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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001231-MR

JOSEPH FAIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-01344

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

TAYLOR, CHIEF JUDGE: Joseph Fain appeals from an order of the Fayette Circuit Court entered June 24, 2010, denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appellant argues that his motion was improperly denied without an evidentiary hearing. For the reasons stated, we affirm.

FACTS AND PROCEDURAL HISTORY

This Court, in considering appellant's case on direct appeal, summarized the underlying facts of this case as follows:

> On August 8, 2006, the Narcotics Enforcement Unit of the Lexington Police Department organized an undercover "buy and ride" operation. Detective William Goldie drove an undercover vehicle in the area of Whitney Avenue and Ash Street in Lexington, Kentucky. Detective Goldie's vehicle was outfitted with concealed video and audio recorders. In addition, Detective Joseph Eckhart, who was hiding across the street, videotaped Detective Goldie's undercover operation.
>
> Detective Goldie noticed Jaqueda Perry standing on the sidewalk near a cemetery. Perry approached Detective Goldie's vehicle, and the detective asked for a "twenty." Perry turned away from Detective Goldie and walked toward Fain, who was sitting a short distance away. A few moments later, Perry returned to the car with a rock of crack cocaine worth twenty dollars. Detective Goldie completed the transaction and drove away from the area. A few minutes later, narcotics officers arrived in the neighborhood and approached Perry and Fain. Both Fain and Perry matched the physical descriptions relayed over the radio by Detective Goldie. The officers compiled personal information provided by Perry and Fain and then left the area.
>
> A Fayette County Grand Jury indicted Fain on one count of trafficking in a controlled substance first degree, and being a persistent felony offender (PFO) in the first degree.
>
> On April 9, 2007, a jury trial was held. Perry testified she had been at the cemetery "waving people down" to facilitate drug transactions and hoping to get drugs for herself. She also identified Fain as the individual who gave her the crack cocaine she sold to Detective Goldie. Detective Goldie and Detective

> Eckhart both testified, and both officers positively identified Fain as being involved in the transaction. The jury also viewed the surveillance video of the transaction.
>
> The jury found Fain guilty of trafficking in a controlled substance first degree. Fain waived jury sentencing and pled guilty to being a first-degree PFO. The court sentenced him to an enhanced sentence of ten [-] years' imprisonment in accordance with the Commonwealth's recommendation.

Fain v. Com., No. 2007-CA-001029-MR, 2008 WL 746813 (Ky. App. Mar. 21, 2008) (footnote omitted). This Court affirmed appellant's conviction in his direct appeal.

On December 5, 2008, appellant filed a *pro se* motion to vacate judgment pursuant to RCr 11.42 on the grounds that he had received ineffective assistance of counsel at trial. Appointed counsel then filed a supplemental motion. Appellant specifically alleged that his trial counsel was ineffective for: (1) failing to investigate appellant's prior convictions used to support the PFO charge; (2) failing to move for a directed verdict; and (3) failing to investigate and to present testimony from exculpatory witnesses. On June 24, 2010, the circuit court entered an opinion and order denying appellant's RCr 11.42 motion without an evidentiary hearing after finding that appellant's allegations could be resolved – and rejected – on the face of the record. This appeal followed.

STANDARDS OF REVIEW

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-pronged test

to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient that it merits relief from that conviction.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* Ultimately, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Supreme Court of Kentucky adopted the *Strickland* analysis for ineffective assistance of counsel in *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

Because an evidentiary hearing was not conducted in this case, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction" upon application of the *Strickland* standards. *Lewis v. Com.*, 411 S.W.2d 321, 322 (Ky. 1967). RCr 11.42 requires a hearing only "[i]f the answer

raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5); *see also Stanford v. Com.*, 854 S.W.2d 742, 743-44 (Ky. 1993). The circuit court may only deny an evidentiary hearing if the allegations are actually refuted by the record, and are not simply unconvincing. *Fraser v. Com.*, 59 S.W.3d 448, 452-53 (Ky. 2001). However, an evidentiary hearing is "unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction." *Harper v. Com.*, 978 S.W.2d 311, 314 (Ky. 1998).

We further note that "[a] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Haight v. Com.*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009). Thus, in conducting our review, we must be highly deferential to counsel's performance, and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *see also Hodge v. Com.*, 116 S.W.3d 463, 469 (Ky. 2003), *overruled on other grounds by Leonard*, *supra*.

ANALYSIS

On appeal, appellant generally argues that trial counsel was deficient for not investigating and securing the attendance of potentially exculpatory witnesses, including one whose testimony may have discredited Jaqueda Perry's testimony. Appellant contends that an evidentiary hearing is necessary because it cannot be determined from the record whether trial counsel actually investigated or

considered any such witnesses. However, we believe that the circuit court correctly rejected appellant's claims without an evidentiary hearing based upon our review of the record below.

Appellant first argues that trial counsel was ineffective for failing to secure the attendance of Shawn Riley as a witness. Riley was in custody at the same time as appellant on unrelated charges. Appellant alleges that Perry visited Riley while he was in custody. According to appellant, during a number of these visits Perry told Riley that she was "going to get [appellant]." Appellant argues that Riley's testimony on this matter, combined with the testimony of Shanese Washington, would have demonstrated to the jury that Perry's testimony was self-serving and untruthful. Washington was Perry's cellmate and the only defense witness who testified at trial. According to Washington, Perry told her that she did not receive the crack cocaine from appellant.

Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. With this said, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. Moreover, "a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight would conduct." *Foley v. Com.*, 17 S.W.3d 878, 885 (Ky. 2000),

overruled on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005). "'Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight.'" *Id.* at 885, *quoting Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998).

In this case, trial counsel did attempt to discredit Perry's testimony by presenting Washington as a witness. Appellant argues that Washington's testimony "would have had more weight if combined" with Riley's proposed testimony. However, we agree with the circuit court that this testimony essentially would have amounted to cumulative evidence attacking Perry's credibility. Thus, it was reasonable for trial counsel to not call Riley as a witness. *See Moore v. Com.*, 983 S.W.2d 479 (Ky. 1998).

We further note that nothing in this proposed testimony suggests that it would have stood out to the jury in such a way as to potentially change the outcome of the trial. Consequently, even assuming counsel erred in this regard, we do not believe appellant has met his burden of establishing a reasonable probability that, but for counsel's errors, the outcome of the case would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. The jury heard the testimony from Washington regarding the credibility of Perry's testimony and was also advised of the parameters of Perry's plea bargain on cross-examination of Perry. It is not reasonably probable that the cumulative testimony of Riley, corroborating Washington's testimony, would have altered the jury's opinion. This is

particularly true given that two police detectives and video surveillance also implicated appellant in the subject crime.

Appellant next argues that trial counsel was ineffective for failing to investigate or to present testimony from any other individual who was present at the scene of the drug transaction. According to appellant, this would have assisted in developing a defense focused upon an alternative suspect. Appellant specifically notes that a man named Mark Owens was present at the scene of the transaction and could have been viewed by the jury as an alternative suspect.

However, as noted by the circuit court, the record reflects that no one else – including Owens – was in the area of the drug transaction *at the time of the transaction*. Both Detective Goldie and Detective Eckhart testified that at the time of the sale the only people they saw in the immediate area were Perry and appellant. The video recording of the transaction also does not show anyone else in the area until approximately five minutes after the transaction was concluded. Accordingly, attempting to implicate an alternative suspect would have been extremely difficult, if not impossible. We further note that appellant failed to provide the circuit court with any concrete indication of what these individuals might have testified to or how this information would have made a difference in the outcome of the trial. "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Com.*, 89 S.W.3d 380, 385 (Ky. 2002), *overruled by Leonard*, *supra*.

Consequently, we cannot say that trial counsel fatally erred in failing to pursue this avenue of defense.

Again, however, even assuming that counsel erred in this regard, we do not believe that there is a reasonable probability that, but for counsel's errors, the outcome of the case would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. This case is analogous to *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1998), wherein the Supreme Court of Kentucky rejected an argument that trial counsel was ineffective for failing to investigate others with a motive to commit the subject crime because "the mere existence of other potential suspects could do nothing to diminish the impact of the Commonwealth's overwhelming proof against [a]ppellant." *Id.* at 550. Here, two police detectives and an individual involved in the drug transaction identified appellant as the other participant. Moreover, the subsequent field investigation disclosed that appellant matched the physical description relayed by Detective Goldie. The jury also saw the police recording of the transaction, and no one else appears in the immediate vicinity in the video. Appellant cannot meet the burden of showing that another witness would have shifted the scale in his direction. Therefore, appellant was not prejudiced by the alleged errors of trial counsel.

Appellant finally argues that the circuit court erred in denying his motion for post-conviction relief because of the cumulative effect of trial counsel's errors. However, since we have found no individual error in this case, we certainly

cannot find any cumulative error. *Furnish v. Com.*, 267 S.W.3d 656, 668 (Ky. 2007). Thus, we must also reject this argument.

CONCLUSION

For the foregoing reasons, the opinion and order of the Fayette Circuit Court denying appellant's claim for post-conviction relief is affirmed.

ALL CONCUR.

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