

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001323-MR

WILLIAM E. SLATER

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: William E. Slater appeals from the denial of his RCr 11.42 motion to vacate, set aside or correct a sentence of 10 years in prison arising from a conviction on one count of trafficking in a controlled substance. Slater argues that his trial counsel's failure to object to improper testimony and failure to investigate

¹ Senior Judge Joseph E. Lambert 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.

potentially exculpatory witnesses constituted ineffective assistance, and that the Mason Circuit Court improperly failed to conduct a hearing on the motion. Slater has not demonstrated that his counsel's assistance was ineffective or that he was entitled to a hearing on the motion, and accordingly we affirm the Order on appeal.

On June 17, 2005, Detective Tim Fagan of the Buffalo Trace Gateway Narcotics Task Force conducted video and visual surveillance of suspected drug sales from a concealed location on Fourth Street in Maysville, Kentucky. The section of Fourth Street was known for drug activity. Fagan observed Slater conduct a hand-to-hand transaction with a female, and also observed him approach passenger cars and lean into the window. In addition, Fagan observed Slater go to nearby bushes repeatedly to retrieve something before walking back to the street. At one point, Slater was observed untying a plastic baggy and being surrounded by several males. As one of the males was walking away, the individual transferred something from his hand into a cigarette pack. Slater was later observed going back to the bushes and was observed counting his money.

Detective Fagan and other task force members directed several of the individuals, including Slater, to the same bushes where Slater had earlier been observed making repeated trips. The officers found a brown bag that contained a large plastic bag containing a quantity of marijuana and several smaller baggies. No other person had been observed in the area of the bushes. The officers then arrested Slater, and he subsequently was indicted by a Mason County grand jury.

The matter proceeded to a jury trial, where Slater testified that he was on Fourth Street for purposes of drinking and gambling. He claimed that he did not sell any marijuana. Slater explained his presence in the bushes by stating that he had hidden some beer by some steps near the bushes so that no one could take it and that he occasionally went to get another beer.

The jury returned a verdict of guilty of Trafficking in a Controlled Substance Within 1000 Yards of a School. Slater was also found guilty of being a Second-Degree Persistent Felony Offender. The trial court sentenced Slater to five years in prison on the trafficking charge. The sentence was enhanced to ten years based on Slater's persistent felony offender status.

Slater then prosecuted a direct appeal to this Court, which affirmed his conviction. On January 8, 2008, the Department of Public Advocacy ("DPA") filed an RCr 11.42 motion on Slater's behalf which sought to vacate, set aside or correct his sentence. DPA also requested a hearing on the motion. As a basis for the motion, Slater maintained that he did not receive effective assistance of counsel at trial. He argued that his trial counsel improperly failed to object to certain portions of Detective Fagan's testimony in violation of a Mason Circuit Court Order, and that counsel also failed to investigate witnesses who potentially could have provided exculpatory testimony. After considering the motion, the circuit court determined that it could be adjudicated by reference to the record and accordingly the court overruled Slater's request for a hearing. The court went on to deny Slater's motion for relief upon concluding that the issues raised in the

motion were previously raised before and addressed by this Court in Slater's direct appeal. This appeal followed.

Slater now argues that the Mason Circuit Court committed reversible error in denying his RCr 11.42 motion to vacate, set aside or correct his sentence. Slater first contends that his trial counsel failed to provide effective assistance in violation of the Kentucky Constitution and the 6th Amendment to the United States Constitution when counsel did not object to portions of Detective Fagan's testimony at trial. Slater notes that before a surveillance video was shown to the jury which allegedly showed Slater engaging in the unlawful sale of drugs, the Mason Circuit Court rendered an Order limiting Detective Fagan's testimony to what he observed and barring Fagan from offering opinions about his observations. Slater acknowledges that his trial counsel objected to Detective Fagan's first narration of the surveillance video, and that in response to the objection the court admonished the jury to ignore comments made by Fagan identifying persons in the video. Slater argues that the ineffective assistance occurred, however, when Fagan continued to make improper comments about the video and counsel failed to object. Slater notes that Fagan said of another person in the video that "he goes back and retrieves it" and later states, "there's Mr. Slater walking back away from it." Slater points to at least four other comments which Fagan allegedly made to the jury while the video was playing, but which are inaudible on the trial record. He also claims that the surveillance video was two and one-half hours in length, but was shown to the jury in 40 minutes. As such, he argues that by allowing

Fagan to speed through the video in 40 minutes, it is possible that trial counsel “failed to show potentially exculpatory ‘transactions’ between Appellant and a person in a vehicle.” In sum, Slater contends that he did not receive the effective assistance of counsel to which he was entitled, and that the Mason Circuit Court erred in failing to so rule.

We have closely examined the written arguments, the record and the law, and find no basis for reversing the Order on appeal on this issue. As the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel’s performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court 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.

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

In the matter at bar, when focusing on the totality of the evidence before the circuit court and assessing the overall performance of counsel throughout the case, we cannot conclude that Slater’s trial counsel failed to provide effective assistance at trial. Slater’s claim of error is based on his assertion that his trial counsel improperly failed to object to some statements made by Fagan as he

narrated the video, the failure to object to Fagan’s inaudible statements, and counsel’s failure to object to Fagan fast-forwarding through a 2-½ hour video in 40 minutes. We have closely examined the two statements to which Slater directs our attention, and find no basis for concluding that his trial counsel was ineffective for failing to object to those statements. Both statements are properly characterized as descriptive of the events shown on the video rather than being opinion or conclusory. Additionally, we are persuaded by the case law cited by the Commonwealth on this issue, which holds in relevant part that the descriptive commentary of law enforcement personnel is not only beneficial to the jury when viewing a surveillance video, but is “in all likelihood necessary.” *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009). *See also, Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999).

Slater goes on to claim in very broad terms that other statements made by Detective Fagan – to which Slater does not cite – as well as other statements he made which he maintains are inaudible on the video record, serve to form a basis for finding ineffective assistance arising from counsel’s failure to object. We have reviewed the video record of Detective Fagan’s narration of the surveillance video, and find nothing to support Slater’s argument on this issue. It is not enough to merely make a broad claim of ineffective assistance, or to point to statements which *might* be objectionable. Rather, the burden rests with Slater to overcome the strong presumption that his counsel’s assistance was effective and fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

Additionally, Slater must demonstrate that but for the ineffective assistance, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.* at 697. Slater has not met this burden, and accordingly we find no error.

Slater goes on to argue that his counsel was ineffective for failing to contact numerous witnesses that were in and around the area where drugs were found. Slater maintains that he was able to identify several people shown on the surveillance video, and that he told trial counsel that they would testify that he did not possess or sell drugs on the day in question. We are not persuaded by this argument. It is not enough to merely hypothesize as to what various uncalled witnesses would have testified to had they been produced at trial. Decisions relating to witness selection are left to counsel's reasonable judgment, which will not be second-guessed in hindsight. *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)). And again, Slater must demonstrate not only that his counsel was ineffective in calling these witnesses, but that there is a reasonable likelihood that their testimony would have altered the outcome of the proceeding. *Strickland, supra*. He has not met this burden, and we find no error on this issue.

Finally, Slater argues that the circuit court erred in failing to conduct a hearing on his RCr 11.42 motion. He argues that the motion could not be adjudicated by the record because portions of Detective Fagan's testimony were not audible on the trial video. He goes on to assert that "an evidentiary hearing is

needed to determine just what Detective Fagan stated and whether or not trial counsel should have raised an objection to these statements.” The Kentucky Supreme Court has held, however, that an RCr 11.42 movant may not utilize the motion to conduct a fishing expedition for possible grievances. “Thus the stated purpose of [RCr 11.42] . . . is to provide a forum for known grievances, not to provide an opportunity to research for grievances.” *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983). The speculative nature of the hearing sought by Slater is demonstrated by his acknowledgment that an evidentiary hearing may not have revealed statements to which his counsel should have objected. In sum, the claims of ineffective assistance arising from the statements Detective Fagan did make, as well as the allegation that his trial counsel improperly failed to investigate exculpatory witnesses, is refuted by the record and the law. We find no error in the circuit court’s determination that no hearing was warranted.

For the foregoing reasons, we affirm the Order of the Mason Circuit Court denying Slater’s motion for RCr 11.42 relief.

ALL CONCUR.

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