

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002350-MR

LESLIE LAWSON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 98-CR-00093

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
JOHNSON, JUDGE: Leslie Lawson, pro se, has appealed from the
September 29, 2003, order of the Laurel Circuit Court which
denied his pro se motion to vacate, set aside, or correct the
trial court's final judgment and sentence of imprisonment
pursuant to RCr² 11.42, without holding an evidentiary hearing.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

Having concluded that the trial court did not err in denying Lawson's claims of ineffective assistance of counsel without holding an evidentiary hearing, we affirm.

Because Lawson directly appealed his 20-year sentence to the Supreme Court of Kentucky,³ we quote the pertinent facts of this case from its Opinion as follows:

On the evening of April 23, 1998, Todd Bodary, his girlfriend, Donna Deverney, and Deverney's two children were in the process of moving from Michigan to Florida when they stopped for the night at a motel in Corbin, Kentucky. The group traveled in two vehicles – Deverney's car and Bodary's GMC "Jimmy" truck with an attached U-Haul containing their possessions. After settling into the motel, Bodary and Deverney went to the parking lot to check on a cat and a rabbit they had left inside Deverney's car, and heard the door of Bodary's GMC slam and its engine start. Bodary ran to his vehicle, but the driver rapidly accelerated and the vehicle knocked Bodary out of the way.

The Laurel County Grand Jury indicted Lawson for second-degree robbery and being a first degree [persistent felony offender][.]

At trial, the Commonwealth introduced: (1) the testimony of Bodary and Deverney, who testified to the events described above and made photographic lineup identifications and in-court identifications of Lawson; (2) still photographs taken from the motel's security system which displayed the events leading up to and following the robbery; (3) Karen Jones's testimony that she was with Lawson on the evening of the robbery, that Lawson took the vehicle as Bodary and

³ Case No. 1999-SC-0454-MR, rendered August 23, 2001, not-to-be published.

Deverney had described, and that she and Lawson then traveled to two different locations and unloaded some of the victims' possessions; (4) Glenn Sanders's testimony that Lawson had, with his permission and assistance, unloaded furniture at Sanders's mobile home on the night in question and later returned and reclaimed the furniture; and (5) testimony from Detective Riley of the Kentucky State Police Department that he discovered the victims' possessions at Lawson's home when he attempted to execute an arrest warrant upon Lawson.

The jury found Lawson guilty of second-degree robbery, and the trial court imposed the twenty (20) year, PFO-enhanced sentence recommended by the jury.

The Supreme Court Opinion became final on September 13, 2001.

On February 25, 2003, Lawson filed a pro se motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. The trial court denied Lawson's request for counsel in an order entered on February 28, 2003. On March 11, 2003, Lawson filed a motion for the trial court to rule on his RCr 11.42 motion. The Commonwealth filed its objections to Lawson's RCr 11.42 motion on July 28, 2003.⁴

⁴ In its order denying Lawson's RCr 11.42 motion, the trial court stated as follows:

Before addressing the issues proffered by the Movant in his RCr 11.42 Motion, this Court will point out that Mr. Lawson filed his RCr 11.42 Motion on February 25, 2003. This is immediately prior to the lengthy transition occurring in the local Commonwealth Attorney's Office. This upheaval included the retirement of long time Commonwealth Attorney, the Hon. Thomas Handy and the swearing in

Lawson filed a reply to the objections on August 15, 2003. The trial court denied Lawson's RCr 11.42 motion on September 29, 2003, without holding an evidentiary hearing. This appeal followed.⁵

Lawson argues on appeal (1) that trial counsel was ineffective for failing to call three alibi witnesses at trial and for failing to call an impeachment witness; (2) that he was prejudiced because the Commonwealth did not provide him with exculpatory evidence regarding the Commonwealth's key witness, Karen Jones; (3) that the trial court erred in failing to

of the Hon. Danny Evans. A serious fire occurred in the Commonwealth Attorney's Office in the [s]pring of 2003 which resulted in damaged records and the moving of the entire office to a very small office in the Laurel County Courthouse. Additional new staff was hired during this time. Then a more permanent location was obtained and the entire Commonwealth Attorney's Office had to be again relocated to another building in London, KY. This Court is aware that the staff made very diligent efforts to file timely documents in Laurel Circuit Court, and to keep the heavy caseload current.

The Court recognizes that over four months have passed since the Defendant filed the RCr 11.42 Motion, but the Court makes a finding that the delay by the Commonwealth's Office was very excusable during their transition times.

⁵ Lawson's notice of appeal was filed on October 6, 2003. On November 13, 2003, Lawson filed a motion for reconsideration in the trial court regarding its denial of counsel to Lawson on appeal. Meanwhile, on February 5, 2004, this Court entered a show cause order against Lawson for failing to timely file his brief. Lawson responded on February 20, 2004, that he was under the impression the Department of Public Advocacy would be filing a brief on his behalf, and requested additional time to file a pro se brief. Also on February 20, 2004, the trial court entered an order denying Lawson's motion for reconsideration requesting appointed counsel. On March 17, 2004, this Court found sufficient cause not to dismiss Lawson's appeal and granted Lawson's request for an additional 90 days in which to file his brief. Lawson's brief was finally filed on July 12, 2004.

suppress evidence obtained during an illegal search of his residence; (4) that trial counsel was ineffective for failing to offer certain testimony by avowal; and (4) that all errors enumerated in his arguments had the effect of reversible cumulative error.

In addition to challenging the trial court's rejection of his various claims, Lawson contends the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record.⁶ "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."⁷ As the following discussion of each of Lawson's claims demonstrates, each allegation is refuted on the face of the record. Thus, Lawson was not entitled to an evidentiary hearing.

To establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally

⁶ Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

⁷ Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986)(citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

unfair and unreliable.⁸ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."⁹ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.¹⁰ In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.¹¹ "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."¹² In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or

⁸ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

⁹ Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998).

¹⁰ Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

¹¹ Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 470; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

¹² Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

was rendered fundamentally unfair and unreliable.¹³ Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.¹⁴

Lawson first argues that defense counsel was ineffective for failing to subpoena and to call three alibi witnesses at trial. He asserts that the first witness, Freddie Jones, would have provided testimony as to Lawson's whereabouts on the night of the robbery, and that Lawson could not have stolen the vehicle and trailer. During voir dire, Lawson's trial counsel announced that she intended to call Freddie Jones as a witness; however, he was never called to testify. Lawson states in his brief that Freddie Jones was not "available" to testify on the day of the trial, but gives no other reason for the failure of trial counsel to call Freddie Jones. Given the questionable availability and the weak probative value of the alleged testimony from this witness, and the fact that he was not a disinterested witness, but instead was a family friend, Lawson has not shown that trial counsel's failure to call

¹³ Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002).

¹⁴ Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

Freddie Jones to testify constituted deficient performance or caused actual prejudice to him.

Lawson further claims that trial counsel was ineffective for failing to offer testimony from his father, Lester Lawson, by avowal. Lawson claims his father could have testified to his whereabouts on the night of the robbery. Because Lawson's father had charges pending that were somewhat connected to the facts of his son's case, the father's attorney advised him to assert his Fifth Amendment right not to incriminate himself if he was subpoenaed to testify at his son's trial. Armed with this knowledge, Lawson's trial counsel, outside the presence of the jury, asked the trial court to call his father as a witness. The father appeared in court with his attorney and noted on the record that he intended to assert his Fifth Amendment right to remain silent in refusing to answer any questions regarding his son's case.¹⁵ Contrary to Lawson's claim, it was not error for counsel not to attempt to offer his father's testimony by avowal because his father did not intend to testify to anything relevant to these robbery charges.

¹⁵ See Combs v. Commonwealth, 74 S.W.3d 738 (Ky. 2002)(quoting Clayton v. Commonwealth, 786 S.W.2d 866, 868 (Ky. 1990))(stating that "[t]his Court has recognized that 'neither the prosecution nor the defense may call a witness knowing that the witness will assert his Fifth Amendment privilege against self-incrimination,' and we have applied this black-letter law in cases where a witness invokes the privilege in order to avoid answering any substantive questions" [emphasis original]).

Lawson also claims that his trial counsel was ineffective for failing to call Lawson's brother, Paul Blevins, as an alibi witness. In Blevins's affidavit, which is attached to Lawson's brief, Blevins stated that on the night of the robbery he was incarcerated in the county jail, and at 11:20 p.m. he called Lawson's home. Because Lawson was not at home, Lawson's wife initiated a three-way call between Blevins and Lawson, which Lawson claims would prove he could not have committed the robbery.¹⁶ Because Blevins's affidavit was improperly filed before this Court as an appendix to Lawson's brief, and was never before the trial court, we are precluded from considering it.¹⁷ Furthermore, we agree with the trial court that the phone bill was "evidence unlikely to change the minds of a jury in light of the extremely incriminating evidence presented against [Lawson]."

Lawson further claims that trial counsel was ineffective for failing to call Perl Smith as a witness for purposes of impeaching the testimony of Karen Jones and Glenn Sanders. Lawson attached an affidavit to his RCr 11.42 motion outlining what Smith's testimony would have been. The trial court found this information to be "unpersuasive" and of "no

¹⁶ Lawson also attached a copy of his phone bill from April 23, 1998, to his RCr 11.42 motion.

¹⁷ See Croley v. Alsip, 602 S.W.2d 418, 420 (Ky. 1980).

relevance as to the guilt or innocence of Leslie Lawson." We agree.

Trial counsel's failure to call Smith as a witness did not fall outside the wide range of professionally competent assistance. Lawson merely concludes, without support of facts, that counsel failed to investigate Smith's testimony. There are a myriad of reasons for not calling a particular witness, and counsel must be given great discretion in trying a case, especially with regard to trial strategy and tactics. The trial court must be careful not to second-guess those decisions made by counsel.¹⁸ Thus, Lawson has not presented a sufficient basis to overcome the strong presumption of the reasonableness of counsel's assistance.

Lawson next argues that the trial court erred when it refused to suppress evidence found in his apartment during an alleged illegal search. In conjunction with this argument, Lawson argues that once the trial court refused to allow John Goodin, the maintenance man for his apartment building, to testify at the suppression hearing, trial counsel was ineffective for failing to offer Goodin's testimony by avowal. Lawson raised both these issues in his direct appeal to the Supreme Court. "In that the issue was considered by the Supreme

¹⁸ Harper v. Commonwealth, 978 S.W.2d 311, 317 (Ky. 1998).

Court of Kentucky, we will not consider it herein."¹⁹ Therefore, we are precluded from reviewing these issues on appeal.

Lawson also argues that he was prejudiced during trial because the Commonwealth failed to provide exculpatory evidence to him regarding the Commonwealth's witness, Karen Jones. In Hodge v. Commonwealth,²⁰ our Supreme Court stated that a RCr 11.42 motion "is limited to the issues that were not or could not be raised on direct appeal." This issue is not the proper subject matter of a RCr 11.42 motion and should have been raised in Lawson's direct appeal. The failure to raise this issue in his direct appeal constitutes waiver of the issue. Therefore, we decline any further review of this argument.

Finally, Lawson asserts that the cumulative effect of the aforementioned errors resulted in a violation of his constitutional rights and as a result his conviction and sentence should be set aside. We find this argument to be meritless. Each of the allegations made by Lawson have been thoroughly reviewed and discussed in this Opinion and each one is either refuted by the record, has been addressed and decided, or should have been addressed in Lawson's direct appeal to the Supreme Court. "Repeated and collective reviewing of alleged

¹⁹ Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990).

²⁰ 116 S.W.3d 463, 467-68 (Ky. 2003).

errors does not increase their validity."²¹ Lawson has failed to demonstrate any basis for his claims that counsel's performance was deficient. He received a fundamentally fair trial.

Accordingly, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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²¹ Parrish v. Commonwealth, 121 S.W.3d 198, 207 (Ky. 2003).