

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001313-MR

COLEY BROWN

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAM WRIGHT, JUDGE
ACTION NO. 04-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

NICKELL, JUDGE: Coley Brown, *pro se*, has appealed from the Letcher Circuit Court's denial of his motion for post-conviction relief pursuant to RCr² 11.42. For the following reasons, we affirm.

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

² Kentucky Rules of Criminal Procedure.

Brown was indicted by a Letcher County grand jury for assault in the second degree,³ robbery in the first degree,⁴ and being a persistent felony offender in the second degree (PFO II).⁵ The indictment charged Brown with striking and threatening to kill Collin Roberts with a lug wrench while in the process of robbing Roberts. Following a jury trial, Brown was convicted on all counts and the trial court imposed enhanced sentences of twenty years on the assault and thirty years on the robbery to be run consecutively for a total sentence of fifty years' imprisonment, in conformity with the jury's recommendation. The Supreme Court of Kentucky affirmed the conviction on direct appeal in an unpublished opinion.⁶

Brown filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42 and requested appointment of counsel. The trial court appointed counsel and scheduled an evidentiary hearing. At the conclusion of the hearing, the trial court made oral findings of fact and denied the motion. A written order was subsequently entered comporting with the earlier oral findings. This appeal followed.

The standard of review for denial of an RCr 11.42 motion is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must prove two prongs: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *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), *cert.*

³ KRS 508.020, a Class C felony.

⁴ KRS 515.020, a Class B felony.

⁵ KRS 532.080(2).

⁶ *Brown v. Commonwealth*, No. 2005-SC-0577-MR, 2006 WL 2987084 (October 19, 2006).

denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard of attorney performance is reasonable, effective assistance. The defendant bears the burden of proof in showing his counsel's representation fell below an objective standard of reasonableness and must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969). The defendant also bears the burden of overcoming "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citations and internal quotation marks omitted). As an evidentiary hearing was held, we must determine whether the trial court erroneously found Brown received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). However, we are required to "defer to the determination of the facts and witness credibility made by the trial judge. (citations omitted)." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 158-59 (Ky. 2009).

Brown contends the trial court erred in finding his counsel was not ineffective. He argues his counsel failed to: 1) impeach one of the Commonwealth's witnesses; 2) communicate the Commonwealth's offer on a guilty plea; 3) conduct a proper investigation of the evidence introduced at trial; and 4) object to inflammatory and prejudicial testimony from the victim as to Brown's criminal history. He also argues his post-conviction counsel was ineffective in failing to fully address these issues during the evidentiary hearing. For the sake of clarity, we will discuss each of these issues separately.

First, we will address Brown's contentions regarding his perceived deficiencies of his post-conviction counsel. This issue is wholly unpreserved as it was not presented to the trial court, and absent a palpable error affecting Brown's rights, the issue is not reviewable on appeal. *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998) (citing *Todd v. Commonwealth*, 716 S.W.2d 242 (Ky. 1986)). Furthermore, because there is no constitutional right to counsel in post-conviction proceedings, a claim of constitutionally ineffective post-judgment counsel cannot be maintained. *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991), and citing *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)).

Second, Brown argues his counsel was ineffective for failing to adequately cross-examine and impeach Deputy Sheriff Shane Amburgey's testimony regarding the vehicle used in the course of the crime and the ownership of same. The victim of the crime testified Brown was driving a green sedan on the night of the attack and Brown had indicated he had recently purchased the vehicle but had not yet transferred title to his name. Deputy Amburgey later testified that Brown's former spouse, "Melissa Johnson," owned a green sedan. On cross-examination, trial counsel was able to elicit an admission from the deputy that he had not examined any marriage records indicating Brown had ever been married to a woman by the name of "Melissa Johnson" or any ownership records indicating this woman actually owned a green car. Trial counsel presented testimony from another witness that, to the best of his knowledge, Brown had never owned a green

car. Trial counsel commented on these facts during closing argument. Brown contends trial counsel's efforts to undermine the deputy's testimony were insufficient and amounted to constitutionally ineffective assistance. We disagree.

As the trial court correctly found, the scope of impeachment regarding the ownership of the green car was well within counsel's discretion in formulating a trial strategy. Whether Brown owned a green sedan or was ever married to a woman who did are collateral to the main issue presented to the jury. Nevertheless, trial counsel's decision on how to address this collateral matter was discretionary. The victim identified Brown as one of the perpetrators, as did an eyewitness. Trial counsel attacked the credibility of both of these witnesses and their identifications. The victim's testimony indicated Brown had recently purchased the vehicle he was driving that evening and that the title had not been transferred. Trial counsel likewise attacked this testimony. Further, trial counsel attacked the deputy's credibility and the scope of his investigation, or lack thereof, into the ownership of the vehicle. Trial counsel commented at length on these issues during closing arguments. Brown has presented nothing to indicate counsel's actions were anything but sound trial strategy or how the outcome of his trial would have differed had counsel undertaken a different strategy. The record contains no evidence that counsel's actions fell outside the range of professionally competent assistance. Thus, as Brown has failed to meet his burden under either prong of *Strickland*—deficiency or prejudice—we hold the trial court correctly found counsel was not ineffective in its handling of this issue.

Third, Brown argues his counsel was ineffective because he failed to communicate a plea offer to Brown. Counsel's failure to bring the offer to Brown, if proven, would satisfy the deficient performance prong of the *Strickland* test. Brown has not proven such a failure. At the evidentiary hearing, trial counsel testified he had, in fact, communicated the offer to Brown and that Brown had rejected the deal. Brown testified to the contrary. The trial court found counsel's testimony more credible and rejected Brown's contention. As earlier stated, we are required to defer to the determinations of the trial court on witness credibility. *Haight*. Brown has failed to show the trial court's determination of credibility was clearly erroneous, and therefore we will not disturb the trial court's judgment on appeal. CR 52.01.

Fourth, Brown argues his counsel failed to pursue potentially exculpatory evidence in that he did not properly investigate certain pieces of physical evidence produced at the trial, more specifically, the lug wrench and a hat recovered from the crime scene. Brown alleges his counsel's failure to have these items tested for DNA, fingerprint, or other trace evidence was prejudicial to his defense and constituted ineffective assistance. This is a wholly different argument than that presented to the trial court. In his RCr 11.42 motion and the hearing thereon, Brown's argument centered on the authenticity and the chain of custody of the lug wrench. It is well-settled that this Court will not undertake review of an issue or argument which is raised for the first time on appeal because an appellant "will not be permitted to feed one can of worms to the trial judge and another to

the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Finally, Brown contends his counsel was ineffective in failing to object to the victim’s testimony regarding Brown’s criminal history. He contends this testimony constituted hearsay and improper “bad acts” testimony under KRE⁷ 404(b). We disagree. The testimony elicited cannot be said to be hearsay as the victim was merely recounting statements Brown himself made, and the plain language of KRE 801A(b) clearly indicates statements and admissions of parties are not excluded by the hearsay rule. Thus, any objection on hearsay grounds would have been meritless and trial counsel cannot be said to have been ineffective for failing to raise a futile objection. Further, KRE 404(b) prohibits the admission of evidence of prior bad acts or wrongs “to prove the character of a person in order to show action in conformity therewith.” The rule continues to state that such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” There is no argument that the statements of the victim were admitted for the truth of the matter asserted, but rather to show the mental state of the victim on the night of the attack and the intimidation inflicted upon him by Brown, and to show Brown’s intent and planning prior to the attack. Thus, any objection to these statements on KRE 404(b) grounds would also have been futile.

⁷ Kentucky Rules of Evidence.

Thus, as Brown has again failed to carry his burden of proof under *Strickland*, we hold the trial court was correct in ruling his counsel was not ineffective.

For the foregoing reasons, the order of the Letcher Circuit Court denying Brown's RCr 11.42 motion for post-conviction relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Coley Brown, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

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