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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002168-MR

RONALD LEE CURTIS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 99-CR-00411

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, Ronald Lee Curtis (Curtis) appeals the October 27, 2008, order of the Warren Circuit Court, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion following a full evidentiary hearing. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

At trial in this matter, it was shown that Curtis met Jack Patrick, the victim, while both were roommates at a federal penitentiary. Sometime in 1989, after both had been released, Curtis and Patrick became business partners. Apparently, Patrick usually supplied Curtis with money, and Curtis ran businesses involving recycling, a gas/convenience store, and personal loans.

As a result of their partnership, Patrick and his wife, Alpha Patrick, purchased Curtis's "dream house" in Central City, Kentucky, and rented it to Curtis. Curtis was supposed to purchase the home from the Patricks on the weekend of April 5, 1991, which was the weekend that Patrick went missing. On that night, Patrick left Knoxville, Tennessee, to go to Curtis's home in Central City, Kentucky, for the night.

The Commonwealth asserts that approximately one week prior to Patrick's murder, Curtis told one of his employees, Billy Mike Gootee, that he needed help digging a hole, and that he took Gootee to a distant field near where his father once owned land in Ohio County for that purpose. Curtis apparently told Gootee that he needed to bury some waste.

The Commonwealth states that although the two started digging, Curtis decided that it was too much work, and told Gootee to get another of his employees, Claudia Boyd, and to return later to finish the job. According to the Commonwealth, Gootee and Boyd apparently returned later that day and completed digging, ultimately leaving a hole which was four-feet deep, four-feet

long, and three- and one-half-feet wide, at which time they returned to the Country Store and informed Curtis that the hole was completed.

Curtis concedes that on the weekend of April 5, 1991, Patrick and Curtis were going to finalize a land-sale contract in which Patrick and his wife would sell to Garon, Inc. (a company which Marilyn Gaye Curtis, wife of Curtis, was president and sole shareholder of) the "dream house" in Central City which Curtis and Gaye Curtis had been renting from the Patricks. Curtis asserts that the two men were also signing a couple of contracts which would memorialize various agreements and obligations between the two couples.

The Commonwealth contends that the proof indicates that by early April of 1991, the Patricks had grown tired of being involved in business with Curtis, and that due to his failure to send timely business reports and questionable returns on their investments, they believed that he was embezzling funds from the businesses. Indeed, at trial, Alpha Patrick testified that the contracts to be entered into by the parties in April of 1991 would sever the relationship between the two families, and that this was necessary because she felt Curtis was "embezzling out of the business."[1]

The Commonwealth argues that the contracts were to settle the sale of the house, and to complete one last business deal involving the aluminum recycling business. Curtis alleges that contrary to Alpha Patrick's assertions that the relationship between the two families was to end, the signed documents and other

[1] *See* Tape 4, 03/29/00, 02:29:41, 03:34:48, 02:53:23, 02:55:32, 02:56:57; Tape 5, 03/20/00, 04:05:20.

testimony refute that assertion. More particularly, Curtis asserts that he and Patrick were going to go to an aluminum sale to begin a new business deal on April 6, 1991. According to Curtis, Patrick brought $40,000.00 in cash with him to Central City on that date for a business deal involving aluminum recycling, which Alpha Patrick had withdrawn from their joint account.

Upon Patrick's arrival, Curtis was to pay the Patricks $106,000 for the house which, according to Alpha Patrick, was to be paid by cashier's check. On the evening of April 5, 1991, Jack Patrick arrived in Central City to meet Curtis. Curtis's wife, Gaye, apparently left town that weekend, leaving Curtis alone with Patrick.

According to Curtis, upon arriving, he and Patrick went to the Country Store to pick up some toiletries for Patrick, after which time they returned to Curtis's home to visit and to sleep. Nina Front, a cashier at the Country Store, testified that she saw Curtis and Patrick at the store that evening, and that Curtis told her that he and Patrick were doing business together, and that Patrick was going to spend the night at his place.

According to Gootee's testimony at trial, at approximately 11:30 p.m., Curtis called Gootee at home, and after speaking briefly with his wife, Peggy, told Gootee that there had been some problems at the Country Store, and that he would be by to pick Gootee up in a few minutes. When Curtis arrived, Gootee got into the truck, at which time Curtis began driving in the direction opposite from the store, telling Gootee that Patrick had been shot and killed, and that he needed

Gootee's help. Curtis apparently told Gootee that another man, Mike Oates, shot Patrick during a fight.

Gootee testified that while driving in rural Ohio County, Curtis abruptly stopped his truck at a wide spot in the road, and informed Gootee that this was the spot where Patrick had been shot. He then continued driving until he reached the spot where Gootee and Boyd had recently dug the hole. According to Gootee, Curtis then used a flashlight to show Gootee Patrick's body, after which he dragged the body to the hole, dumped it in, and directed Gootee to assist him in burying it. Curtis apparently then told Gootee to get Patrick's wallet, after which time he took $70.00 in cash from the wallet and gave it to Gootee. The two apparently then drove away, stopping once to bury the wallet on the way back to Curtis's house.

According to Gootee, upon returning to his house, Curtis put on a pair of gloves and proceeded to rummage through Patrick's car, telling Gootee that Patrick was supposed to have a large amount of money in the car. Upon searching, the two found two money bags. Afterwards Curtis invited Gootee into the house to show him a stack of papers that had also been taken from Patrick's car. Curtis then drove Gootee home.

Contrary to the story told by Gootee, Curtis alleges that Patrick slept until late the next morning, while Curtis took Patrick's black Lexus to the Country Store to fill it up with gas and groceries. Curtis claims that he then took the car back to his house and that Patrick left Central City to return home around 1:00 p.m.

Curtis states that prior to Patrick's departure, Curtis paid Patrick the money owed to him under the agreements and land-sale contract as evidenced by Patrick's signature upon those documents.

Curtis further states that on Sunday morning, April 7, 1991, Alpha Patrick called Curtis and advised him that Jack Patrick was missing. Curtis states that he told Alpha Patrick that he last saw Jack Patrick on Saturday at 1:00 p.m. when Jack Patrick left Central City to return home. Curtis claims that he also informed Alpha Patrick at that time that the aluminum deal did not go through.

Kenneth Hughes, a witness in the trial below, testified that approximately 10:00 a.m. on Monday morning, April 8, 1991, he arrived at Curtis's house to work on his Jeep, which was parked in the garage. Hughes testified that upon entering the garage, he noticed a black Lexus parked next to the Jeep. David Givens, an employee of Curtis, testified that he also arrived at Curtis's house on Saturday morning, April 6, 1991, as he was running errands for Curtis at that time. Givens testified that when he arrived, he asked Curtis the whereabouts of Patrick, at which time Curtis responded that Patrick was still upstairs in the house sleeping. Givens also noticed the black Lexus parked in the garage.

Gootee testified that he arrived for his usual shift at the Country Store on Saturday morning, and that when Curtis arrived at the store a short time later, he told Gootee never to tell anyone what had happened the night before, and in fact covertly threatened Gootee at that time. Gootee testified that he noticed blood in the back of Curtis's truck, and that he took the vehicle through the car wash.

Gootee testified that later that day, Curtis informed him that they were going to take Patrick's black Lexus back to Nashville, and instructed Gootee to meet him at Curtis's house at dark. According to Gootee, Curtis stated that he would drive the Lexus while Gootee followed him in the truck. Gootee states that the two men took Patrick's car and parked it in the lot behind Calhoun's Restaurant in Nashville. Gootee stated that when Curtis exited the car he was wearing gloves, and that he wiped the car down to remove any fingerprints.

According to the Lori Shaw Grant, another clerk at the Country Store, Curtis called the store at approximately 1:30 a.m. on the same evening he had supposedly driven the car back to Nashville. Grant testified that she asked Curtis why he was calling so late, and that he informed her he had just made a quick trip to Nashville, had dinner, and had driven back.

Curtis's bookkeeper, Michelle Smith Pointer, also testified in this matter. She stated that on Monday, April 8, 1991, Curtis had her notarize some documents for him, including his wife's signature on the land-sale contract for the sale of his house. Pointer testified that although it was April 8th, Curtis instructed her to write April 6th when she notarized it. She stated that Curtis then changed his mind, and had her scratch out the false date and write in the correct one. Pointer stated that Curtis showed her another document with Gaye's signature which was dated April 5th. Pointer stated that she knew this was impossible as Gaye had been out of town on that date and could not have signed the document on that date. Pointer stated that Curtis then gave her two additional documents for

notarization, which were supposedly signed by Curtis, Gaye, and Patrick. Pointer stated that for each of these documents, Curtis instructed her to write down the date of April 6th, as opposed to the date of April 8th on which she was actually notarizing them.

Maxine Kummel, a representative from Curtis's bank, testified that on April 8, 1991, Curtis deposited $14,000.00 cash into the Country Store's money order account, which he controlled. She stated that he also deposited $4,200.00 in cash in another money order account, and that he deposited $800.00 dollars in cash in his wife's personal account. Kummel testified that this was highly unusual, and that Curtis had never deposited that amount of cash before. Pointer also testified that she had never deposited that much cash for Curtis before.

Curtis apparently waited nearly two months before he attempted to record the land-sale documents containing the fraudulent notarizations. Meanwhile, Alpha Patrick moved to have Curtis evicted from the house as she never received any money from Curtis for it. In the ensuing civil lawsuit, Curtis claimed that he paid Patrick $226,000.00 in cash for the house on the day Patrick was murdered. Curtis claimed that his father had given him the cash a few days earlier, and his father, Cecil Curtis, testified that he had given Curtis $225,000.00 in cash. Cecil could not remember exactly when he gave the money to his son, nor could he produce any documents to show how he obtained the money. According to Curtis, no one witnessed him giving this large amount of cash to Patrick.

Despite investigation by law enforcement, no credible leads as to Patrick's disappearance occurred until 1992 when an ad was placed in the local Central City newspaper, offering a $10,000 reward for information concerning his disappearance. In need of money, Billy Gootee had his wife, Peggy, call the Patrick's attorney on February 18, 1992, to say that he knew where the body was buried. After telling the attorney that Gootee could produce Patrick's missing wallet, they arranged to meet the next day at a motel. The next day, Gootee met with the attorney and the police and showed them Patrick's wallet. He also told them what happened and where the body was buried.

The body was indeed located in the place Gootee described, and after exhuming the body, medical examiner David Jones stated that the site was consistent with someone disturbing the soil ten to twelve months prior to their arrival. It was ultimately determined that Jack Patrick died as a result of two gunshot wounds to the back. Dr. Mark Avon, the forensic pathologist in this matter, testified as to the path of the bullets and the manner in which he believed the wounds were inflicted. He found no evidence of defensive wounds.

Subsequent to the aforementioned events, on April 18, 1994, Gootee's wife, Peggy, died mysteriously of unusual circumstances. The investigation into her death apparently continued until one month before Gootee and Curtis were indicted for Patrick's murder.

Curtis states that the actual murder weapon which killed Patrick has never been found. During the trial in this matter, the Commonwealth played the

video deposition of Chief Nunnelly, the retired police chief of Central City, Kentucky. Chief Nunnelly testified that he gave Curtis a .38 Smith and Wesson (S & W) Chief's Special in the late 1970's. Nunnelly testified that it was an unusual gun because it shot .38 short bullets. Nunnelly said the gun he gave Curtis looked "similar" to the Commonwealth's model gun.

Two .38 short bullets were retrieved from Patrick's body. Two Kentucky State Police (KSP) firearms experts examined the bullets. Miles Bradford Park, a KSP expert, examined the bullets in February of 1992, and determined that they were .38 caliber bullets, also called .38 Smith & Wesson bullets or .38 shorts, and that the same gun fired both bullets. Park further testified that a .38 S&W cartridge can be fired from other firearms, such as a .38 Special or a .357 Magnum, but that he could tell from the rifling on the bullets that the two bullets recovered from Patrick's body could only have been fired from a .38 S&W gun. Park was no longer with the KSP at the time he testified.

Ronnie Freels also examined the bullets for the KSP in November of 1995. He testified by videotape deposition that the bullets were .38 S&W caliber bullets, which were fired from the same weapon. Contrary to Park's testimony, Freels also testified that two other guns, the .38 Special and the .357 Magnum, could have fired these bullets and that the bullets would look no different.

The Commonwealth asserts that proof indicated that Curtis had his wife, Gaye, retrieve his .38 caliber Smith & Wesson revolver from her father's house where he had been storing it, despite the fact that he had previously claimed

it was lost in a fire long ago. The Commonwealth also states that because Curtis was a convicted felon, he sent his employees Gootee and David Given to buy some of the unique ammunition required by the gun.

Although Patrick's body was located in February of 1992, no indictments for the alleged crime were returned until July 6, 1995, when Curtis was indicted by the Ohio County Grand Jury. At the time of the indictment, Curtis was incarcerated in a federal prison in Petersburg, Virginia. Thereafter, on July 7, 1995, Curtis served a motion for a fast and speedy trial and for discovery upon the Ohio County Court Clerk.

In his motion for a fast and speedy trial, Curtis asserted that he had been advised by the prison authorities on May 12, 1995, that the murder indictment was forthcoming, and that he was being placed in administrative segregation as a result. Subsequently, on September 18, 1995, Federal Corrections received a request from Curtis for disposition of the charge pursuant to the Interstate Agreement on Detainers (IAD).

Curtis was extradited to Kentucky and arraigned in Ohio County on December 8, 1995. The litigation of Curtis's case in the circuit court ceased on May 14, 1996, when his counsel filed a motion to dismiss the indictment pursuant to the IAD. That motion ultimately led to an interlocutory appeal to the Kentucky Supreme Court, which denied the IAD issue in 1998.[2]

[2] *See Curtis v. Lewis*, Ky., No. 96-SC-1053 (rendered September 3, 1998)(reconsideration denied November 19, 1998).

Thereafter, on March 5, 1999, the circuit court granted Curtis's motion for a change of venue, and transferred the case to the Warren Circuit Court. Prior to the start of trial, Curtis's trial counsel made a written motion to apply the mitigating amendments of the 1998 Omnibus Crime Bill, which would allow for a sentence of life imprisonment without parole. Trial began on March 27 and ended April 5, 2000.

During the course of trial, Curtis's defense called Joe Roper, Douglas Egbert, Guy Hunt, Barry Roseham, James Kent, and Mike Davenport to testify regarding a "decoy Lexus" parked at Calhoun's Restaurant in Nashville at the time Patrick was murdered.

Curtis's defense also elicited testimony from Teresa Ross, whom Curtis believed had a motive to kill Patrick. According to Curtis, Ross was causing problems for the Patricks around the time of Jack Patrick's disappearance. Ross's ex-husband testified that Ross was "abnormally obsessed" with Patrick's disappearance. Barr apparently testified that Ross and Patrick had a prior business relationship, that there was bad blood between them, that she was a convicted felon, and that she became hysterical after being interviewed by the Nashville Police regarding Patrick's disappearance.

Following trial, the jury found Curtis guilty of murder, and upon a penalty phase instruction under the aforementioned amendments to the Omnibus Crime Bill, he was subsequently sentenced to serve life imprisonment without the possibility of parole. Following trial, Curtis filed a direct appeal to the Kentucky

Supreme Court as a matter of right, challenging the constitutionality of his conviction. In an unpublished opinion rendered on October 17, 2002, the Kentucky Supreme Court affirmed Curtis's conviction. Rehearing was denied on January 23, 2003, after which Curtis filed a motion to vacate pursuant to RCr 11.42.

In the memorandum accompanying his RCr 11.42 motion, Curtis argued that counsel was ineffective in refusing to allow him to testify in his own defense, in failing to object when the jury pool was advised in voir dire that he had served time in prison, in advising the jury that he could been sentenced to life without parole (a sentence not in effect at the time of the crime but submitted to the jury on Curtis's motion), in agreeing to abate his discovery motion suspending the running of time under the IAD, in failing to object to the sentence of life without parole, in failing to obtain an independent defense firearm expert to cross-examine the Commonwealth's experts, in failing to object to false testimony from the Commonwealth's witnesses, in failing to call Rickey Adler to the stand, in failing to prepare a defense to the aggravators, in failing to inform the jury that other people possessed a motive to do harm to Patrick, and as to the cumulative effect of the foregoing.

On March 10, 2006, Curtis also requested that Judge Steve A. Wilson of the Warren Circuit Court recuse himself from the case, as he had been the Commonwealth's Attorney for Warren County at the time of Curtis's trial in Warren County. At the hearing on the motion, Judge Wilson stated that he had no

recollection of this case, that the case was not tried by his office, and that he had no direct or indirect contact with the prosecution, though it was his custom to allow a visiting prosecutor the use of an extra office.

During the course of the hearing on the motion to recuse, Curtis called Commonwealth's Detective Martin Scott to testify as to whether he assisted in voir dire or otherwise, but Martin had no knowledge of doing so in this case. The Court indicated that if a review of the tapes showed that Detective Scott had assisted in some manner, then he would recuse. The parties reviewed the tapes, and both reported that no such evidence existed. Accordingly, on January 16, 2007, Judge Wilson denied Curtis's motion to recuse, stating there was no factual basis to support the motion.

Thereafter, on November 1, 2007, the trial court held an evidentiary hearing on Curtis's RCr 11.42 motion. The parties took the deposition of Curtis's trial counsel, Steve Mirkin, and submitted that testimony to the court for consideration in its ruling. At the November 1, 2007, hearing, Curtis alleged that his counsel refused to allow him to testify. However, according to the deposition of Steve Mirkin, Curtis had informed Mirkin that he did not want to testify, and that if he had not done so, Mirkin would in fact have called him to testify.

Proof was apparently also introduced that counsel had obtained Curtis's consent prior to proceeding with advising the jury that Curtis could be sentenced to life without parole, a sentence which was not in effect at the time of the crime, but which was submitted to the jury on Curtis's motion. At the hearing,

Curtis acknowledged that he may not have recalled this because of the shock of being convicted of murder. Regardless, the Commonwealth asserts that the issue of proper penalties was put before the trial court by the Commonwealth in its February 25, 1999, motion to apply the penalty range in effect as of the date of defendant's crimes, and by Curtis in his March 27, 2000, motion to apply the mitigating portion of the amendment to Kentucky Revised Statutes (KRS) 532.030.

As to Curtis's complaint that counsel was ineffective in agreeing to abate his discovery motion suspending the running of the time under the IAD, the Commonwealth states that former counsel, Sheila Shelton Seadler, testified that Curtis would have been timely tried if so ordered.

The Commonwealth asserts that Curtis presented no witnesses at the hearing on the question of a need for an independent firearms examiner, and in fact only called former co-counsel Seadler, appellate counsel Karen Maurer, Alpha Patrick, Laura Shaw, and Billy Fields, in addition to taking the stand himself.

Subsequently, on December 14, 2007, Curtis filed a motion to allow additional proof on his RCr 11.42 motion, claiming that not every witness subpoenaed to the evidentiary hearing was called to testify, and stating that such testimony was necessary for the court to consider before it rendered its ruling. Curtis also argued that it was necessary to recall Mirkin as a witness so that he could testify with respect to the evidence presented at the evidentiary hearing. Curtis also filed a January 22, 2008, motion to amend his RCr 11.42 motion to

include a "soil sample report" that he claimed trial counsel should have introduced at his trial. The trial court overruled these motions on January 30, 2008.

Ultimately, the trial court entered its order overruling Curtis's RCr 11.42 motion on October 20, 2008. Subsequently, it entered a second order amending its finding of fact to include findings that it considered the testimony produced at the November 1, 2007, evidentiary hearing, and that it considered Steve Mirkin's deposition in reaching its decision. It is from those orders that Curtis now appeals to this Court.

We note at the outset that to prevail on a claim of ineffective assistance of counsel, a criminal defendant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d. 674 (1984). First, he must show that counsel's performance was deficient, which is to say that he must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Secondly, he must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Id.*

To be defective, counsel's performance must fall below an objective standard of reasonableness, considering all of the circumstances of the case at the time of trial. To show prejudice, the defendant must show, to a reasonable degree of probability, that but for counsel's unprofessional errors, he would have been found not guilty. *Id.* There is a strong presumption that counsel's assistance was either constitutionally sufficient, or that under the circumstances, counsel's actions

might have been considered legitimate trial strategy. *Id.* Finally, we note that the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)).

As his first basis for arguing ineffective assistance of counsel, Curtis asserts that counsel was ineffective in purportedly refusing to allow him to testify in his own defense. Curtis asserts that pursuant to the Fourteenth Amendment, he had the right to be heard, and to offer testimony. It is Curtis's argument that he felt forced by trial counsel not to testify at trial, and that because he was facing the death penalty, he had no choice but to acquiesce to counsel's recommendation that he not testify.

Curtis asserts that despite being informed by defense counsel that he had the right to testify at trial under the federal and state constitutions, counsel refused to allow him to testify in the belief that Curtis's testimony would inflame the jury due to his prior adversarial dealings with the prosecutor, and because of his inability to stay focused.

Curtis asserts that his testimony was necessary to refute most of the evidence introduced against him at trial, specifically, Alpha Patrick's testimony that he was embezzling from the Patrick's business, Gootee's statement that Curtis was a convicted felon, and Gootee's version of events as they related to Patrick's black Lexus. Lastly, Curtis asserts that he would have testified that Shaw was not working on the night of April 6-7 1991, and that he never called her or visited her at the store to discuss a trip to Nashville. Accordingly, Curtis argues that counsel erred in discouraging him from testifying, and that his actions were not consistent with any legitimate type of trial strategy.

In response, the Commonwealth asserts that the evidence reveals that Curtis consulted with counsel, and decided on his own, as was his right, not to testify. Further, the Commonwealth asserts that the record clearly shows that counsel, according to his own testimony, would have called Curtis to testify, had Curtis wished to do so.

Having reviewed the record, we are compelled to agree with the Commonwealth on this issue, and cannot find that the trial court abused its discretion in finding that Curtis chose not to testify. The record indeed reveals that trial counsel, in his deposition, testified that Curtis would have been afforded the opportunity to testify had he expressed a desire to do so. Certainly we cannot find that trial counsel's reasons for discouraging Curtis from testifying were not part of a reasonable trial strategy given the facts of this matter. Regardless, the choice

ultimately having been left to Curtis, we cannot find that counsel provided ineffective assistance on this ground.

As his second basis for appeal to this Court, Curtis asserts that counsel was ineffective in failing to object to the jury pool being advised in voir dire that Curtis was a convicted felon. Curtis asserts entitlement to be tried by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred. *See Tayloe v. Commonwealth*, 335 S.W.2d 556 (Ky. 1960). In support of that assertion, Curtis relies upon *Osborne v. Commonwealth*, 867 S.W.2d 484, 492 (Ky.App. 1993), wherein this Court held that a defendant was denied his right to a fair and impartial adjudication of his trial because the Commonwealth introduced evidence of a prior felony conviction during the guilt/innocence phase of the trial.

Curtis argues that his prior felony convictions were not material or inextricably intertwined with the facts of his case, and that only the fact that he and Patrick were business partners was important. Accordingly, he argues that his trial counsel's failure to object in this situation was highly prejudicial and the evidence should not have been allowed, as defense counsel did not know during voir dire whether Curtis was going to testify or not.

In response, the Commonwealth asserts that the fact that Curtis had served time in prison with Patrick was inextricably intertwined into the facts of the case, and that Kentucky Rules of Evidence (KRE) 404(b)(2) specifically allows the introduction of collateral matters when they are intertwined with the facts. Further,

the Commonwealth asserts that there is no likelihood that the result of the trial would have been different if counsel had objected. Regardless, the Commonwealth argues that with or without the notice required by KRE 404(c), it is highly unlikely that the court would have excluded this fact as there is no evidence that a failure to give notice would have caused unfair prejudice or that some other remedy could not have been fashioned.

In reviewing this matter, we note that KRE 404(b)(2) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

In the matter *sub judice*, we simply cannot find that the manner in which Patrick and Curtis initially became acquainted with one another is of any significant importance to the matters at issue, or that it was so intertwined with the other essential evidence that it could not be separated without an adverse effect on the Commonwealth. In the opinion of this Court, it was significant only that Patrick and Curtis were friends and business partners. The circumstances under which that relationship initially developed were of no relevance to the issues to be considered by the jury. Accordingly, we find that counsel did commit error in failing to object to the introduction of Curtis's prior felony convictions during voir dire.

Nevertheless, as the courts of this Commonwealth have repeatedly held, Curtis was entitled to a fair trial, not a perfect one. *See Martin v.*

Commonwealth, 170 S.W.3d 374 (Ky. 2005), citing *U.S. v. Dempsey*, 830 F.2d 1084, 1088 (10th Cir. 1987). Certainly, some errors are "virtually inevitable" in every case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Having reviewed the record in its entirety in this matter, we cannot find that evidence of Curtis's prior conviction, when viewed in the light of all other evidence introduced at trial, was in and of itself evidence that would bias the jury to the point that they were incapable of rendering an impartial decision. Having so found, we affirm the trial court's ruling in this regard.

As his third basis for appeal, Curtis asserts that his trial counsel was ineffective in allowing the jury to be advised that Curtis could be sentenced to life in prison without parole (a sentence not in effect at the time of the crime but submitted to the jury on Curtis's motion) without obtaining Curtis's express consent. Curtis cites this Court to *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000), wherein our Kentucky Supreme Court held that life in prison without parole could be applied as a sentence in the criminal trial of a defendant charged with a crime before the 1998 Omnibus Crime Bill's enactment with the defendant's "unqualified consent." However, Curtis states that pursuant to *Garland v. Commonwealth*, 127 S.W.3d 529 (Ky. 2003)(*overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)), this issue is one that should be addressed with the defendant at the time of pretrial, or at trial with a colloquy taken from the defendant by the Court.

Curtis asserts that the trial court did not take a colloquy from him at trial concerning his express or unqualified consent to life imprisonment without parole, and that counsel made a motion for the trial court to allow the jury the optional sentence of life imprisonment without parole without his knowledge or consent. Curtis asserts that absent this action on the part of his counsel, there is a reasonable likelihood that the outcome of his trial would have been different.

In addressing this issue, the court below noted that the caselaw set forth in *Garland* did not exist at the time of Curtis's trial. Accordingly, the court found that given the state of the law at the time of Curtis's trial, counsel's performance was reasonable considering the circumstances of the case. The trial court also found that counsel did in fact obtain Curtis's consent in this matter.

The Commonwealth argues, and we believe correctly in this instance, that there is no legal requirement for counsel to be omniscient, or to comply with a standard set forth in caselaw rendered three years following the trial. As was clearly set forth in *Strickland*, counsel's performance must fall below an objective standard of reasonableness considering all of the circumstances of the case *at the time of trial*. At the time of trial, KRS 446.110 required that the application of the mitigating provisions by the trial court be with the consent of the defendant. A review of the record indicates that a motion was made by counsel, and instructions

were submitted accordingly. We believe this to have satisfied the unqualified consent provision. *See St. Clair v. Commonwealth,*[3] 140 S.W.3d 510 (Ky. 2004), and *Furnish v. Commonwealth,*[4] 95 S.W.3d 34 (Ky. 2002). Accordingly, we affirm the trial court's ruling on this issue.

As his fourth basis for appeal, Curtis argues that his trial counsel was ineffective in handling his request for a speedy trial under the IAD. Specifically, Curtis asserts that trial counsel was ineffective in handling the IAD time limitations because he did not set a trial date at the February 1996 hearing, and because he assented to the trial court's request for abatement of his discovery motion.

While Curtis acknowledges that this issue is one which he raised on direct appeal, he argues that he is not barred from raising this issue now because his trial counsel who allegedly committed the error also represented Curtis in his interlocutory appeal of the IAD issue to the Kentucky Supreme Court. Essentially, Curtis argues that one could not expect counsel to raise his own actions at trial as error.

Further, Curtis argues that regardless of the Supreme Court's ruling on the IAD issue, he was extremely prejudiced by his trial counsel's ineffectiveness in handling that matter. Curtis directs this Court's attention to

[3] In *St. Clair*, our Kentucky Supreme Court addressed a motion to apply the same changes, finding it to be sufficient for the court to apply the changes, and specifically rejecting the argument that the defendant's consent needed to be "personal," i.e. direct from the defendant.

[4] In *Furnish*, our Kentucky Supreme Court held that a motion satisfied that unqualified consent provision.

testimony from defense counsel Steve Mirkin, Karen Maurer, and Shelia Seadler establishing that they believed a mistake occurred in their dealing with the IAD time limitation. At the evidentiary hearing in this matter, Mirkin testified via deposition that it was his fault that a trial date was not set, due to his assent to the trial court's inquiry as to whether he agreed to "abate" defense counsel's discovery motion. Seadler apparently also testified that she believed she probably told Curtis to file an RCr 11.42 motion against herself and Mirkin with respect to how they handled the IAD issue both in pretrial and on interlocutory appeal. Further, Seadler and Maurer testified that Curtis was substantially prejudiced by counsel's mistake, and that they believe the charges would have been dismissed with prejudice had the IAD issue been dealt with properly. Accordingly, Curtis argues that but for counsel's allegedly ineffective assistance, the result of the trial was reasonably likely to have been different.

In response, the Commonwealth asserts that counsel was not ineffective in agreeing to abate Curtis's discovery motion suspending the running of time under the IAD. The Commonwealth argues that state courts have consistently held that an RCr 11.42 procedure is not a substitute for appeal, nor does it permit a review of trial errors. *See Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1998); and *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997). Thus, the Commonwealth argues that the Supreme Court's finding pretrial that there was no violation of the IAD is the law of the case, which should put this issue to rest.

In response, while Curtis concedes RCr 11.42 is not normally to be used as a vehicle for trial errors, he cites the decision of the Court of Appeals for the Sixth Circuit in *Hicks v. Collins*, 384 F.3d 204, 211 (6th Cir. 2004), in support of the argument that if the same counsel represented the defendant at trial and on direct appeal, claims of ineffective assistance of counsel are not procedurally barred because appellate counsel will rarely assert his own ineffectiveness at trial.

Regardless of Curtis's arguments in this regard, the Commonwealth asserts that even if we were to find that the Supreme Court's ruling was not the law of the case in this instance, we should be persuaded by the decision of our United States Supreme Court in *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). In *Hill*, the Court held that counsel can delay waiving an IAD claim even without the defendant's assent, noting that "scheduling matters are plainly among those for which agreement by counsel generally controls." *Hill*, 528 U.S. at 110, 120 S.Ct. at 662.

Finally, the Commonwealth argues that Curtis's claim of prejudice in this regard is purely speculative. The Commonwealth notes that at the hearing, Curtis testified that he was prejudiced because the abatement precluded dismissal under the IAD. However, the Commonwealth states that no evidence exists to establish that the case could not have been scheduled for trial within the time limits of the IAD. Indeed, the Commonwealth states that to the contrary, Seadler testified that Curtis would have been timely tried if so ordered.

Having reviewed the record, we are of the opinion that our Kentucky Supreme Court adequately addressed this issue at the time of the interlocutory appeal. While counsel may have represented Curtis during the interlocutory appeal, he makes no specific argument as to how counsel's appellate assistance was ineffective, other than to cite to counsel's admission that she may have instructed Curtis to file a motion under RCr 11.42. This alone, absent any other basis for asserting ineffective assistance is an insufficient basis to support the ruling that Curtis requests. This Court is of the opinion that the Supreme Court adequately addressed the substantive merits of the IAD issue in its prior ruling, and that ruling will not now be disturbed by this Court. Accordingly, we affirm.

As his fifth basis for appeal, Curtis asserts that his counsel was ineffective in failing to obtain an independent firearms expert during trial. Curtis asserts that an independent firearms expert was essential to assist his counsel in presenting his defense. He notes that the alleged murder weapon in this case was never located, and that the Commonwealth placed great emphasis on the bullets removed from Patrick's body.

Curtis concedes that the Commonwealth presented testimony from only one of its two KSP firearms examiners, Miles Parks. Curtis presented testimony from the other KSP examiner, Ronnie Freels, but asserts that neither Parks nor Freels testified as to the "groove impression" of the two bullets allegedly removed from Patrick's body, or with respect to his assertion that the second bullet weighed 1.2 grains greater than the first bullet. Curtis asserts that it was necessary

to have an independent firearms examiner address these issues, and that counsel's failure to obtain an independent expert was reasonably likely to have affected the outcome of his trial.

In addressing this issue, the court below noted that in fact, Curtis's trial counsel did utilize the conflicting statements of the Commonwealth's two ballistics experts, and that no proof existed to establish that any other expert would have disagreed with any of the conclusions set forth by either of the experts called. Indeed, as the Commonwealth correctly notes, Curtis offered no proof at the evidentiary hearing that any other expert would have disagreed with the conclusions of Parks or Freels, or would have been more persuasive to the extent that it would have been reasonably likely to affect the outcome of the trial.

A review of the record reveals that Freels, in contradiction to Parks, believed that any one of three guns could have fired the bullets at issue. Curtis's counsel elicited that testimony, in contrast to the testimony that the Commonwealth elicited from Parks concerning his belief that the gun could only have been a .38 Smith & Wesson. As Curtis has offered no proof that any other expert would testify differently than the two experts who have already submitted an opinion in this matter, we cannot find that counsel's failure to call an additional expert was reasonably likely to affect the outcome of the trial. Accordingly, we affirm.

As his sixth basis for appeal, Curtis asserts that counsel was ineffective in failing to object to purportedly false or perjured testimony from the

Commonwealth's witnesses. Specifically, Curtis asserts that Commonwealth witnesses Alpha Patrick,[5] Laura Shaw,[6] and Billy Gootee[7] provided false or perjured testimony, and that Curtis asked his defense counsel to object to or correct that testimony, but that counsel would not, even though Curtis asserts that counsel knew certain of these statements were false.

Curtis relies upon *Olden v. Kentucky*, 488 U.S. 227, 233, 109 S.Ct. 480, 483, 102 L.Ed.2d (1988), in support of his argument that failure to effectively cross-examine a witness whose testimony played a central and crucial role in the defendant's prosecution is prejudicial error that is not harmless beyond a reasonable doubt. Accordingly, Curtis asserts that because of counsel's failure to object and correct the testimony, he suffered substantial prejudice in the eyes of the jurors, and if not for those errors, the result of his trial would have been different.

In response, the Commonwealth asserts that there was no credible proof at the hearing that any witness gave perjured testimony, or that the testimony was of such weight or import to create a reasonable probability that but for counsel's errors, the result of the trial would have been different. Regardless, the Commonwealth asserts that an objection would have had no practical effect, as the

[5] Curtis asserts that Alpha Patrick offered false or damaging testimony that: (1) Curtis was stealing or embezzling from Patrick's business; (2) Curtis and Patrick met in prison; and (3) Patrick went missing after the Patricks decided to end their relationship with Curtis.

[6] Curtis asserts that Laura Shaw offered false and damaging testimony that: (1) She was working at the Country Store on the night of Patrick's disappearance; and (2) Curtis called her at the Country Store on April 7, 1991, at approximately 1:00 to 1:30 a.m. and allegedly told her that he had just returned from a quick trip to Nashville.

[7] Curtis asserts that Billy Gootee offered false and damaging testimony that he was not a convicted felon.

testimony was given under oath, and it was for the jury to determine its truthfulness or lack thereof.

Having reviewed the record, we must affirm the trial court on this issue. Our review reveals no evidence, aside from Curtis's own assertions, that counsel was aware that the testimony at trial was perjured, which is requisite before the precedent cited by Curtis becomes applicable. Absent such evidence, the manner in which counsel did or did not choose to cross-examine the witnesses on various issues is a matter left to the discretion of counsel in forming a reasonable trial strategy, and is not for this Court to second-guess in hindsight. Accordingly, we affirm.

As his seventh basis for appeal, Curtis asserts counsel was ineffective in failing to call Ricky Adler to the stand in his defense. Curtis argues that he has a due process right to call witnesses, including Adler, on his own behalf. *See Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d (1973). Curtis submits that Adler had knowledge of prior instances where Billy Gootee had stolen from Curtis and other individuals in Greenville. Curtis argues that Adler's testimony was necessary for the jury to have assessed the proper weight to be given to Gootee's testimony. Accordingly, Curtis argues that counsel's alleged ineffectiveness in this regard was reasonably likely to have affected the outcome of his trial. In the deposition which he provided in this matter, trial counsel testified that his decision not to call Adler was trial strategy.

In response, the Commonwealth notes that trial counsel, in his deposition in this matter, testified that the decision not to call Adler was trial strategy. The Commonwealth asserts that as Curtis provided no testimony from Adler at the evidentiary hearing which would have established what he would likely have testified to at trial, there is no support for the assertion that trial counsel made an erroneous decision in choosing not to call Adler to testify.

In the matter *sub judice*, we are compelled to agree with the trial court and the Commonwealth on this issue. As our Kentucky Supreme Court has made clear, decisions relating to witness selection are normally left to the judgment of counsel, and will not be second-guessed by hindsight. *See Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000)(*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). Thus, the movant arguing ineffective assistance of counsel has the burden of stating what the testimony of the witness would have been, and how this testimony would have changed the reliability of the verdict. *Foley,* 17 S.W.3d at 878. As our United States Supreme Court has ruled, the movant must overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland, supra,* at 690.

In the matter *sub judice*, Curtis failed to provide testimony, or any other type of evidence during the course of the evidentiary hearing which would have established Adler's purported testimony, or the effect it would have had on the verdict. Accordingly, we affirm.

As his eighth basis for appeal, Curtis asserts that counsel was ineffective in failing to offer a defense to the penalty phase aggravators. He asserts that the jury, when deliberating his sentence had only the Commonwealth's theory that Curtis either killed Patrick during a robbery, or else that Curtis killed Patrick for profit. He argues that counsel did not investigate or offer any additional defense to the penalty phase aggravators other than what was presented at trial, and that this was reasonably likely to have affected the outcome of his trial.

In response, the Commonwealth notes that counsel offered a defense of actual innocence to the murder charge throughout the trial, and that this defense did not change during the penalty phase. Thus, the Commonwealth asserts that Curtis's proof at the hearing was insufficient to establish that counsel was ineffective in otherwise purportedly failing to prepare a defense to the aggravators during the penalty phase, or in failing to inform the jury that other people possessed a motive to do harm to Patrick.

Upon review, we are in agreement with the Commonwealth and the trial court. While Curtis asserts that the jury had only the Commonwealth's theories that Curtis killed Patrick for profit or that he killed him during the course of a robbery, Curtis neglects the theory and defense set forth by his counsel throughout the course of the trial – that of his own purported innocence. Certainly, that defense would be incongruous with any additional defense that Curtis' counsel could have offered to the penalty phase aggravators. Accordingly, we do not find counsel ineffective on this ground, and we affirm.

As his ninth basis for appeal, Curtis argues that counsel was ineffective in failing to inform the jury that other people possessed a motive to do harm to Patrick. Specifically, Curtis asserts that the jury was not made aware of all of the facts concerning Teresa Ross's motives to harm Patrick. Curtis submits that counsel was ineffective in not calling Ross as a witness at trial, and in not questioning her about her disputes and affair with Patrick. Curtis argued that this alleged ineffectiveness on the part of his counsel was reasonably likely to have affected the outcome of his trial.

In response, the Commonwealth asserts that Curtis's arguments in this regard are rebutted by the proof actually offered at trial and unsupported by anything at the hearing aside from Curtis's testimony as to what he perceived was lacking. The Commonwealth argues that there was an abundant amount of evidence presented as to Teresa Ross, most notably by Jim Barr, her former husband, who testified as to her stormy relationship with Patrick, their past business relationship, that there was "bad blood" between them, that she was a convicted felon, and that she became "hysterical" after being interviewed by the Nashville Police regarding Patrick's disappearance.

Having reviewed the record, we are of the opinion that ample evidence was introduced concerning other individuals, including Ross, whom Curtis believed had a motive to commit this crime. Indeed, this testimony came not only from Patrick's wife and from Detective Bradley, but also from Ross's ex-husband himself. During the course of the evidentiary hearing in this matter,

Curtis offered no evidence as to what, if any, testimony was lacking with respect to Ross, in light of all of the information introduced at trial. Believing the evidence to be more than sufficient in this regard, we affirm.

In addition to the foregoing reasons which Curtis asserts that his counsel was ineffective, Curtis also argues that the cumulative effect of counsel's errors denied him a fair trial. Having affirmed on each individual issue, it follows that we must also affirm collectively, and deny Curtis's motion in this regard as well.

In addition to asserting that his counsel was ineffective, Curtis also argues on appeal that the trial court committed reversible error when it denied his motion to recuse Judge Steve A. Wilson. Curtis asserts that Wilson should have recused himself as he was the Commonwealth's Attorney in Warren County at the time that his case was tried. While Curtis concedes that Wilson did not prosecute his case, nor did his investigator assist in selecting the jury, Curtis nevertheless states that Wilson made his office space and personnel available to the Attorney General's office that did try the case. Accordingly, Curtis submits that Judge Wilson was made privy to information related to his case which created a bias and antagonism against him.

As a result, Curtis asserts that Judge Wilson had a bias and impartiality which was severely prejudicial to his case. Thus, Curtis asserts that a substantial possibility exists that his RCr 11.42 motion would have been granted had Judge Wilson not been presiding.

In response, the Commonwealth notes that Curtis's case did not originate in the Warren Circuit Court, and was tried by a special prosecutor from the Office of the Attorney General. The Commonwealth asserts that there is no evidence that Wilson even shared his office with the Attorney General in this case.

In reviewing Curtis's arguments in this regard, we note that issues relating to the recusal and appointment of a judge are reviewed for palpable error. A palpable error is one, in which upon consideration of the case as a whole, the reviewing court concludes that a substantial possibility exists that the result would have been different without the error. *See Johnson v. Commonwealth*, 180 S.W.3d 494, 498 (Ky. App. 2005).

Upon our review of the record, we can find no evidence that Judge Wilson had any prior information about the facts of this case, aside from what he obtained as a sitting judge hearing this case. The fact that Wilson's extra office space may have been made available for use certainly does not in and of itself indicate that Wilson personally had any knowledge of the facts of the case. Certainly, a motion for recusal of a trial judge must contain facts showing legal bias or other disqualification on the part of a judge. Mere rumor and speculation are wholly insufficient to prove bias. *See Com. Ex. Rel. Cooper v. Howard*, 276 Ky. 299, 124 S.W.2d 86 (Ky. 1939).

As KRS 26A.015 makes clear, any justice or judge shall disqualify himself from any proceeding wherein he had personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the

proceedings, or where he has expressed an opinion concerning the merits of the proceeding. In this case, Curtis has failed to show that Judge Wilson met any of these criteria, and our review of the record reveals no evidence that he had any personal knowledge of anything related to the case prior to taking the bench. Accordingly, we affirm the trial court in this regard.

In addition to arguing error in denying the motion to recuse, Curtis also argues that the trial court committed reversible error by abusing its discretion in denying Curtis's motion to allow additional proof for his RCr 11.42. Specifically, Curtis asserts that both Alpha Patrick and Laura Shaw gave perjured testimony. Accordingly, he argues that additional proof needs to be taken from both of those witnesses to support the allegations set forth in his RCr 11.42 motion.

In reliance upon *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky. 1999), Curtis asserts that the introduction of perjured testimony is to be treated as newly discovered evidence, and further, pursuant to *Commonwealth v. Harris*, 250 S.W.3d 637, 640-41 (Ky. 2008), that the determination as to whether newly discovered evidence warrants an evidentiary hearing lies within the discretion of the trial court, to be overturned only upon a determination that such discretion has been abused.

Further, Curtis argues that an additional hearing is necessary to question trial counsel Mirkin concerning the testimony produced at the evidentiary hearing, as his deposition was taken before the hearing took place, and before the perjured testimony of Patrick and Shaw. Accordingly, Curtis asserts that the trial

court abused its discretion in not granting him an additional evidentiary hearing, and argues that if the court had done so, it would likely have granted his RCr 11.42 motion.

In response, the Commonwealth argues that Shaw, Patrick, and Mirkin have all already testified in the course of these proceedings, and that except for the fact that Mirkin testified prior to the other witnesses by deposition, Curtis offers no reason why they should be made to submit to additional questioning. As to the testimony of Mirkin, the Commonwealth asserts that there is no reason why it is necessary now to question him regarding the trial testimony of Patrick and Shaw, because issues as to whether their testimony was objectionable as perjury was a question that could have been addressed during his deposition based upon the trial transcripts.

The Commonwealth argues that the trial court did not exceed its discretion because (1) as set forth in *Blankenship v. Commonwealth*, 740 S.W.2d 164, 168 (Ky. App. 1987), the trial court is vested with wide discretion in determining whether to reopen a case so that a party may adduce new evidence, and (2) there was no abuse of discretion in the matter *sub judice* as Curtis had over two years from the filing of his motion to the hearing to prepare his proof. Further, the Commonwealth states that it is unknown at this time what testimony or questioning is needed with respect to these three witnesses, and that RCr 11.42 proceedings are for *known* grievances and not fishing expeditions. *See Mills v.*

Commonwealth, 170 S.W.3d 310 (Ky. 2005)(*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Upon review, we are in agreement with the Commonwealth that the trial court did not abuse its discretion in this regard. As the Commonwealth has correctly stated, it is within the discretion of the trial court to determine whether or not to reopen a case. In this case, particularly in light of the fact that Curtis has produced no evidence as to what additional testimony or questioning from these witnesses is needed, we cannot find that the trial court abused its discretion in denying his motion in this regard. Accordingly, we affirm.

As his final basis for appeal to this Court, Curtis argues that the trial court committed reversible error and abused its discretion in denying his motion to amend the RCr 11.42 to include a claim of ineffective assistance of counsel for failing to introduce a soil sample report into evidence at trial. Curtis argues that counsel was ineffective in failing to introduce a February 2000 sample report which was prepared during the course of his trial.

Curtis asserts that he became aware of this report after his RCr 11.42 motion was filed with the trial court on September 26, 2005, and after going through boxes of legal materials on his case. Further, Curtis concedes this issue was addressed during Mirkin's August 2007 deposition, and at the evidentiary hearing on November 1, 2007.

Curtis argues that this report would have refuted the prosecutor's arguments at trial concerning the use of two "mud covered" shovels which it

asserts were used in the burial of Patrick's body. Curtis asserts that as a result, his defense was substantially prejudiced, and the outcome of his trial was likely affected.

In response, the Commonwealth argues that Curtis admitted in his motion that the report had been provided to him by counsel prior to the filing of his RCr 11.42 motion, and that RCr 11.42(3) specifically requires that the original motion state all grounds for holding the sentence invalid of which the movant has knowledge. The Commonwealth asserts that there is no reason why the claim with respect to expert testimony concerning the soil analysis could not have been included in the original hearing, and that as Curtis addressed the issue in the August 2007 deposition of Mirkin, the information was readily available. Accordingly, the Commonwealth asserts that as good cause was not shown as to why the motion to amend should have been allowed *after* the conclusion of proof, the court did not abuse its discretion in denying the motion.

In addressing this issue, we note that a trial court's ruling on a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion. *See Bowling v. Commonwealth*, 981 S.W. 2d 545, 548 (Ky. 1998). The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

With respect to this issue, we again affirm. Curtis himself concedes that the soil sample survey was included in the box of legal materials which he was

reviewing. Curtis had access to pertinent materials and information concerning his case; the fact that he did not discover the information until he decided to search more thoroughly through his materials does not in and of itself suffice as a basis to amend his RCr 11.42 motion *after* the evidentiary hearing. Having the materials either in his possession or available for his inspection from the date of his conviction onward is, in the opinion of this Court, constructive, if not actual knowledge.

Certainly, Curtis could have discovered this report through the exercise of due diligence prior to the filing of his RCr 11.42 motion, as required by the rule. Accordingly, we cannot find that the trial court abused its discretion in denying Curtis's motion to amend his RCr 11.42 motion post-hearing to include this report, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the October 20, 2008, order of the Warren Circuit Court overruling Curtis's RCr 11.42 motion, the Honorable Steve Alan Wilson, presiding.

ALL CONCUR.

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