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Supreme Court of Kentucky.

Benny Lee HODGE, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2009–SC–000791–MR.
|
Aug. 25, 2011.
|
Rehearing Denied Feb. 23, 2012.

Synopsis

Background: Following the affirmance of his murder conviction and death sentence, 809 S.W.2d 835, prisoner filed post-conviction motions to vacate the judgment. The Circuit Court, Letcher County, Samuel T. Wright III, J., denied the motions without holding an evidentiary hearing. Prisoner appealed. The Supreme Court, 68 S.W.3d 338, reversed and remanded. On remand, the Circuit Court, Letcher County, Eddy Coleman, J., denied motions. Prisoner appealed.

Holdings: The Supreme Court held that:

there was no credible evidence to support a conclusion that any jury tampering or misconduct occurred during defendant's trial, and

defense counsel's failure to present mitigation evidence during penalty phase did not prejudice prisoner.

Affirmed.

On Appeal From Letcher Circuit Court, No. 85–CR–00070–002; Eddy Coleman, Judge.

Attorneys and Law Firms

Dennis James Burke, Assistant Public Advocate, LaGrange, KY, Laurence E. Komp, Manchester, MO, for Appellant.

Jack Conway, Attorney General, Julie Scott Jernigan, William Robert Long, Jr., Assistant Attorneys General, Office of the Attorney General, Frankfort, KY, Rickey Lee Bartley, Commonwealth Attorney, Pikeville, KY, for appellee.

MEMORANDUM OPINION OF THE COURT

***1** Appellant, Benny Lee Hodge, appeals the denial of his RCr 11.42 motion. In 1986, he was tried and convicted of murder, robbery, and burglary and sentenced to death. The charges arose from the invasion of the home of Dr. Roscoe Acker, wherein Hodge and two others used a ruse to gain entry into the home and thereafter assaulted Dr. Acker, killed his daughter, and stole approximately two million dollars from a home safe. In a combined appeal with his co-defendant, the conviction was affirmed by this Court in *Epperson and Hodge v. Commonwealth,* 809 S.W.2d 835 (Ky.1990).

In 1992, Hodge filed a motion, pursuant to RCr 11.42, alleging *inter alia* ineffective assistance of counsel and jury tampering. The trial court denied the motion without a hearing. Hodge appealed that judgment to this Court. Agreeing that an evidentiary hearing should have been conducted, we remanded the matter to the Letcher Circuit Court. *Hodge v. Commonwealth,* 68 S.W.3d 338 (Ky.2001). The trial court held a joint hearing on the issue of jury tampering, which also considered an identical claim raised by Hodge's co-defendant, Roger Epperson. A second hearing concerning Hodge's claim of ineffective assistance of counsel was held shortly thereafter. Ultimately, the trial court denied both motions. Hodge now appeals that judgment.

Jury Tampering

In his RCr 11.42 motion, Hodge alleged several instances of juror misconduct and jury tampering. First,

he claimed that the jury foreman at his trial had contact with the Commonwealth's Attorney, James Craft, during the trial. Additionally, he asserted that, while sequestered, jurors were provided alcohol, watched television, and had access to newspapers. More egregious, Hodge claims that the jury decided the case before the close of evidence.

To support these claims at the evidentiary hearing, Hodge presented the testimony of four live witnesses and the deposition testimony of five others. Gary Rogers, a deputy sheriff who was responsible for overseeing the sequestered jury, was a primary witness. Rogers was less than forthcoming at the evidentiary hearing, even attempting to invoke a Fifth Amendment privilege. On at least eight occasions, the court had to order him to testify. When he did answer questions, he often contradicted his own testimony from moments before or contradicted his own prior statements to investigators.

What can be gleaned from Rogers' testimony with any reliability is that he worked with the jury during the trial and guarded them at the hotel. He also admitted that he is a convicted felon. Inexplicably, Rogers testified that the conviction arose from his attempts to assist Hodge and Epperson. However, it was established that he was convicted in a matter wholly unrelated to this case.

Specifically relating to Hodge's claims, Rogers did testify that he saw the jury foreman talking to Craft at the courthouse, though he did not overhear the conversation. He also testified that he saw Craft in the parking lot of the hotel where the jury was sequestered. Rogers remembered that one of the jurors was provided three bottles of vodka and others with televisions and newspapers. However, at various points during his testimony, Rogers contradicted or outright denied portions of his own testimony given moments before. Despite his contradictory testimony moments before, he later emphatically testified that no one approached any juror and that no juror had access to television or newspapers.

***2** Six other persons—all DPA attorneys or DPA investigators—had spoken with Rogers over the years and had taken statements from him regarding these allegations of jury tampering. Rogers denied ever speaking to or giving a statement to any of them, though all testified regarding their conversations with him. At times, his testimony at the evidentiary hearing comported with a prior statement, while at other times it diverged significantly. Additionally, his own statements to the investigators contradicted one another. In short, Rogers' testimony was confused, inconsistent, and contradictory.

In addition to Rogers and the DPA representatives, the trial court heard the testimony of Marsha Hogg Thursty, who served as an alternate juror at the trial. She acknowledged that she suffered from post traumatic stress disorder and bipolar disease. She testified that no jurors were allowed visitors during sequestration and that no one communicated with the jury. She further testified that the jury did not discuss the case and that she had no knowledge of anyone watching television or listening to the radio. Thurtsy also denied Hodge's allegation that she gave a "thumbs-up" sign to anyone during the trial, nor did she witness any other juror do so.

In considering an RCr 11.42 motion, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. CR 52 .01. Here, the trial court very accurately described Rogers' testimony as "inconsistent with itself and inconsistent with the various inconsistent statements he made to investigators and attorneys for Hodge...." There is more than the requisite substantial evidence on the record to support the trial court's ultimate conclusion that Hodge failed to present competent and credible evidence supporting any of his allegations of jury tampering or misconduct. Hodge's contention that portions of Rogers' and Thursty's testimony went uncontested by the Commonwealth and, therefore, must be taken as true by the trial court, is unavailing. The fact-finder—here, the trial court—is free to believe all of a witness' testimony, portions of it, or none of it. *Commonwealth v. Anderson,* 934 S.W.2d 276, 278 (Ky.1996).

The parties disagree as to whether the presumption of prejudice established in *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) was overruled in *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). *See generally Parker v. Head,* 244 F.3d 831, 839 n. 6 (11th Cir.2001). We need not address the parties' arguments because there has been no credible evidence presented to support a conclusion that any jury tampering or misconduct occurred. Therefore, we need not assess any resulting prejudice.

Hodge's RCr 11.42 motion on the grounds of jury tampering was properly denied.

Ineffective Assistance of Counsel

Hodge alleges ineffective assistance of counsel because his trial counsel failed to investigate or present any evidence in mitigation during the penalty phase. Rather,

the parties agreed to the following stipulation, which was read to the jury: "Benny Lee Hodge has a loving and supportive family-a wife and three children. He has a public job work record and he lives and resides permanently in Tennessee." He argues that the failure to present mitigation evidence regarding his dramatically abusive childhood rendered the jury's sentence of death unreliable.

***3** At the outset, we reiterate Hodge's burden in establishing ineffective assistance of counsel. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This analysis involves mixed questions of law and fact. While we will not disturb the trial court's factual findings if they are supported by substantial evidence, we review its conclusions of law *de novo. Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky.2008).

Here, the Commonwealth concedes that the performance of Hodge's defense counsel was deficient in conducting a reasonable investigation to find mitigation evidence. Thus, the inquiry must focus only on the prejudicial effect of this deficiency. "When a defendant challenges a death sentence ..., the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. 668 at 695, 104 S.Ct. 2052, 80 L.Ed.2d 674. A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* at 694. Hodge's burden in this respect is "highly demanding." *Williams v. Taylor,* 529 U.S. 362, 394, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Bearing this standard in mind, we turn to a review of the mitigation evidence that was available at the time of Hodge's trial. His mitigation case would have been based on his childhood, which was marked by extreme poverty, sustained physical violence, and constant emotional abuse. The trial court's characterization of Hodge's childhood as "difficult" is not inaccurate, but certainly inadequate.

The evidence established that Hodge's mother, Kate, was married to six different men, all of whom were substance abusers and some of whom were physically abusive to Kate. She married Billy Joe when Hodge was eight years old. The majority of Hodge's evidence concerned the extreme violence he suffered at the hands of his stepfather. Again, the trial court's description of Billy Joe as "particularly abusive" is insufficient.

Billy Joe was described by at least four witnesses as a "monster ." His rage was explosive and violent, often triggered by Kate's shows of affection towards her children. At other times, he was incited for no apparent reason and the household lived in constant fear as a result. He would regularly rape Kate, threaten her with a gun, and beat her. On one occasion, Billy Joe assaulted Hodge's mother so violently that she suffered a miscarriage. Hodge's sisters testified that, more than once, they thought Kate had been beaten to death.

Hodge's mother and sisters agreed that Billy Joe was more violent and abusive towards him than any other person in the house. This is perhaps because Hodge, being the only male child in the home, often tried to defend his mother and sisters from physical attacks. He was regularly beaten with a belt and metal buckle, which left bruises and welts on his body that were observed by family members and neighbors alike. At other times, he was kicked, thrown against walls, and punched. Hodge's half-sister specifically recalled an occasion when Billy Joe rubbed Hodge's face in his own feces. His sisters testified that Billy Joe made Appellant watch while he brutally killed the boy's dog. Because his mother, who was evidently paralyzed by fear and substance abuse, refused to protect Hodge, he often ran away from home.

***4** School records indicate that Hodge was of normal intelligence and received average grades through elementary school. After Billy Joe entered the home, his grades declined, he became withdrawn, and he was often truant. He began stealing at the age of twelve and was sentenced to a juvenile detention facility when he was fifteen.

There was testimony that, at the Tennessee residential facility, Hodge was subjected to regular beatings. He escaped from the facility twice and once refused to return after a furlough. After finally being released at the age of sixteen, Hodge assaulted his stepfather, which resulted in his return to the juvenile facility until he was eighteen years old.

At the age of twenty, Hodge pled guilty to his first felonies: burglary and grand larceny. He escaped from custody four days later. Following his capture and eventual parole, he was convicted of a separate armed robbery. Again, he escaped and was recaptured. After serving nearly eight years in prison for that felony, Hodge was again paroled. He was thirty-four years old at the

time he killed Tammy Acker. He had been married three times and had fathered three children.

At the evidentiary hearing, Hodge presented the expert opinions of two psychologists, both of whom had assessed him in 2009. Both agreed that the violence in Hodge's childhood home was ruinous to his development and compounded by the physical abuse occurring at the Tennessee residential facility. One of the psychologists diagnosed Hodge with post traumatic stress disorder (PTSD) and opined that it was present at the time of Hodge's crimes and trial. This expert further testified that PTSD can render a person violent, hypervigilant, aggressive, and erratic. Both psychologists found it particularly interesting to note that Hodge did not inflict any abuse on his own children and was described by all as a loving father.

We now turn to the primary inquiry before us, i.e., whether the result of the penalty phase would have been any different had this mitigation evidence been presented to the sentencing jury. In doing so, we must weigh this mitigation evidence against other aggravating circumstances. First, we consider, as did the trial court, that the evidence of Hodge's abusive childhood would have also included the damaging evidence of his long and increasingly violent criminal history, his numerous escapes from custody, and the obvious failure of several rehabilitative efforts.

And, we must also consider the heinous nature of Hodge's crime. *See Epperson and Hodge v. Commonwealth,* 809 S.W.2d 835 (Ky.1990). The assault on Dr. Acker and the murder of his daughter were not just brutal and vicious, but calculated and exceedingly cold-hearted. The sentencing jury was aware that Hodge and his two co-defendants carefully planned the robbery after learning of the large quantity of cash kept in the home safe, that they traveled from out of state to carry out the plan, and that they packed weapons and tools in advance. They posed as FBI agents to gain entry into the elderly doctor's home and followed him to the kitchen where they pretended to take his statement regarding a former business partner's supposed fraud. They had the doctor call his daughter to the room to witness the statement. At that point, Hodge brandished a handgun. They covered the heads of both the father and the daughter. They restrained Tammy, a young college student due to go back to school the next day, alone in a bedroom. She begged them not to hurt her father. After forcing Dr. Acker to open the safe, Hodge's accomplice strangled him with an electrical cord until he lost consciousness. Hodge went to Tammy's bedroom and stabbed her at least ten times, then stole a bracelet and watch from her wrist. Afterwards, he coolly told Epperson that he knew Tammy was dead because the knife had gone "all the way through her to the floor." Autopsy reports confirmed this boast.

***5** Believing both victims were dead, they left the home. The three men then fled to Florida. Along with their girlfriends, they brazenly spent the stolen money on a lavish lifestyle and luxury goods, including a Corvette. A former cellmate testified that Hodge recounted spreading all the money out on a bed and having sex with his girlfriend on top of it.

We have considered the totality of evidence before Hodge's sentencing jury, including the proposed mitigation evidence. *Parrish v. Commonwealth,* 272 S.W.3d 161, 169 (Ky.2008) (reviewing court must consider totality of the evidence in considering prejudice prong of ineffective assistance of counsel claim). Balancing all of the available evidence in mitigation and aggravation, we are compelled to reach the conclusion that there exists no reasonable probability that the jury would not have sentenced Hodge to death. There is no doubt that Hodge, as a child, suffered a most severe and unimaginable level of physical and mental abuse. Perhaps this information may have offered insight for the jury, providing some explanation for the career criminal he later became. If it had been admitted, the PTSD diagnosis offered in mitigation might have explained Hodge's substance abuse, or perhaps even a crime committed in a fit of rage as a compulsive reaction. But it offers virtually no rationale for the premeditated, cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge. Many, if not most, malefactors committing terribly violent and cruel murders are the subjects of terrible childhoods. Even if the sentencing jury had this mitigation evidence before it, we do not believe, in light of the particularly depraved and brutal nature of these crimes, that it would have spared Hodge the death penalty. We, therefore, affirm this portion of the trial court's judgment.

Conclusion

As a final matter, there is nothing in the record to support Hodge's allegation that the trial court abdicated its judicial function to the Commonwealth. We find nothing improper in the trial court assigning to the Commonwealth the clerical task of memorializing, in writing, its oral findings of fact and conclusions of law.

For the foregoing reasons, the judgments of the Letcher Circuit Court are hereby affirmed.

All Citations

Not Reported in S.W.3d, 2011 WL 3805960

All sitting. All concur.

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