

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001626-MR

JOSEPH D. HARRIS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Joseph D. Harris, *pro se*, appeals from the denial of his motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. Harris argues that: (1) the trial court failed to consider his arguments and make findings; and (2) his counsel was ineffective in several regards throughout the trial. After reviewing the record and briefs, we affirm.

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

The Muhlenberg County Grand Jury indicted Harris on the following charges: (1) manufacturing methamphetamine, or by complicity and while in possession; (2) possession of a methamphetamine precursor with intent to manufacture methamphetamine; (3) escape in the second degree; and (4) being a persistent felony offender (PFO) in the first degree. The Commonwealth filed a motion to amend the indictment by removing the phrase, “while in possession of a handgun,” from Count 1, which the trial court granted. Following a trial, the jury found Harris guilty of manufacturing methamphetamine, escape in the second degree, and being a PFO in the first degree. Harris was sentenced to a total of thirty years of imprisonment. On direct appeal, the Supreme Court of Kentucky affirmed the judgment in an unpublished opinion. *Harris v. Commonwealth*, 2007-SC-000671-MR (rendered March 19, 2009). Subsequently, Harris filed a motion for relief under RCr 11.42, which the trial court denied without an evidentiary hearing. This appeal followed. Additional facts will be developed as necessary.

Harris first argues that trial counsel failed to consider his arguments and failed to make findings in accordance with RCr 11.42(6). In addition to Harris’s concession that the failure to make findings does not constitute reversible error unless the failure is brought to the attention of the trial court, this argument is completely refuted by the seven page order of the trial court, which thoroughly addressed each of the arguments in his motion and made findings accordingly.

Harris next argues that his trial court was ineffective in several regards, which we will address in turn.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S.Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066. In measuring prejudice, the relevant inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

Harris argues that his counsel was ineffective for failing to object when the Commonwealth cross-examined his co-defendant, Keith Douglas Edwards, about accumulating products to manufacture methamphetamine with Harris prior

to their arrests. Contrary to Harris's assertions, his counsel did object to the Commonwealth's line of questioning. The trial court overruled the objection. On direct appeal, the Supreme Court held that the Commonwealth's cross-examination of Edwards was proper. *Harris, supra*, at 9. Therefore, Harris's argument that counsel was ineffective for failing to object is refuted by the record and entirely without merit.

Harris next argues that counsel was ineffective for failing to obtain an expert witness to demonstrate that a jar found in his possession contained only water and not chemicals necessary to manufacture methamphetamine. Harris was not indicted for possession of methamphetamine. Kentucky Revised Statutes (KRS) 218A.1432 states that a person is guilty of manufacturing methamphetamine when he "knowingly and unlawfully . . . with intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine." There was testimony that washing a jar can be a vital part of methamphetamine production. Moreover, there was evidence that Harris possessed chemicals and numerous items of equipment in addition to the jar. Even if counsel had obtained an expert to testify that the jar contained only water, Harris has not demonstrated how this evidence would have changed the outcome of the trial.

Harris next argues that the Commonwealth withheld facts and failed to disclose favorable evidence. He does not state how his counsel was ineffective in this regard. The claim that the Commonwealth withheld facts and evidence could

and should have been raised on direct appeal. Therefore, we will not consider it here. *See Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003).

Finally, Harris argues that it was error for the Commonwealth to state that his witnesses were convicted felons. He further argues that counsel was ineffective for failing to request a mistrial on this basis. All of Harris's witnesses were, in fact, convicted felons. Kentucky Rules of Evidence (KRE) 609 permits the introduction of the existence of a felony conviction for impeachment purposes. Therefore, Harris's counsel had no grounds for requesting a mistrial.

Accordingly, the order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph D. Harris, *pro se*
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BRIEF FOR APPELLEE:

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