

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000322-MR

BRENDA HUMPHREY

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 87-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, HUDDLESTON, and KNOFF, Judges.

BUCKINGHAM, JUDGE. This is an appeal by Brenda Humphrey (Humphrey) from an order of the Kenton Circuit Court denying her Kentucky Rule of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. We affirm.

Humphrey was tried and convicted of capital kidnapping, facilitation of murder, first-degree robbery, facilitation of first-degree rape, and criminal conspiracy. Humphrey was sentenced pursuant to the jury's verdict to life in prison without the possibility of parole for 25 years for capital kidnapping, and she was sentenced to a total of 40 years in prison on the other charges which was enhanced to 50 years on her

guilty plea to being a first-degree persistent felony offender. Her convictions were affirmed on direct appeal to the Kentucky Supreme Court. Humphrey v. Commonwealth, Ky., 836 S.W.2d 865 (1992).

On October 1, 1997, Humphrey filed an RCr 11.42 motion to vacate her sentence.¹ On February 3, 1998, the trial court overruled her motion without granting an evidentiary hearing. This appeal followed.

In its opinion considering the direct appeal of Humphrey's co-defendant, Gregory Wilson (Wilson), Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992), the Kentucky Supreme Court described the facts of the case as follows:

The victim was a restaurant employee in Newport. On Friday, May 29, 1987 at 11:45

¹ The Commonwealth contends that Humphrey's motion was time-barred as RCr 11.42 required that it be filed within a three-year limitation period and that "the time for filing the motion shall commence upon the effective date of this rule." The rule became effective on October 1, 1994, and the motion was filed on October 1, 1997. We will not specifically address this issue as it was not addressed by the trial court and is unnecessary to our determination of this appeal.

p.m., she left her best friend's house and said she was going straight home. The prosecution presented evidence that she had just parked her car outside of her apartment in Covington when she was abducted by Wilson and co-defendant Humphrey at knife point.

Testimony at trial from various sources, including Humphrey, indicated that the victim was forced into the back seat of her own car. Humphrey drove the car to the flood wall in Covington. Wilson took the victim out of the car and took her up on the flood wall and made her lie down with her eyes closed while Humphrey went to put gas in the car. After Humphrey returned from the gas station, Wilson again forced the victim into the back seat of the car.

Wilson made the victim unbutton her blouse. Wilson finished undressing the victim and raped her. He then tied her hands with a lamp cord, and the victim began begging for her life. Wilson told her she would have to die. Humphrey said, "You have seen us. You know who we are, and you have to die." The victim kept begging, "Please don't kill me. I don't want to die." Wilson robbed her and strangled her to death before they crossed the state line into Indiana.

Wilson and Humphrey disposed of the victim's naked corpse in a wooded thicket in rural Hendrix County, Indiana. Later that same morning, Saturday, May 30, Wilson and Humphrey stopped at a Holiday Inn in Crawfordsville, Indiana. According to a registration card, Humphrey and a guest checked into the hotel at 4:19 a.m. Two of the maids there identified the pair as Wilson and Humphrey.

Wilson and Humphrey proceeded to a Payless Shoe Store in Danville, Illinois where the victim's credit card was used to purchase two pairs of women's shoes and some hosiery. Later that same day, May 30, 1987, Wilson and Humphrey went to a K-Mart in Danville where the victim's credit card was used to make purchases totaling \$227.46. Included in these purchases were a man's Seiko watch and a woman's Gruen watch for \$68.00 each. Wilson and Humphrey also paid cash for a number of cosmetic items and some clothing.

Later that day, the victim's credit card was used to make a \$24.50 purchase at an Amoco gas station in Urbana-Champagne, Illinois.

On Sunday, May 31, Wilson and Humphrey returned to the home of Humphrey's best friend, Beverly Finkenstead. Finkenstead testified that Humphrey had a K-Mart bag with a blouse in it. They both had a watch on and were each wearing a necklace. On Sunday, June 7, Humphrey visited Finkenstead and told her details of the crimes in which she and Wilson had participated the previous weekend. Eight days later, on June 15, Finkenstead reported to the police what Humphrey had told her. Also on June 15, the Hendrix County, Indiana Sheriff's Department was summoned to a wooded thicket where a corpse had been discovered.

Authorities were able to determine the identity of the corpse only by comparing its remaining teeth with the victim's dental X-rays. The cause of death could not be determined due to the absence of internal organs. A forensic entomologist testified that, based on the extent of blowfly maggot development in and on the corpse, the estimated time of death had occurred 15 to 19 days prior to his June 16 examination of the corpse.

Wilson told cell mate Willis Maloney details of the crimes including that the initial intent had been to "snatch" the victim and rob her; that the victim was still alive when her money was taken from her; that the victim was killed before they crossed the state line into Indiana; that the corpse would be so badly decomposed that no sperm would show up; and that they had used the victim's credit card to purchase, among other things, a watch Wilson was wearing at the time of his arrest which Humphrey later obtained by signing it out from one of the jailers. Wilson also told Maloney, "I bet they can't find what I used to strangle her with."

Maloney's and Humphrey's account of the rape was corroborated by the presence of semen on the back seat of the victim's car. Head hairs similar to those belonging to Humphrey were found inside the victim's car. Pubic

and head hairs similar to those belonging to Wilson were also found inside the victim's car. A handwriting expert established that Humphrey had authored the forged credit card receipts. A search of the hotel room where Wilson and Humphrey were arrested produced various items of clothing, all bearing K-Mart price tags.

Humphrey was the only defense witness during the guilt/innocence phase of the trial. Wilson gave his own closing argument in which he told the jury he was not guilty, he "never met nor knew the victim" and that Humphrey told her sister that she killed the victim. The jury returned guilty verdicts against both defendants. After the penalty phase, Wilson was sentenced to death for kidnapping and murder. He was sentenced to consecutive prison terms of 20, 20 and 10 years respectively for first-degree rape, first-degree robbery and criminal conspiracy to commit robbery.

In her RCr 11.42 motion, Humphrey argued that her sentence should be vacated on the basis that she received ineffective assistance of counsel. A showing that counsel's assistance is so ineffective as to require reversal has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that any deficient performance so prejudiced her that, but for the errors of counsel, there is a reasonable likelihood that the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985); cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The burden is on the movant to overcome the strong presumption that counsel's assistance was constitutionally sufficient, Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969), and that the challenged action might be considered sound trial strategy. Strickland, supra at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95.

The burden is also upon the movant to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by RCr 11.42. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). Humphrey's RCr 11.42 petition fails to meet this burden with respect to each of the specific allegations of ineffective assistance of counsel.

Humphrey's first two allegations of ineffective assistance of counsel are that her trial counsel failed to adequately investigate her history of drug addiction and physical and mental abuse. However, Humphrey's drug and alcohol background was raised at trial, as was her unfortunate background in general. Her testimony established that she was a prostitute, that she had a drug problem, that she had an alcohol problem, and that she had suffered physical and mental abuse. Humphrey testified that she first met Wilson following an occasion on which she had been beaten and raped. Even if trial counsel was deficient in his investigations, Humphrey's drug abuse and physical and mental abuse were generally brought out at trial. She has failed to meet her burden of showing that any deficient performance so prejudiced her that, but for trial counsel's failure to investigate, there is a reasonable likelihood that the result of her trial would have been different. Strickland, supra.

Humphrey's third and fourth claims are that trial counsel was ineffective because of his failure to request a psychological examination to determine her mental status at the time of the crimes and his failure to request a competency hearing. Whether a defendant is competent to stand trial is a threshold question which must be answered before a defendant can be tried and sentenced. Gabbard v. Commonwealth, Ky., 887 S.W.2d 547, 551 (1994). Factors relevant to the inquiry of whether reasonable grounds existed for a competency hearing include evidence of irrational behavior, a defendant's demeanor before

the trial court, and any available medical evaluations supported by qualified physicians. See Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103 (1975); Weisberg v. State of Minnesota, 29 F.3d 1271, 1276 (8th Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 935, 130 L. Ed. 2d 880 (1995).

Based upon our review of the trial record, the suggestion that Humphrey lacked the mental capacity to appreciate the nature and consequences of the proceedings against her is entirely unpersuasive. To the contrary, as demonstrated by her performance as a witness on her own behalf, Humphrey was competent to stand trial. Her testimony discloses that she was a capable witness who even corrected the prosecutor regarding various details of the case in the course of cross-examination. Because appellant has failed to identify any objective evidence of incompetency, we find no basis for concluding that her trial counsel provided ineffective assistance by failing to request a competency hearing.

Concerning Humphrey's allegation that her counsel rendered ineffective assistance by failing to request a psychological examination to evaluate her mental state at the time of the crimes, we note that there was evidence at trial regarding whether Humphrey was acting out of her fear of Wilson. We also note that this case does not involve a classic "battered spouse syndrome" defense or a defendant who perpetrated an act of violence against a person abusing her, but it involves an entirely different situation. We conclude that counsel's failure to move for a psychological examination to evaluate Humphrey's

mental state at the time the crimes were committed did not result in an error which prejudiced her to the extent that the result of the trial would have been different.

Humphrey's fifth, sixth, and seventh allegations of ineffective assistance of counsel are that trial counsel failed to present duress, intoxication, and choice of evils defenses and failed to request instructions on these defenses. The trial transcript discloses that Humphrey's defense was that Wilson alone was responsible for the crimes of the weekend of May 29, 1987, and that her participation was limited to carrying out the directions of Wilson out of fear for her life. While there was evidence of these factors, we conclude that any error by counsel in failing to request instructions in this regard did not prejudice Humphrey to the extent that the result of the trial would have been different. Furthermore, while Humphrey testified that she had a few wine coolers just prior to the initial abduction and that she took speed during the weekend, the intoxication issue is likewise without merit.

In her motion before the trial court, Humphrey alleged ineffective assistance of counsel in that trial counsel failed to request a separate trial and separate penalty phase prior to the commencement of the trial. While she mentions this in her brief, it is unclear whether she desires to pursue this issue on appeal. In any event, we believe that this allegation of ineffective assistance of counsel falls within the "sound trial strategy" rule. Humphrey's strategy was to place all the blame on Wilson, and a consolidated trial could have reasonably furthered this

strategy. Matters of reasonable trial strategy do not rise to the level of ineffective assistance of counsel. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986). The arguments relating to separate trials contained in the record before us fail to overcome "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 106 S. Ct. at 2065 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 2d 83 (1955)).

Humphrey's next contention is that the trial court erred when it refused to enter an order requiring the payment of reasonable funds for necessary expert assistance to present her RCr 11.42 claims. Specifically, Humphrey alleges that she was entitled to an expert psychologist to evaluate her competency and "whether she suffered from battered woman syndrome or other psychological deficit at the time of the events in this case[.]" As discussed previously, Humphrey's testimony clearly indicates that she was competent to stand trial. Through her testimony, she demonstrated an excellent grasp of the facts of the case, and she was clearly aware of the consequences of the charges against her. She rationally participated in her defense by presenting testimony regarding her position as to the events involved.

The potential benefits of a psychological evaluation with respect to the remaining issues raised by Humphrey in her RCr 11.42 motion appear to be slight and speculative. We believe that it would be unprecedented and improper to order funds to be appropriated so that a convicted defendant in a post-conviction

proceeding could attempt to prove a defense involving what his or her mental state was ten years ago. The trial court did not err in denying Humphrey's motion for fees for a psychological examination.

Humphrey also argues that the trial court erred by denying her motion without making specific findings of fact and conclusions of law. First, RCr 11.42(6) requires that "findings determinative of the material issues of fact" shall be made by the trial court "[a]t the conclusion of the hearing or hearings[.]" As there was no hearing in this case, then no findings are required. Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 744 (1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Furthermore, the trial court did enter a specific finding that "the Court is unable to conclude that the result of this trial would have been different had trial counsel taken all of the steps now suggested by the Defendant." Thus, the trial court in essence found that Humphrey suffered no prejudice, even if counsel rendered ineffective assistance as Humphrey alleged, and was, therefore, not entitled to relief pursuant to RCr 11.42.

Finally, we believe the trial court properly denied Humphrey's RCr 11.42 motion without conducting an evidentiary hearing. RCr 11.42 requires a hearing "if the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5); Stanford, supra. If the record refutes the claims of error, there is no need for an evidentiary hearing. Id. A hearing is also unnecessary where the

allegations, even if true, would not be sufficient to invalidate the conviction. Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998). Under these standards, there was no need for an evidentiary hearing in this case.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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