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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000922-MR

SHERMAN D. PERRY — APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Sherman D. Perry, *pro se*, appeals an order of the Martin Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 wherein he claimed ineffective assistance of trial counsel for failing to move to suppress his blood test results, failing to interview witnesses who could have provided impeachment evidence of trial testimony and for failing

to file a motion to suppress his toxicology report. After careful review of the record and the applicable law, we affirm.

Procedural History

In 2011, Perry was indicted in Martin Circuit Court for wanton murder, first-degree assault, operating a motor vehicle under the influence of alcohol/drugs, failure to maintain required insurance and no/expired Kentucky registration receipt. The charges arose from an automobile accident in which Perry, while driving under the influence of prescription drugs, crossed over the center line of the highway and collided head on with another vehicle, killing its driver and seriously injuring a passenger. On June 15, 2011, Perry was convicted in a jury trial of second-degree manslaughter, first-degree assault, and operating a motor vehicle under the influence of alcohol/drugs. Perry was sentenced to a total of thirty years' imprisonment.

On August 18, 2011, Perry filed his direct appeal to the Kentucky Supreme Court. On December 20, 2012, in an unpublished opinion, the Kentucky Supreme Court affirmed Perry's conviction in the Martin Circuit Court. *Perry v. Commonwealth*, 2012 WL 6649197 (Ky. 2012) (2011-SC-000478-MR). On March 20, 2014, Perry filed this *pro se* motion in Martin Circuit Court pursuant to RCr 11.42. The circuit court denied the motion without an evidentiary hearing on April 4, 2014. This appeal follows.

Analysis

Perry claims that his trial counsel was ineffective 1) for failing to file a motion to suppress his blood test, after his blood was taken without a warrant; 2) for failing to interview witnesses who could have testified as to the absence of residue in Perry's nose and on his tongue at the time of the accident; and 3) for failing to file a motion to suppress his toxicology report on the ground that all of his prescription medication on the day of the accident was within therapeutic levels.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court promulgated a two-part test to determine ineffective assistance of counsel claims. A petitioner is entitled to relief for ineffective assistance of counsel if his or her counsel at trial provided representation that "fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669.

A defendant has a heavy burden to establish that trial counsel's performance was ineffective or unreasonable, and this burden is subject to the presumption that counsel's conduct falls within the acceptable range of reasonable and effective assistance of counsel. *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998). Because the trial court denied Perry an evidentiary hearing, our examination of Perry's motion is limited to whether on its face, the motion states grounds that are not conclusively refuted by the record and which, if true, would

necessitate setting aside his conviction. *See Fuston v. Commonwealth*, 217 S.W.3d 892 (Ky. App. 2007).

I. Consent for a Blood Test

Perry's first argument is that his trial counsel was ineffective for failing to move to suppress his blood test results because the police did not obtain a search warrant prior to taking a sample of Perry's blood. In response, the Commonwealth notes that Kentucky State Police Detective T. Russell testified that Perry consented to have his blood drawn. More importantly, for purposes of this motion, Perry's signed consent form for his blood sample is included in the trial record.

It is well established that "[c]onsent is a valid exception to the rule against warrantless searches," *Payton v. Commonwealth*, 327 S.W.3d 468, 479 (Ky. 2010). In *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992), the Kentucky Supreme Court held that a defendant could not suppress blood test results under the Fourth Amendment where the defendant had voluntarily consented to giving blood. *Id.* The *Cook* Court held that the record did not demonstrate Cook "was confused or tricked into giving his blood sample. He was fairly apprised of what the police wanted and why they wanted it, and the consent was freely and voluntarily given. That is all the Fourth Amendment requires." *Id.* at 331. Perry voluntarily consented to the blood test and thus there was no legal basis to suppress the results.

II. **Failure to Interview Witnesses**

Perry next argues that his trial counsel was ineffective because he failed to interview witnesses at the hospital who would have testified that Perry did not have residue in his nose and on his tongue. Detective T. Russell of the Kentucky State Police testified at trial that shortly after the accident, he had seen pill residue on Perry's tongue and in his nose. Pictures of the residue in Perry's nose were introduced at trial. The Supreme Court upheld the validity of this testimony by Russell as an expert in Perry's direct appeal.

Deputy Sheriff Keith Maynard also testified at trial that he did not observe any substances on Perry's face, and this observation was made based upon Maynard being approximately three feet from Perry, after the accident. Thus, the jury was presented conflicting testimony and any other witnesses' testimony would have been cumulative at best. The failure to identify other witnesses to present cumulative testimony cannot be regarded as prejudicial. *Halvorsen v. Commonwealth,* 258 S.W.3d 1 (Ky. 2007). Accordingly, we cannot say that Perry was prejudiced by his counsel's failure to locate other witnesses regarding whether Perry had pill residue in his nose.

We would also note that Perry failed to specifically identify any other witnesses who counsel should have interviewed. RCr 11.42(2) provides that a movant "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." Since Perry did not specifically state the identity of any of the alleged witnesses

that counsel should have interviewed or called at trial in his motion, this argument is also without merit to support the RCr 11.42 motion.

III. Failure to File Motion to Suppress

Finally, Perry asserts that his trial counsel was ineffective when he failed to file a motion to suppress his toxicology report, pursuant to Kentucky Revised Statutes (KRS) 189A.010(4).

The statute reads as follows:

> **189A.010. Operating motor vehicle with alcohol concentration of or above 0.08, or of or above 0.02 for persons under age twenty-one, or while under the influence of alcohol, a controlled substance, or other substance which impairs driving ability prohibited – Admissibility of alcohol concentration test results – Presumption – Penalties – Aggravating circumstances.**
>
> (4) (a) Except as provided in paragraph (b) of this subsection, the fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.
> (b) A laboratory test or tests for a controlled substance shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice.

KRS 189A.010(4) is limited to charges of operating a motor vehicle under the influence of alcohol or drugs. In this case, Perry was also indicted for

wanton murder and first-degree assault. The jury acquitted Perry on the murder charge but still found him guilty of the lesser included offense of second-degree manslaughter as well as being guilty of first-degree assault. As the Supreme Court noted in its Opinion affirming Perry's conviction, while the drugs in Perry's system tested within therapeutic levels, evidence presented at trial showed that taking the drugs together could act in combination to make it unsafe for Perry to have been driving. Perry had also admitted to smoking marijuana prior to the accident. Accordingly, Perry's argument that trial counsel was ineffective for failing to object to the introduction of the toxicology report under KRS 189A.010(4) fails on its face.

Additionally, counsel not objecting at trial to the introduction of the toxicology report clearly appeared to be a matter of trial strategy by Perry to rebut the testimony of the state policeman who testified he observed drug residue in Perry's nose and tongue after the accident. The toxicology report allowed Perry the opportunity to rebut at trial, the evidence and inferences that his intoxication on drugs was the cause of the accident and not some other cause. Counsel's conduct in this regard was certainly reasonable and consistent with sound trial strategy which we are not permitted to second guess. *See Strickland*, 466 U.S. 668.

For the foregoing reasons, the order of the Martin Circuit Court denying Perry's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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