

Exploring a Defense of Extreme Emotional Disturbance

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Evidentiary Hearing Warranted on Claim of Ineffective Assistance of Counsel When Counsel Failed to Investigate and Advise Defendant of Defense Based on Extreme Emotional Disturbance

In *Commonwealth v. Rank*, 494 S.W. 3d 476 (Ky. 2016), a defendant convicted of first-degree assault, and sentenced to 15 years, moved to vacate his sentence on the basis of ineffective assistance of counsel. He claimed that his counsel failed to inform him of a possible defense of extreme emotional disturbance (EED), which could have lessened his offense and shortened his sentence. The defendant asserted that, without information about EED, his guilty plea was not knowing and voluntary. The court of appeals granted a motion for an evidentiary hearing, and the Kentucky Supreme Court affirmed.

Facts of the Case

Dr. Douglas Rank, a practicing psychiatrist, was romantically involved with and living with a former patient named Misty Luke. One day, after a heated argument with Dr. Rank and believing that he had left the apartment, Ms. Luke sent him a text message that she was ending their relationship. Dr. Rank, still on the premises, returned with a sword and stabbed Ms. Luke four times.

Dr. Rank was arrested and charged with attempted murder. His attorney, Robert Gettys, hired Dr. Bobby Miller, a forensic neuropsychiatrist, to interview Dr. Rank and opine as to his mental state. Dr. Miller determined that although Dr. Rank was not insane, he suffered from schizotypal personality disorder. Mr. Gettys notified the court and the Commonwealth's attorney that he intended to present

expert testimony at trial to show that Dr. Rank had a mental disease or defect, or other mental condition relating to the issue of guilt or punishment.

The Commonwealth offered Dr. Rank a plea deal. It offered to recommend a sentence of 15 years' imprisonment if he would plead guilty to an amended charge of first degree assault. Upon the advice of counsel, Dr. Rank accepted the offer and entered his plea. Under the deal, Dr. Rank could argue for a lesser punishment at his sentencing hearing.

At the sentencing hearing, the prosecutor asserted that Dr. Rank's attack was motivated by rage and jealousy. In effort to mitigate, Dr. Miller testified that Dr. Rank, although competent and sane, had schizotypal personality disorder, which made him susceptible to "fixed responses" in stressful situations. Dr. Miller explained that Dr. Rank felt betrayed when Ms. Luke ended the relationship. Dr. Rank had also consumed alcohol on the night of the assault. Mr. Gettys urged the trial court to consider Dr. Rank's personality disorder, along with his alcohol use, as mitigating factors. The trial court imposed a 15-year sentence.

Dr. Rank then filed a motion under RCr 11.42 (2012) to vacate his conviction and request an evidentiary hearing to establish that he did not make his guilty plea knowingly, intelligently, and voluntarily because of ineffective assistance of his counsel. Dr. Rank claimed, among other things, that Mr. Gettys had failed to explore the possibility of a defense based on EED and that he did not explain to Dr. Rank the legal concept of EED.

The trial court denied Dr. Rank's motion. The court used the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); to invalidate a guilty plea on the basis of deficient performance of counsel, a movant must demonstrate that: (1) defense counsel's performance fell outside that of professionally competent assistance; and that (2) a reasonable probability exists that, but for the deficient performance of counsel, the defendant would not have pleaded guilty and would have proceeded to trial. The court reasoned that Mr. Gettys fulfilled his obligation of competent representation by retaining Dr. Miller to evaluate Dr. Rank for mental conditions that might provide the basis for a defense. Based on the totality of circumstances, the court concluded that "[w]hile his counsel's performance may well have fallen outside the range of professionally competent and ethical assistance, [Dr. Rank had] failed to establish that he would have proceeded to trial in this case [but for counsel's deficient performance]" (*Rank*, p 482).

On appeal, the court granted Dr. Rank's motion for an evidentiary hearing. The appeals court held that it could not be determined from the record alone whether Dr. Rank, if properly advised and represented, would have rejected the plea offer and proceeded to trial. Specifically, the court found that the record did not establish whether his counsel had investigated an EED defense and that Dr. Miller's testimony did not foreclose this question.

The Commonwealth appealed and the Kentucky Supreme Court granted review.

Ruling and Reasoning

The Kentucky Supreme Court affirmed the decision of the appeals court. The court concluded that the probability that EED played a role in Dr. Rank's crime would have been apparent to any lawyer versed in criminal law and that the record did not conclusively show that Mr. Gettys had understood and explored the potential for an EED defense.

The court rejected the argument that retaining a mental health expert was enough to satisfy Mr. Gettys' responsibility of exploring an EED defense, because the record did not conclusively establish that Dr. Miller examined Dr. Rank specifically for the purpose of testifying about EED. Nothing in Dr. Miller's testimony showed that he had explored the defense with Dr. Rank. Moreover, the court stated, "If Dr. Miller was not expressly instructed to evaluate Rank and the circumstances of his crime in light of the definition of EED, the error is Gettys', not Miller's" (*Rank*, p 485). Further, the court noted that because EED does not arise from a mental disease or defect, even though expert psychiatric or psychological testimony may be helpful in understanding an emotional reaction like EED, it is not required.

In sum, the court concluded that had Dr. Rank been advised about EED, there was a reasonable possibility that he would have rejected the plea offer and opted to go to trial, because a successful EED defense could significantly reduce the severity of the principal charge and its accompanying punishment.

Discussion

In *Rank*, the Supreme Court of Kentucky clarified that it is the responsibility of defense counsel to explore the defense of EED and discuss it with the defendant, noting that the defense counsel is obligated "to make reasonable investigations [of potentially applicable legal and factual issues] or to make a reasonable decision that makes particular investiga-

tions unnecessary" (*Rank*, p 485, citing *Strickland*, 466 U.S. at 691). Failure to explore a possible EED defense may be grounds for invalidating a guilty plea or sentence due to ineffective assistance of counsel.

Further, the court noted that unlike a determination of competency or insanity, the defense of EED does not mandate the opinion of a forensic psychiatric expert. However, if an expert is retained to assist with this defense, defense counsel is also obligated to instruct the expert regarding its exploration.

Forensic experts are ethically obligated to learn and apply the legal standards of the jurisdiction in which they are performing the evaluation (AAPL Practice Guidelines for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense, *J Am Acad Psychiatry Law* 42:S21, 2014). However, in *Rank*, the court made it clear that it is not the forensic psychiatrist, but defense counsel who is responsible for making the inquiries and decisions to pursue one defense strategy over another.

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Duty to Warn for Federal Parole Officers

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No Claim Under the Federal Tort Claims Act for Failure to Report When Plaintiff Is Not a Specifically Identified Victim of a Federal Parolee

In *Dugard v. United States*, 835 F.3d 915 (9th Cir. 2016), the plaintiff was sexually abused by a parolee over many years. She successfully sued the state of California for its negligence in supervising the parolee. She then attempted to sue the federal government for the same negligence. The district court ruled that the Federal Tort Claims Act (FTCA) precludes her recovery.