RENDERED: APRIL 27, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002125-MR

TIMONTE DESHAW HARRIS — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 01-CR-01202

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant Timonte Harris appeals the Fayette Circuit Court's order denying his RCr 11.42 Motion to Vacate or Set Aside the Judgment entered against him. After a careful review of the record, we affirm the Fayette Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted, following a jury trial, of wanton murder. He was sentenced to a term of thirty years of imprisonment. On appeal, the Kentucky Supreme Court affirmed Appellant's conviction and sentence. *See Harris v. Commonwealth*, 134

S.W.3d 603 (Ky. 2004). In doing so, the Supreme Court summarized the facts of the case as follows:

> At approximately 8:30 p.m. on September 15, 2001, Jeffrey ("Eenie") Reed was shot to death while driving a white Oldsmobile Achieva belonging to the mother of his cousin, Tyson Fee. Fee was riding as a passenger in the vehicle when the shooting occurred. Fee testified that another vehicle pulled behind them as they drove down Merino Street in Lexington and that someone in that vehicle began shooting at them. Fee attempted to return fire with his .357 magnum Smith & Wesson revolver, but was unsuccessful because there was no cartridge in the chamber. Reed was shot in the back but was able to stop and exit the vehicle before collapsing in the street. Fee drove to 710 Pine Street, the home of another cousin, and hid his revolver and car keys under a mattress. He then directed his cousin to call the police to report Reed's death. Because of darkness, Fee was unable to identify the vehicle from which the shots were fired or to recognize anyone in the vehicle. Two eyewitnesses testified that the shots came from a black vehicle chasing a white vehicle and that there appeared to be three people in the black vehicle. Appellant had access to a black Honda belonging to his mother.FN1
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> FN1. One of the eyewitness (sic), however, described the black vehicle as a two-door car with gold rims whereas other evidence indicated that the black Honda owned by Appellant's mother was a four-door car without gold rims.
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> The Commonwealth's theory was that Appellant shot Reed as part of a cycle of revenge and retaliation between Reed and Fee on one side and Appellant and Dewan Mulazim on the other. Mulazim once described Appellant to the police as his "buddy" and "partner." In support of its theory, the Commonwealth first proved that on August 15, 2001, Reed and Mulazim were involved in an argument during which Reed knocked Mulazim to the ground and Mulazim retaliated by shooting Reed in the leg. Reed's girlfriend testified that on the night of September 14, 2001, Reed and Fee were at her apartment when they spotted Mulazim and Appellant in the

neighborhood. She heard someone say, “Go get a gun,” following which Reed and Fee left her residence. Shortly thereafter, she heard gunshots in the vicinity. Fee testified that on September 15th, he and Reed were parked in the white Oldsmobile when Appellant approached them on foot. Appellant accused Reed of shooting at him the previous evening. When Appellant reached in his pants as if to draw a gun, Reed started the vehicle, and he and Fee sped away.

Reed's cousin, Jeremiah Sullivan, testified that he encountered Appellant on the night of the shooting and that Appellant was waving a .9mm Glock pistol, saying, “I just got one of 'em” (sic) Appellant told Sullivan that “I rode on 'em ... Eenie and Tyson, chased 'em down,” explaining that they had shot at him the previous night because he was with Mulazim, who had previously shot Reed. Appellant continued to exclaim, “Well, man, I got 'em, dog, I got 'em. I know I done hit one of them. They tried to kill me.” Appellant described how he had driven up behind their vehicle while holding his gun in front of the windshield and shooting.

When police interviewed Mulazim on September 17, 2001, he denied being with Appellant on either the night of the 14th or the night of the 15th but revealed that a man nicknamed “Mal Viddy,” whom he identified as a brother of Brian Brown, was driving the vehicle from which the shots that killed Reed were fired. The jury could have reasonably concluded that the three people the eyewitnesses observed in the black car were Appellant, Mulazim, and Horace (“Mal Viddy”) Brown (who testified that he was not with Appellant when Reed was killed). At trial, Mulazim testified that he had “made up” the story about “Mal Viddy,” but admitted that he had shot Reed on August 15th and that someone had shot at him and Appellant on the night of September 14th.

The police found three bullet holes in Fee's white Oldsmobile. The fatal bullet passed through the license plate holder, the trunk, the rear seat, the driver's seat, and Reed's body. The bullet was not found, but the police discovered six .9mm shell casings at the crime scene. Neither was the murder weapon found, but a ballistics expert testified that all six casings were

> fired from the same Glock .9mm pistol. The medical examiner who performed the autopsy testified that the entrance wound of the bullet into Reed's body was consistent with a wound caused by a medium-sized bullet, such as a .9mm bullet.

Harris, 134 S.W.3d at 605-07.

After the Kentucky Supreme Court affirmed his conviction and sentence, Appellant filed his *pro se* RCr 11.42 Motion to Vacate or Set Aside the Judgment in the circuit court, alleging that he had been denied the effective assistance of trial counsel on the following grounds: (1) counsel failed to object to the admission of Appellant's statement to the police; (2) counsel failed to explain to the jury the instructions for lesser included offenses; (3) counsel failed to object to the Commonwealth's closing argument; (4) counsel failed to object to the testimony presented by the victim's mother; and (5) counsel failed to investigate and adequately present readily available evidence. Furthermore, Appellant claimed that his RCr 11.42 motion should be granted based on the cumulative effect of the aforementioned errors by counsel.

Appellant moved for the appointment of counsel and for an evidentiary hearing. The circuit court appointed counsel for Appellant. Appointed counsel filed a supplement to Appellant's RCr 11.42 motion, adding the following claim: (1) trial counsel rendered ineffective assistance when counsel failed to effectively address the issue of ballistics evidence presented that enhanced the credibility of a key prosecution witness. Appointed counsel also reiterated Appellant's claim that trial counsel rendered ineffective assistance by failing to investigate and adequately present evidence, as well as

Appellant's claim that his RCr 11.42 motion should be granted due to the cumulative effect of all of the aforementioned errors.

The Fayette Circuit Court denied Appellant's RCr 11.42 motion. As part of the court's order, the court noted that because Appellant had failed to prove that he received the ineffective assistance of counsel during trial, an evidentiary hearing was not required.

Appellant now appeals, raising the following claims: (1) trial counsel rendered ineffective assistance when counsel failed to investigate and adequately present readily available evidence; (2) trial counsel rendered ineffective assistance when counsel failed to effectively address the issue of ballistics evidence presented that enhanced the credibility of a key prosecution witness; (3) trial counsel rendered ineffective assistance when counsel failed to object to the admission of Appellant's statement to the police; (4) the trial court applied an improper standard when it denied Appellant's motion for an evidentiary hearing; and (5) the cumulative effect of the errors denied Appellant his rights to a fair trial, due process, and a reliable verdict. Finally, in a footnote in his appellate brief, Appellant asserts that trial counsel rendered ineffective assistance when counsel advised Appellant not to testify at trial.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42, such as that brought by Appellant in this case, "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and

rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id*. "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id*. (citations omitted).

III. ANALYSIS[1]

A. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND ADEQUATELY PRESENT EVIDENCE

Appellant first claims that his trial counsel rendered ineffective assistance when counsel failed to investigate and adequately present available evidence to refute the Commonwealth's theory that Appellant was seeking revenge against the victim by shooting him. Specifically, Appellant contends that counsel should have presented evidence showing that there were no problems between Appellant and the victim until the day before the victim was killed, when the victim shot at Mr. Mulazim while Appellant was present. Mr. Mulazim previously shot the victim in the leg on August 15, 2001. Additionally, Appellant asserts that counsel should have presented evidence to refute the Commonwealth's assertion that he and Mr. Mulazim were "partners" and "buddies," rather than mere acquaintances.

Regarding claims of ineffective assistance of counsel, the Kentucky Supreme Court has noted that:

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[1] Appellant's present claims were not brought in his direct appeal.

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). In order to be classified as ineffective, the performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222 (6th Cir. 1992). The critical issue is not whether counsel made errors, but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for such grievances. *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983).
>
> In reviewing a claim of ineffective assistance, the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Morrow*; [*Haight v. Commonwealth, 41 S.W.3d 436 (Ky.2001)*], *supra*. A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *Haight*; *See also McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997).

Simmons, 191 S.W.3d at 561.

Appellant alleges that trial counsel failed to present evidence to challenge the Commonwealth's assertion that he and Mr. Mulazim were "partners" and "buddies," rather than mere acquaintances. However, Appellant's appointed counsel, in the supplemental brief filed in the circuit court regarding Appellant's RCr 11.42 motion,

acknowledged that trial counsel had "objected to the use of the term 'partner' to describe the relationship" between Mr. Mulazim and Appellant, but the objection was overruled. Additionally, during his closing argument, trial counsel noted the evidence that had been introduced at trial which refuted the Commonwealth's argument that Appellant and Mr. Mulazim were "partners." Specifically, trial counsel mentioned that one witness testified that she had grown up with Appellant and known him all of his life, but she did not know Mr. Mulazim. Trial counsel stated that another witness had testified that she knew both Appellant and Mr. Mulazim, but she had never seen them together. Furthermore, trial counsel noted that no witness had testified that Appellant and Mr. Mulazim were "close buddies," as the Commonwealth had alleged. Therefore, because trial counsel objected to the Commonwealth's use of the term "partners," and because trial counsel noted the evidence which refuted that they were partners, Appellant is unable to show that counsel's performance was deficient, or that counsel's failure to introduce evidence showing that Appellant and Mr. Mulazim were not partners prejudiced his defense. *See Simmons*, 191 S.W.3d at 561.

Appellant also claims that counsel rendered ineffective assistance when he failed to introduce evidence showing that there were no problems between Appellant and the victim until the day before the victim was killed, when the victim shot at Mr. Mulazim while Appellant was present. However, this claim fails because even if counsel had presented such evidence, Appellant acknowledges that there were problems between the victim and himself that began the day before the victim was killed, and the jury could

have assumed that the murder stemmed from such problems. Thus, because Appellant is unable to show that counsel's failure to present such evidence prejudiced his defense, this ineffective assistance of counsel claim lacks merit. *See id*.

B. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO EFFECTIVELY ADDRESS BALLISTICS EVIDENCE

Appellant next alleges that trial counsel provided ineffective assistance when he failed to effectively address the issue of ballistics evidence presented that enhanced the credibility of a key prosecution witness, Jeremiah Sullivan. Specifically, Appellant contends that the Commonwealth's ballistics expert, Warren Mitchell, "superficially supported the suspect testimony of" Mr. Sullivan. Mr. Sullivan testified that he observed Appellant waving a 9-millimeter Glock pistol and announcing, in the presence of approximately a half dozen individuals, that he shot the victim. Appellant alleges that when the ballistics expert testified that the gun used to kill the victim was a Glock, he lent credibility to Mr. Sullivan. He contends that the ballistics report prepared by Mr. Mitchell did not mention that a 9-millimeter Glock pistol was used to kill the victim. Furthermore, Appellant asserts that his counsel failed to tell him about the aforementioned evidence, because if he had known, he would have "informed counsel that, on the street, the term 'Glock' is synonymous with 'gun.'" Appellant argues that trial counsel rendered ineffective assistance by failing to introduce evidence demonstrating that "Glock" is synonymous with "gun" and that 9-millimeter firearms are commonly found in Lexington, where the victim was killed. He asserts that trial counsel was also

ineffective in failing to adequately challenge the testimony of the ballistics expert on the aforementioned evidence.

Although Appellant contends that when Mr. Sullivan testified that he had seen Appellant waiving a Glock, he merely meant that Appellant was waiving some sort of gun, Mr. Sullivan's testimony at trial refutes that assertion. During trial, the prosecutor specifically asked Mr. Sullivan what type of gun Appellant was waiving, and Mr. Sullivan responded that the gun was a 9-millimeter Glock. The prosecutor then asked Mr. Sullivan if he knew what a 9-millimeter Glock looked like, and he responded affirmatively. The prosecutor asked Mr. Sullivan if he was certain that the gun was a 9-millimeter Glock, and Mr. Sullivan responded that Appellant was carrying such a gun.

Therefore, even if trial counsel had presented evidence indicating that some people use the term "Glock" interchangeably with "gun," Appellant is unable to prove that counsel's failure to present this evidence prejudiced his defense because Mr. Sullivan affirmatively testified that he knew what a Glock looked like and he was certain that the gun waved by Appellant was a Glock. Consequently, Appellant has failed to establish that his counsel rendered ineffective assistance by failing to present this evidence. *See Simmons*, 191 S.W.3d at 561.

Further, even if counsel had presented evidence showing that 9-millimeter Glock guns are commonly found in Lexington, as Appellant alleges counsel should have, such evidence would not have refuted the allegation that Appellant shot the victim with a Glock. Therefore, Appellant is unable to show that his trial counsel rendered ineffective

assistance by failing to present this evidence because Appellant cannot show that such failure prejudiced his defense. *See id*.

Appellant also contends that trial counsel was ineffective by failing to adequately challenge the testimony of the ballistics expert. At trial, Mr. Mitchell testified that every one of the six shell casings found at the scene of the crime was fired from the same 9-millimeter Glock pistol. Although Appellant argues that the ballistics report did not reveal that a 9-millimeter Glock was used to kill the victim, any failure on trial counsel's part to challenge the ballistics evidence presented at trial did not prejudice Appellant's defense to the extent that counsel would be considered ineffective. This is because Mr. Sullivan testified that he saw Appellant waiving a 9-millimeter Glock and stating that he had shot someone by holding his pistol out in front of a car's windshield and shooting at the person. Based on this testimony by Mr. Sullivan, Appellant cannot show that his counsel's allegedly deficient performance in failing to challenge the ballistics evidence prejudiced his defense. Thus, this ineffective assistance claim lacks merit. *See Simmons*, 191 S.W.3d at 561.

Moreover, Appellant acknowledges that trial counsel was able to elicit testimony alleging that people in another vehicle had been trying to shoot at a vehicle in which the victim rode the same day that he was killed. Therefore, this evidence tends to refute Mr. Sullivan's testimony implying that Appellant was the murderer, and it shows that trial counsel's performance was not deficient and that he did not render ineffective assistance. *See Simmons*, 191 S.W.3d at 561.

C. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ADVISING APPELLANT NOT TO TESTIFY AT TRIAL

In a footnote in his appellate brief, Appellant asserts that trial counsel rendered ineffective assistance when counsel advised Appellant not to testify at trial. Appellant alleges that he would have testified if counsel had not advised against it, and if he had testified, he would have attested that the term "Glock" is used interchangeably "on the street" with the word "gun." However, Appellant makes no attempt at developing his argument in support of this constitutional claim. Thus, his allegation is conclusory. It fails because he did not show how counsel's performance in giving this advice was deficient or prejudicial, particularly considering that Mr. Sullivan testified that he knew what a 9-millimeter Glock looked like, and he was certain that the gun he observed Appellant waiving was a 9-millimeter Glock. Consequently, this ineffective assistance of counsel claim lacks merit. *See id*.

D. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE ADMISSION OF APPELLANT'S STATEMENT TO THE POLICE

Appellant next claims that he received the ineffective assistance of trial counsel when trial counsel failed to object to the admission of his statement to the police. However, Appellant's argument is misplaced. In fact, during a hearing several days before trial, the parties and the court discussed trial counsel's various objections to the admission of certain parts of Appellant's statement, as well as whether or not those parts of the statement would be redacted when the statement was shown to the jury during trial. Thus, trial counsel clearly objected to certain parts of the statement, and it may have been

his trial strategy to not object to the admission of the entire statement. In fact, one part of the statement that counsel did not object to was when Appellant informed the police that he was with his girlfriend, and that he was drunk and asleep in a van at the time that the victim was killed. During trial, counsel elicited testimony from Appellant's girlfriend, Nakia Bailey, in which she testified in accordance with Appellant's statement, i.e., she attested that Appellant was drunk and asleep in her van when the victim was killed. Therefore, trial counsel's objections to parts of the statement, but not to others, was presumably part of his trial strategy, and Appellant is unable to show that trial counsel rendered ineffective assistance when he failed to object to the entire statement. *See Strickland*, 466 U.S. At 689. ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation marks and citation omitted)).

E. CLAIM THAT TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR AN EVIDENTIARY HEARING

Appellant next contends that the trial court applied an improper standard when it denied his motion for an evidentiary hearing. He contends that the trial court cited *Maye v. Commonwealth*, 386 S.W.2d 731 (Ky. 1965), when it denied his evidentiary hearing, and reasoned that a hearing was unnecessary because Appellant failed to show that he received the ineffective assistance of trial counsel under *Maye*. Appellant alleges on appeal that the trial court should have relied on the case of *Fraser v.*

Commonwealth, 59 S.W.3d 448 (Ky. 2001), as a basis for determining whether he had established his ineffective assistance claims, thus warranting an evidentiary hearing.

However, Appellant's argument is misplaced, as the trial court cited only *Fraser* as support for its holding that an evidentiary hearing was unnecessary. Furthermore, the trial court analyzed Appellant's ineffective assistance of counsel claims under *Strickland*, rather than *Maye*, and *Strickland* is still binding precedent. Contrary to Appellant's contention, the trial court did not cite *Maye* in determining whether Appellant's ineffective assistance of counsel claims had merit to warrant an evidentiary hearing. Rather, the trial court cited *Maye* in support of the court's determination that Appellant's "allegations [were] insufficient on their face to meet the burden required by an RCr 11.42 motion." Thus, Appellant's assertions are misplaced.

Furthermore, the trial court properly denied Appellant's motion for an evidentiary hearing concerning his RCr 11.42 motion to vacate. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . ." In the present case, because the trial court had determined that Appellant's ineffective assistance of counsel claims lacked merit based on the record as a whole, the court denied his motion for an evidentiary hearing.

On appeal, after "the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion on its face states grounds that are not conclusively refuted

by the record and which, if true, would invalidate the conviction." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted).

In the present case, Appellant's claims were conclusively refuted by the record, as discussed *supra*. Thus, the trial court did not err when it denied Appellant's motion for an evidentiary hearing. *See id*.

F. CLAIM CONCERNING THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

Finally, Appellant contends that the cumulative effect of the errors resulted in a denial of his rights to a fair trial, due process, and a reliable verdict. He cites *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992), a case involving a direct appeal of a criminal conviction, as support for his claim. In *Funk*, the Supreme Court held that even when errors are not sufficient to warrant reversal individually, "the cumulative effect of the prejudice" may warrant reversal. *Funk*, 842 S.W.2d at 483.

The Commonwealth challenges Appellant's claim and cites *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998), in its appellate brief. In *Sanborn*, the movant filed a motion to vacate pursuant to RCr 11.42 alleging, *inter alia*, claims of ineffective assistance of counsel. Sanborn's RCr 11.42 motion was denied and on appeal, the Supreme Court held that "[t]he contention that cumulative error by counsel establishes a federal or state violation of the constitution is without merit. In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect." *Sanborn*, 975 S.W.2d at 913.

Because *Sanborn* involved an appeal from the denial of a motion brought under RCr 11.42 that raised claims of ineffective assistance of counsel, as well as a claim involving the cumulative effect of those alleged errors by counsel, *Sanborn* is more on point with the facts of the present case than *Funk*, which involved a direct criminal appeal. Thus, *Sanborn* is controlling in this appeal, and Appellant's cumulative effect of the errors claim fails because his individual assertions of the ineffective assistance of counsel lack merit. *See id*.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Ray Myers
Amber Marie Ramanauskas
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Samuel J. Floyd, Jr.
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