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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002052-MR

KENNETH W. PARKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 02-CR-001558

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

COMBS, JUDGE: Kenneth Parker appeals the order of Jefferson Circuit Court denying the motion for relief which he filed pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After careful review, we affirm.

On September 16, 2005, a jury found Parker guilty of two counts of murder, three counts of attempted murder, one count of first-degree assault, one count of

second-degree assault, one count of tampering with physical evidence, one count of first-degree robbery, one count of conspiracy to trafficking in a controlled substance, and engaging in organized crime (criminal syndicate). He was sentenced to life without parole for twenty-five years on the murder charges. The sentences for the non-capital offenses totalled thirty years.

On direct appeal, the Supreme Court of Kentucky upheld all of Parker's convictions except for the criminal syndicate charge, which it vacated due to a lack of evidence. On December 6, 2010, Parker filed a motion to vacate his judgment of conviction pursuant to RCr 11.42. The trial court denied the motion on October 6, 2011. This appeal follows.

Parker argues that he received ineffective assistance of counsel and that the trial court erred by not holding an evidentiary hearing prior to denying his motion. We have found no error.

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States, which has prescribed a two-pronged test concerning the defendant's burden of proof in these cases:

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.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. *Strickland* emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id.* at 695-96.

On appeal, we must review a trial court's denial of a motion for an evidentiary hearing as to whether the allegations are refuted by the record, which, if they were true, would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record on its face contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Parker first submits that his counsel was ineffective because the trial court overruled counsel's objections to the joinder of charges at his trial. The trial court ruled that all charges would be dealt with in one trial because the criminal syndication proof consisted of the proof of all the other crimes together. See Kentucky Revised Statute[s] (KRS) 506.120. Parker's argument is retrospective in nature. Since the Supreme Court determined that the Commonwealth did not prove the syndication charges, he contends that he should never have been charged in the first place.

Parker argues that the trial court did not have jurisdiction over the syndication charges because the original indictment included a time period during

which Parker was a juvenile. His counsel successfully objected to the indictment, and the Commonwealth amended it to include only the dates after which Parker had attained eighteen years of age. Parker admits that the trial court granted his motion to amend the indictment. Thus, we cannot agree that Parker was prejudiced. The amendment was to his benefit in shortening the amount of time from which the Commonwealth could derive its proof. The record also shows that Parker's counsel diligently argued to the court that the criminal syndication statute is void for vagueness, both on its face and as applied to Parker. However, despite his counsel's success, Parker contends that his counsel should have pursued the argument more persistently.

In Parker's direct appeal, the Supreme Court addressed this argument, anticipating that it was likely to arise:

The fact that the Commonwealth did not ultimately adduce proof sufficient to convict Parker of criminal syndication does not alter our conclusion that the trial court did not err by trying the criminal syndication charge with the other charges. After all, it is impossible to know with precision at the beginning of trial, the time when such joinder decisions necessarily must be made, what evidence will be presented during the trial. Likewise, the fact that the Commonwealth did not prove Parker's guilt regarding the criminal syndication charge beyond a reasonable doubt does not render infirm the indictment on that charge.

Parker v. Commonwealth, 291 S.W.3d 647, 677 (Ky. 2009) f.n. 84.¹ We cannot conclude that Parker did not receive effective assistance of counsel regarding the criminal syndication charge.²

Parker next argues that his attorney did not adequately cross-examine one of the Commonwealth's witnesses and that he was not properly prepared to do so. One of the assault charges that Parker faced was the shooting of Levolia Baker. JuJuan Stephenson had originally been charged with the shooting. Before Stephenson's trial, he taped a telephone conversation with Parker in which Parker admitted shooting Baker. At the time of Parker's trial, Stephenson was deceased. (Parker was charged with murdering Stephenson, but the jury was unable to return a verdict on this charge.) Therefore, the Commonwealth introduced the recording of the telephone conversation along with the testimony of attorney Scott Drabenstadt. Drabenstadt testified that he recognized Parker's voice on the tape.

Parker contends that his counsel's cross-examination of Drabenstadt was so deficient as to render his representation ineffective. We have reviewed both the direct and the cross-examination of Drabenstadt. Parker's trial counsel was thorough under the circumstances. Drabenstadt was a very confident witness who gave his opinion that audio identification is strong evidence. Drabenstadt's

¹ We also note that the Supreme Court's opinion indicates that it partially reversed the criminal syndication charge due to deficient briefing by the Commonwealth. It suggests that there might have been sufficient evidence to support the charge but that the Commonwealth failed to cite to the proof in its brief.

² Parker also claims that he received ineffective assistance of *appellate* counsel regarding the criminal syndication charge. However, Parker's appellate counsel raised this argument on appeal and succeeded in obtaining a reversal of the conviction.

confidence and stance were not attributable to any alleged deficiency on the part of Parker's counsel. The Supreme Court found that Drabenstadt's testimony was admissible. The evidence did not lend itself to extensive questioning.

Additionally, Parker's counsel presented his own witnesses who testified that the voice on the tapes did not sound like Parker's. The jury had the opportunity to choose which witnesses to believe. Parker does not provide any specificity as to how his counsel could have or should have performed otherwise. See *Parker v. Commonwealth*, 291 S.W.3d at 666; RCr 11.42(2).

Parker also argues that his counsel erred by abandoning an objection regarding Officer Hunt, whom the Commonwealth called as a rebuttal witness. During the Commonwealth's case-in-chief, trial counsel objected to Officer Hunt's testimony on discovery-violation grounds. Trial counsel later objected on rebuttal when Officer Hunt testified at the end of the trial. Parker contends that counsel was ineffective for abandoning the discovery-violation objection.

Parker claims that counsel's failure to persist in the objection left the error unpreserved for appeal. Nonetheless, the Supreme Court conducted its analysis of Parker's objection to Officer Hunt's testimony *as if the error had been preserved*. *Parker v. Commonwealth*, 291 S.W.3d at 662. Therefore, Parker has no basis to argue that any prejudice resulted from the alleged error.

Parker next alleges that trial counsel was ineffective by his "inexplicable acquiescence in the admission of extensive and inappropriate testimony concerning Commonwealth's witnesses' fear of testifying against Parker." Kentucky Rule[s]

of Civil Procedure (CR) 76.12(4)(c)(v) mandates that arguments must be supported by ample references to legal authority. See also *Harris v. Commonwealth*, 384 S.W.3d 117, 130-31 (Ky. 2012) (It is not the function or responsibility of the court to research and argue for a party). Parker has failed to provide *any* legal authority to support this allegation of error. Parker cites to his direct appeal in a footnote, providing only quotations from various witnesses rather than any legal authority to support his argument. Therefore, we decline to address it.

The same deficiency exists for Parker's next two arguments – counsel's perceived error in cross-examination of a witness and his failure to call another witness. Parker does not offer *any* legal authority in support of either contention. Therefore, we must refrain from addressing those arguments as well.

Finally, Parker contends that his counsel erred by not objecting to testimony by Kentucky Bureau of Investigation Special Agent David James. Agent James testified about the crack cocaine trade and gave his opinion that certain items of evidence obtained in a search were items commonly used in the trade.

We have reviewed the testimony of Agent James. First, he established that he is an expert in the narcotics trade. Agent James has received extensive training in narcotics and has worked as an undercover narcotics officer, a narcotics detective, and as a narcotics instructor. He testified generally about the qualities of powder cocaine and crack cocaine and explained how they are processed. Agent James also explained the open-air market of drug dealing. His opinion was that if a house contained a large amount of cash, a large amount of

drugs (including fake drugs), drug paraphernalia, and scales, it was likely that drug dealing was taking place. Agent James did not testify about Parker specifically. Parker's counsel cross-examined Agent James, eliciting that many people deal solely in cash and that users will sometimes stockpile drugs for a weekend with friends.

Parker relies on an unpublished case as the basis for his contention that Agent James's testimony was inadmissible evidence of the habits of a class of people (drug dealers). *Hayes v. Commonwealth*, 2010 WL 2629561 (Ky. App. July 2, 2010). Unpublished cases are not binding precedent and may only be considered if no published case law exists on the issue for which they are cited. CR 76.28. Because published case law does exist, we may not consider *Hayes*.

The Supreme Court has addressed similar testimony in a drug trafficking trial. *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009). In *McCloud*, the appellant did not challenge the admissibility of the substance of the testimony; the issue was whether a hearing to establish the expert's qualifications was required.

Pertinent to our case, the Court observed as follows:

Detective Bryant Bowling testified about the drug trade, including things like baggies being used to package drugs, the amount of cocaine in a typical "hit," and his opinion regarding whether the amount of drugs seized from McCloud indicated an intent to traffic or for personal usage. McCloud argues Bowling's testimony "included nothing that was beyond the ken of a lay person [,]" meaning that "[t]he trial court abused its discretion when it allowed the Commonwealth to present Bowling's opinion testimony."

Our precedent is directly contrary to McCloud's argument. Bowling was unquestionably an experienced, qualified law enforcement officer. We have approved the introduction of similar testimony both before and after the United States Supreme Court's landmark 1993 decision regarding expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* And we have held that the type of testimony offered by Bowling was “representative of the type of expert opinion based on ‘specialized knowledge’ for which a formal Daubert hearing on reliability may be unnecessary....” We believe our precedent remains a correct exposition of the law and, thus, hold that the trial court did not abuse its discretion when it permitted Bowling to render his opinions without first holding a formal *Daubert* hearing.

Id. at 787-88. (Internal citations omitted). The striking similarity between *McCloud* and the case before us leads us to conclude that failure to object to Agent James’s testimony did not constitute ineffective representation.

In summary, Parker’s arguments are either inadequately presented or are refuted by the record. Thus, we cannot conclude that his motion required an evidentiary hearing. We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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