

IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01227 COA

JAMES HOWARD COURINGTON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHARLES D. EASLEY, JR

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: FORREST ALLGOOD

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: GUILTY OF MURDER AS A HABITUAL OFFENDER AND
SENTENCED TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE OR
PROBATION

BEFORE BRIDGES, P.J., BARBER, MCMILLIN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

James Howard Courington (Courington) was convicted of the murder of Betty Courington and was sentenced as a habitual offender to a term of life imprisonment in the custody of the Mississippi Department of Corrections without possibility of parole or probation. It is from this decision that Courington now appeals, asserting two errors: (1) that the trial court erred in failing to have Courington examined for competency immediately prior to or immediately following the commencement of the trial and (2) that trial counsel was ineffective and failed to vigorously defend the charge against the Appellant. Finding no merit in either of the Appellant's issues, we affirm the decision of the lower court.

FACTS

Appellant and Betty Courington (Betty) were married in November of 1981 and lived in Columbus, Mississippi. One child, Reneko Courington (Reneko), was born of the marriage and Kyla Cowans (Kyla), the natural child of Betty Courington, also resided with the couple.

During the evening hours of March 31, 1991 Betty Courington and Appellant had an argument which resulted in the Appellant packing a suitcase, kissing the two children, and leaving the family residence. However, Courington returned to the home approximately ten or fifteen minutes later and asked his wife to come outside. The children remained in the kitchen coloring Easter eggs while Betty went into the yard to speak to Courington. Courington testified that he returned to the residence to speak to Betty about the argument. He also testified that he decided "to shoot her in the leg where [he] could kind of talk to her cause [they] were having problems." When Betty joined Courington in the yard, she noticed that he had a gun. They fought over the gun, and Betty fell to the ground. Courington then fired the gun at Betty. The children testified that they heard gunshots coming from the yard and could hear Courington hitting Betty. Kyla and Reneko hid behind the deep freezer. Courington entered the kitchen, emptied the gun he was carrying onto the counter, and laid the gun down. He then called 911 and told the dispatcher that there had been a shooting, and he needed an ambulance and the police. He also stated that he had done the shooting, but that he was no longer armed.

The Columbus Police Department arrived on the scene, and Courington put his hands in the air. He told police that he had shot Betty Courington. She died shortly thereafter.

Dr. Parker testified that Betty suffered four gunshot wounds to the body: a wound to each leg and two wounds to her abdomen. He also testified that Betty Courington had bled to death from the injuries.

DISCUSSION

1. Did the Trial Court Err in Failing to Have Courington

Examined for Competency Immediately Prior

to or Immediately Following the Commencement of the Trial?

Courington argues that the trial court erred by allowing the doctors to determine his competency after a one hour interview when they had previously determined him to be incompetent after a month long evaluation. Additionally, Courington cites the fact that his trial was not held until six months after the physicians found him competent. Thus, his mental condition could have changed within the six month period.

The State counters that there is nothing in the record which indicates a deterioration in Courington's condition during the six month period between his evaluation and trial. Thus, he was not entitled to a new competency hearing without supporting proof of a change in his condition.

On November 26, 1991, Courington was committed to the Mississippi State Hospital at Whitfield for a determination of his competency. While at Whitfield, Courington was under the care of Dr. Reb McMichael, a forensic psychologist, and Dr. Criss Lott, a clinical psychologist. After a month long evaluation, both doctors were of the opinion that Courington was not competent to stand trial, and informed the court of this by letter dated December 24, 1991. In February 1992, the court held a hearing pursuant to Rule 4.08 of the Criminal Rules of Circuit Court Practice to determine the competency of Courington. The morning of the hearing, Dr. McMichael and Dr. Lott performed a follow-up evaluation of Courington and determined that he was competent to proceed to trial. Based on this testimony the court determined that Courington was competent to stand trial.

When the trial court finds that the defendant is capable of making a rational defense, this Court will not overturn its decision unless the finding was against the overwhelming weight of the evidence. *Emanuel v. State*, 412 So. 2d 1187, 1188 (Miss. 1982). Courington was afforded a pre-trial competency hearing and was found competent to stand trial. He could have filed a motion for further psychiatric evaluation prior to trial, but he failed to do so. Furthermore, his assertion that his mental condition had changed is unsupported by the record. Thus this assignment of error is meritless. Additionally, this Court will not find the trial court in error for failing to order another mental evaluation when the motion was not made at the trial level.

2. Ineffective Assistance of Counsel

The next issue raised by Courington challenges the effectiveness of his appointed attorney at trial. For this claim to be successful he must meet to two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by this State in *Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984). Courington has the burden of proof in showing that (1) counsel's performance was deficient, and (2) his defense was prejudiced by the deficient performance. *Roland v. State*, 666 So. 2d 747, 750 (Miss. 1995). Furthermore, Courington must show that but for his attorney's deficient performance, the outcome of the case would have been different. *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). There is a "strong but rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance." *Moody v. State*, 644 So. 2d 451, 456 (Miss. 1994).

I. Counsel's Failure to Request Discovery

Courington first asserts that his attorney was deficient in failing to request or receive any discovery in connection with his case. The State counters that a previous attorney requested discovery after it was "lost" and that there is nothing in the record to show that Mr. Burdine did not receive this discovery from the former attorney.

Courington was entitled to a defense. A basic defense in this case required investigation of the facts surrounding the death of Betty Courington, familiarity with the scene of the incident and the testimony of any witnesses, and obtaining all information held by the State and available to the defense through pre-trial discovery methods. A review of the record does not reveal any proof that Mr. Burdine failed to request and receive pre-trial discovery from former counsel and fulfil his obligations to Courington. Burdine was familiar with all the State's witnesses and cross-examined them in an acceptable manner. Additionally, Courington does not refer to any specific event or occasion whereby it was obvious that Burdine had not completed pre-trial discovery. The issue is therefore meritless.

II. Counsel's Failure to Thoroughly Question the Doctors

Concerning Courington's Future Competency

According to Courington, counsel was ineffective by failing to question the doctors as to whether his competency level could change prior to trial. The record reveals that Burdine cross-examined Dr. McMichael concerning Courington's past, present, and future mental condition. Dr. McMichael testified that Courington was presently competent and, in his opinion, able to assist his attorney in preparing a defense. However, Dr. McMichael also testified that he was not responsible for any future treatment of Courington, but only the question of his present competency. Burdine also thoroughly questioned Dr. McMichael concerning Courington's sanity at the time of the incident. The record also reveals that Burdine failed to cross-examine Dr. Lott concerning his opinion of Courington's competency. However, Courington has produced no evidence to establish or even suggest that his mental condition actually changed prior to his trial. Thus, there is no evidence of prejudice to Courington regarding Burdine's alleged failure to thoroughly question the doctors. This issue is without merit.

III. Counsel's Failure to Call Witnesses

Courington argues that his attorney failed to call any witnesses on his behalf and did not make an independent investigation to identify any possible witnesses. The State counters that Mr. Burdine's decision not to call witnesses was a strategic move because there were no witnesses who could give favorable testimony on behalf of the Appellant. Furthermore, the State argues, Appellant has not provided this Court with sworn affidavits of the witnesses that were not called. Thus, there is no proof that other witnesses ever existed.

A review of the record does not enlighten this Court to any possible witnesses who could have been

called in Courington's favor. We cannot say that counsel was derelict in failing to call witnesses that do not exist, nor does the record reveal a failure to investigate independently on behalf of Burdine. This assignment of error is without merit.

IV. Failure to Effectively Cross-Examine

Courington alleges that Mr. Burdine failed to effectively question Corporal Myers and Commander Freshour concerning inconsistent testimony over who recorded the 911 call. Additionally, Courington argues that counsel failed to object to the admission of the tape even though there was an obvious chain of custody issue. The State counters that Courington fails to show any prejudice or deficiency of counsel because it is undisputed that a tape was made, and it is possible that both officers requested a recording of the call.

Counsel made no attempt to suppress the admission of the 911 tape even though the chain of custody was carelessly handled by the police. The record also reveals that Freshour and

Myers testified contradictorily concerning the recording of the 911 call. However, Courington fails to show that but for the failure of Burdine to object to the admission of the tape or the cross-examination of Freshour and Myers concerning the recording, the outcome of his trial might have been different. Additionally, the record reveals that Courington testified that he did make the phone call to 911 and testified to the substance of the call. Thus, this assignment of error is also without merit.

V. Counsel Was Inept in Playing the 911 Call Two Times to the Jury

Courington asserts that Burdine was inept by playing the 911 call a second time during cross-examination, ostensibly to identify a word on the tape. From reviewing the record it is unclear as to Burdine's intent for replaying the 911 tape. However, this incident did not severely prejudice the Defendant and would not have changed the outcome of his trial. There is no merit to this assignment of error.

VI. Counsel's Failure to Raise the Insanity Defense

Courington cites as ineffective assistance of counsel Burdine's failure to elicit evidence of insanity. The record reveals that Courington was questioned about raising the insanity defense while he was being evaluated at Whitfield. The evaluation report sent to the court contained the following passage: "When we asked his opinion should his attorney want to use the insanity defense he responded, 'he would be insane.'" Additionally, the report revealed that Dr. Lott and Dr. McMichael agreed that Courington knew the difference between right and wrong in relation to his actions at the time of the crime. Thus, it appears from the record that Courington chose not to allow the use of the insanity defense, and he cannot rely on this decision to procure error on appeal. This assignment of error is without merit.

VII. Counsel's Failure to File Jury Instructions

Courington argues that Burdine's failure to offer a defense to the jury in written form indicates that he was not prepared to aggressively defend Appellant's case. This assertion of error by Courington does not meet either prong of the *Strickland* test. Regarding the failure to offer an instruction on the

theory of defense, Courington offers only "he did not offer a single theory of defense to the jury in written form, and this error, among others, is indicative of the fact that he was not prepared to defend Appellant's case to the best of his ability." Courington does not cite any theory of defense in his brief which Burdine failed to propose by an instruction to the jury, nor does he demonstrate that the lack of any instruction prejudiced his case. Nothing here warrants reversal by this Court.

CONCLUSION

Finding no assignment of error which warrants reversal, this Court affirms the conviction of murder as a habitual offender and the sentence of James Howard Courington.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AS A HABITUAL OFFENDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LOWNDES COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.