors of counsel, there is a reasonable likelihood that the results would have been different." *MacLaughlin v. Commonwealth*, [717 S.W.2d 506-07](#) (Ky. App. 1986). An "[RCr 11.42](#) motion must set forth all facts necessary to establish the existence of a constitutional violation." [Hodge](#), [116 S.W.3d at 468](#). Further in order to be granted an evidentiary hearing on the issue, a defendant's motion must raise an issue of fact that cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742-44 (Ky. 1993). Gill's argument did not contain facts at issue.

Thus, the trial court did not err by failing to hold an evidentiary hearing in this regard.

Gill also alleges that the trial court violated his due process rights when it issued an amended order correcting the judgment to reflect that Gill's life sentence was to run consecutively instead of issuing an amended judgment. Gill also alleges that his due process rights were violated when the trial court admitted his confession and failed to invoke RCr 8.06, requiring a stay in proceedings when the defendant is believed to "lack[] the [mental] capacity to appreciate the nature and consequences of the proceedings against him[.]" RCr 8.06. A defendant may not raise an argument that was argued or should have been argued on direct appeal simply by cloaking it in an RCr 11.42 motion. *Brown v. Commonwealth*, 788 S.W. 2d 500 (Ky. 1990). Whether the court erred in amending a judgment, erred in admitting a confession, or erred in the advancement of a case whose defendant was mental incapable to stand trial, all should have been directly appealed. Thus, the issue is improper for an RCr 11.42 review.

Gill failed to demonstrate that but for trial, counsel's defense strategy, counsel's alleged evidentiary errors, or counsel's alleged drug usage or addiction, he would not have been convicted. In light of the abundant evidence against him, Gill failed to show that counsel's alleged errors prejudiced his case, individually or cumulatively, thereby falling short of the requirements of *Strickland*.

Accordingly, we affirm the judgment and conviction of the Fayette Circuit Court.

ALL CONCUR.

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