

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000466-MR

JAMES R. SIMONS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 12-CR-00099-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Simons appeals from an order of the Franklin Circuit Court denying his motion of relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He alleges he was denied his right to effective assistance of counsel. We affirm.

Simons, Joshua Hammond, and David Bruce robbed, assaulted and killed Charles Monroe, a drug dealer who lived in Frankfort. Following Simons's indictment on charges of murder, first-degree robbery, first-degree assault, tampering with physical evidence and second-degree persistent felony offender, he was appointed an attorney from the Department for Public Advocacy. His counsel filed various motions, including funding for investigation and expert witnesses, production of discovery and continuance of the trial to provide time for investigation and preparation of a defense for a separate trial from Hammond and Bruce. The court ordered that the defendants be tried separately.

Bruce entered guilty pleas and agreed to cooperate with the investigation of prosecution of the crime and provide truthful and competent testimony at any trial or hearing. Simons's trial commenced but, on the second day, he also entered guilty pleas to various charges.

Pursuant to the agreement, the Commonwealth offered to amend the murder charge to manslaughter first-degree and recommend twenty-years' imprisonment. Twenty years was also recommended on first-degree robbery and first-degree assault. Five years was recommended on the tampering charge to run consecutive to the twenty-year sentences for a total of twenty-five years. The persistent felony charge was to be dismissed. As part of the agreement, Simons

agreed to cooperate in the continued investigation and prosecution of Hammond and to provide truthful and competent testimony if necessary.

At the time of Simons's guilty plea, he and the trial court engaged in a colloquy. Simons informed the trial court that he had a seventh-grade education and had not suffered any mental disease or illness. He was not ill or under the influence of drugs or alcohol. Simons acknowledged that he had consulted with his attorney about the plea and was satisfied with counsel's advice. The trial court reviewed Simons's constitutional rights with him and informed him that, by pleading guilty, he was waiving those rights. Simons affirmed that he understood his sentence would be twenty-five years and admitted that he committed the underlying crimes. He further affirmed that no threats or promises had been made to him or that he had been pressured to plead guilty. Counsel informed the court that Simons understood the plea offer and that Simons's plea was knowing, intelligent and voluntary. Simons further understood that twenty years of his sentence was subject to 85% parole eligibility. After finding the plea was knowing, intelligent and voluntary, the trial court accepted the plea and sentenced Simons to twenty-five years.

Simons filed a RCr 11.42 motion alleging his trial counsel was ineffective for failing to explain the plea agreement and failing to explain defense strategies. He further alleged that a conflict of interest arose when one of his

attorneys, Emily Wilkey, left the Public Defender's Office for employment with the Franklin County Commonwealth's Attorney. After the Commonwealth responded, the trial court summarily denied the motion. Simons appealed.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. at 2064.

The "performance" prong requires that the movant show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2064) (internal citations and quotations omitted)). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

The prejudice prong requires that the movant “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Parrish*, 272 S.W.2d at 169 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068) (internal quotations and citations omitted). The reasonable probability under the prejudice prong is a probability “sufficient to undermine confidence in the outcome.” *Id.* In the context of a guilty plea, the prejudice prong requires the movant to “demonstrate ‘a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.’” *Premo v. Moore*, 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011) (quoting from *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). In *Premo*, the Supreme Court observed that the burden to establish prejudice is substantial when a guilty plea is challenged based on ineffective assistance of counsel. *Premo*, 562 U.S. at 132, 131 S.Ct. at 746.

A movant is not automatically entitled to an evidentiary hearing. RCr 11.42(5) states in part that if there is a “material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]” When considering whether an evidentiary hearing is required, “[a] trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001).

Where no evidentiary hearing is held, our review is restricted to “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Simons alleges his trial counsel failed to investigate his addiction to pain medications and his mental condition, including his prior treatment for mental illness, and failed to use that information in mitigation. He also argues trial counsel should have presented an extreme emotional disturbance defense.

“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky. 2007) (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066). Contrary to Simons’s allegation, the record establishes that counsel adequately investigated Simons’s mental capacity. Counsel sought psychological experts to access and treat Simons during his incarceration and filed a notice of intent to introduce evidence on mental illness in Simons’s defense. Additionally, Simons was evaluated at the Kentucky Correctional Psychiatric Center by Dr. Amy Trivette and Dr. Eric Drogan who concluded Simons did not have any significant mental illness. The record clearly refutes Simons’s claim of ineffective assistance of counsel.

Moreover, considering the evidence, there is little likelihood that an extreme emotional distress defense would have been successful at trial. To succeed on such a defense, Simons would have been required to show 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). “[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted.” *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). The evidence in this case was that Simons, Hammonds and Bruce planned to rob Moore. Trial counsel acted reasonably in not pursuing an extreme emotional disturbance defense and advising Simons to plead guilty.

The plea agreement and the colloquy between Simons and the trial court complied with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). There was simply no evidence that Simons suffered from any mental illness that would prevent his plea from being knowing and voluntary.

Simons also alleges that a conflict of interest occurred when Wilkey went to work as a Franklin County Commonwealth’s Attorney. This same issue involving the same attorney was addressed in *Calhoun v. Commonwealth*, 492 S.W.3d 132 (Ky. 2016). Our Supreme Court held because there was no evidence

that Wilkey participated at all in the defendant's prosecution, there could be no actual prejudice. *Id.* at 138. We reach the same conclusion in this case where Wilkey was not involved in the prosecution of Simons's case and there is no evidence that she provided any information regarding Simons's case to the prosecution.

On appeal, Simons argues that his trial counsel was ineffective for advising him to plead guilty to manslaughter and assault when under the principle of double jeopardy, he could not be convicted of both crimes. Although we apply more lenient standards of compliance with procedural rules to *pro se* prisoners, we may not abandon our rules of procedure or jurisprudence. *Campbell v. Commonwealth*, 316 S.W.3d 315, 318 n.2 (Ky.App. 2009). One such rule is that an issue not presented to the trial court for consideration is not reviewable on appeal in the absence of palpable error affecting appellant's rights. *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998).

Even under a lenient view of Simons's *pro se* motion, we cannot find where his double jeopardy argument was raised to the trial court. However, regardless of whether it was or was not, we would be unable to say Simons could meet the *Strickland* prejudice prong because his sentences for manslaughter and assault were ordered to run concurrently. Given the strong evidence on the

charges, including murder, it would not have been reasonable to reject the guilty plea in favor of going to trial.

For the reasons stated, the order of the Franklin Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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