

RENDERED: SEPTEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001705-MR

JOEL DAN WILSON

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NOS. 06-CR-00249 & 06-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

KELLER, JUDGE: Joel Dan Wilson (Wilson) appeals from an order of the Russell Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. For the following reasons, we reverse and remand.

FACTS

Having reviewed the record, we adopt the following facts as stated in this Court's opinion on Wilson's direct appeal:¹

On August 16, 2006, Middlesboro Police Officer Kevin Goodin observed Wilson back out of a residence, squealing and spinning his tires and Officer Goodin initiated a traffic stop. Upon approaching Wilson's vehicle, Officer Goodin smelled alcohol. Officer Goodin gave Wilson several field sobriety tests, only one of which he passed, and a preliminary breath test (PBT) which registered the presence of alcohol in Wilson's system. After arresting Wilson for DUI, Officers Goodwin and Greene searched Wilson's car. Officer Greene found a plastic bag which contained syringes and a burned spoon with a white powdery residue later confirmed to be cocaine. Wilson was taken to the hospital where he refused blood and urine testing.

Wilson was indicted by the Bell County Grand Jury for operating a motor vehicle with a revoked or suspended license and expired registration, failure to maintain insurance, first degree possession of controlled substance, possession of drug paraphernalia, DUI, third offense, careless driving, and in a separate indictment, being a second degree persistent felony offender (PFO).

Wilson was convicted by a jury of first degree possession of a controlled substance, DUI, third offense, operating a motor vehicle without a license, and being a second degree PFO.

On August 10, 2009, Wilson filed an RCr 11.42 motion to vacate his judgment and sentence on grounds of ineffective assistance of counsel. Without holding an evidentiary hearing, the trial court entered an order on August 25, 2009, denying Wilson's motion. It is from this order that Wilson appeals.

¹ *Wilson v. Commonwealth*, 2007-CA-001309-MR, 2009 WL 960750 (Ky. App. Apr. 10, 2009).

STANDARD OF REVIEW

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *see also Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690, 104 S. Ct. at 2066.

There is no automatic entitlement to an evidentiary hearing with regard to an RCr 11.42 motion. Rather, a hearing is required only if there is an "issue of fact that cannot be determined on the face of the record." RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Furthermore, "[w]here the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (*citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)).

ANALYSIS

On appeal, Wilson argues that he received ineffective assistance of counsel because his counsel (1) failed to investigate and call witnesses on his behalf; (2) advised him not to testify; and (3) failed to present mitigating evidence during the penalty phase. Wilson also argues that the cumulative errors of trial counsel warrant reversal. Additionally, Wilson argues that he was entitled to an evidentiary hearing because he alleged material issues of fact which cannot be conclusively resolved by the record. We address each issue in turn.

1. Failure to Investigate and Call Witnesses

Wilson first contends that he received ineffective assistance of counsel because his counsel failed to investigate and call witnesses, thereby depriving him of any defense to the charge of first-degree possession of a controlled substance. KRS 218A.1415(1) provides that “[a] person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses” a number of listed substances, including cocaine. As the driver of the vehicle, Wilson constructively possessed the controlled substance. *See Leavell v. Commonwealth*, 737 S.W.2d 695, 697 (Ky. 1987) (concluding that contraband concealed in a motor vehicle is constructively possessed by the person with dominion or control over the vehicle). However, it appears that Wilson is arguing that his counsel failed to put on any defense as to whether he knowingly possessed the cocaine found in his vehicle.

In support of his argument, Wilson contends that his counsel failed to call him as a witness. Wilson alleges that he would have testified that the plastic bag,

syringes, spoon, and cocaine were not his. Moreover, Wilson alleges that he would have testified that he let April Vanover (Vanover) borrow his car two and a half hours prior to his arrest.

Wilson also argues that his counsel failed to call Barbra Kist (Kist) as a witness. According to Wilson, Kist was present at his trial and expected to testify. Wilson alleges that Kist was prepared to testify that Vanover borrowed Wilson's car that morning, and that she had to assist Vanover when she ran out of gas while driving Wilson's car. Additionally, Kist would have testified that Vanover had a history of drug abuse. Furthermore, Wilson argues that his counsel failed to investigate and call Vanover as a witness. Wilson contends that, even if Vanover did not take responsibility for the bag containing the needles, spoon, and cocaine, counsel could have called Vanover as a witness to testify that she did borrow his vehicle earlier that day.

In this case, the record does not conclusively establish whether Wilson's counsel conducted an investigation. Furthermore, the record does not establish whether counsel's failure to call Wilson, Kist, and Vanover as witnesses was part of a strategic plan. Generally, decisions regarding witness selection are left to defense counsel's judgment, and this Court will not second-guess counsel's trial strategy. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). Because it is not refuted by the record, we conclude that an evidentiary hearing must be held to determine whether counsel's decision was "trial strategy or an abdication of

advocacy.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 345 (Ky. 2001). If the decision was tactical, it is given “a strong presumption of correctness and the inquiry is generally at an end.” *Id.* at 344 (quoting *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)). “[I]f the decision was not tactical, then the court must evaluate whether there was a reasonable probability that, but for the deficiency, the result would have been different.” *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007).

2. Advising Wilson Not to Testify

Wilson next argues that he received ineffective assistance of counsel because his counsel advised him not to testify. According to Wilson, he was insistent on testifying but his counsel deprived him of that right. The Commonwealth argues that, based on Wilson’s lengthy criminal history, advising Wilson not to testify was reasonable trial strategy.

Although we agree with the Commonwealth that advising Wilson not to testify might be part of trial counsel’s strategic plan, we cannot determine that from the record. Thus, we agree with Wilson that he was entitled to an evidentiary hearing on this issue.

3. Failure to Present Mitigating Evidence During Penalty Phase

Next, Wilson argues that his counsel was ineffective for failing to present witnesses during the penalty phase of the trial. Specifically, he contends that his son would have testified that Wilson was a good dad, a good son to his father, and was trying to get off drugs. Wilson also alleges that Kist and her sister, Sue

Martin, were willing to testify that Wilson had been taking steps to overcome his drug addiction. Further, Wilson asserts that he would have testified that he was taking steps to address his drug problem. Again, whether counsel's failure to introduce mitigating evidence was trial strategy cannot be determined from the record. Thus, Wilson was entitled to an evidentiary hearing on this issue as well. *See Hodge*, 68 S.W.3d at 344-45.

4. Cumulative Errors

Finally, Wilson argues that the cumulative errors of trial counsel warrant reversal. It is not appropriate for this Court to decide the validity of this argument in light of our reversal for an evidentiary hearing. As such, we decline to address this argument.

CONCLUSION

The alleged failure to investigate and call witnesses, and the decision against allowing Wilson to testify on his own behalf may very well have been sound trial strategy. However, for the foregoing reasons, the order of the Bell Circuit Court denying Wilson's motion for post-conviction relief pursuant to RCr 11.42 is reversed and the matter is remanded for an evidentiary hearing.

ALL CONCUR.

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