

RENDERED: April 10, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3287-MR

HERMINIO A. PEREZ

APPELLANT

V. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE WILLIAM S. COOPER, JUDGE
ACTION NO. 94-CR-0057

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, COMBS and GARDNER, Judges.

GARDNER, JUDGE: Herminio Perez, acting pro se, appeals an order of the Hardin Circuit Court entered on November 22, 1996, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, following an evidentiary hearing on the motion. We affirm.

On February 3, 1994, Perez and a passenger were stopped by a Kentucky State Police Trooper while traveling on an interstate highway because Perez was driving too close to a truck in front of him. Perez gave the trooper an expired Texas driver's license. A further check of the vehicle, which had a Tennessee license plate, revealed it was registered to a third party. After issuing a

warning for following too closely and a citation for driving on an expired license, the trooper noticed some suspicious items in the vehicle and an odor of marijuana; so he asked for Perez's permission to search the vehicle. Perez voluntarily signed a Spanish language consent to search form, and the vehicle was searched by the original trooper and two other troopers who had arrived on the scene. With the aid of a police dog trained to detect drugs, the troopers discovered twenty-three bundles of marijuana weighing approximately fifty-four pounds hidden under the floorboard of the driver's seat. During the investigation, Gary Tennant, a Spanish speaking special agent with the United States Drug Enforcement Agency, was called to interview Perez because Spanish was appellant's primary language, and he spoke limited English. Special Agent Tennant informed Perez of his Miranda rights, and Perez allegedly admitted the marijuana was his.

On March 30, 1994, the Hardin County Grand Jury indicted Perez on one felony count of trafficking in marijuana - five pounds or more, second offense, Kentucky Revised Statute (KRS) 218A.1421(4), and a misdemeanor count of operating a motor vehicle without a valid operator's license, KRS 186.410. After a two-day trial in which an interpreter was provided for Perez, a jury convicted appellant of the two offenses and fixed his punishment at twenty years for trafficking in marijuana and six months in jail with a \$500.00 fine for the offense of no valid operator's license. On April 18, 1995, the circuit court sentenced Perez to twenty years in prison. Perez appealed, and the Kentucky Supreme Court

affirmed the conviction in an unpublished opinion dated February 8, 1996.

On July 15, 1996, Perez filed a RCr 11.42 motion raising several issues related to ineffective assistance of counsel. On November 19, 1996, the trial court conducted an evidentiary hearing on the RCr 11.42 motion at which Perez was represented by counsel and an interpreter was furnished. During the hearing, Perez's attorney raised one new ground for ineffective assistance of counsel not discussed in the original motion. After the hearing, the trial judge issued a written opinion, containing findings of fact and conclusions, denying the motion. This appeal followed.

Perez contends that his attorney committed several errors that constituted ineffective assistance of counsel. In his original RCr 11.42 motion, Perez asserted that counsel failed to perform the following acts: 1) bring to court the registered owner of the vehicle identified as Marino; 2) follow up on the statement by Trooper Oldham that Marino admitted owning the vehicle; 3) emphasize during closing argument that Marino owned the vehicle; 4) question Trooper Stevens more fully about his ability to observe the unusual structure of the vehicle's floorboard; 5) request a fingerprint analysis of the drug bundles; and, 6) obtain a copy of the original indictment. At the RCr 11.42 hearing, Perez's attorney also raised the issue of trial counsel's failure to move to suppress appellant's confession to Special Agent Tennant.

RCr 11.42 allows individuals in custody under sentence to raise a collateral attack to the judgment entered against them.

RCr 11.42(2) requires the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." It is well-established that an allegation of ineffective assistance of counsel does not state grounds for relief under RCr 11.42 unless the petition presents sufficient facts to show that the representation of counsel was inadequate. See Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Mullins v. Commonwealth, Ky., 454 S.W.2d 689, 691 (1970).

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The movant bears the burden of overcoming a strong presumption that counsel's assistance was constitutionally sufficient and outside the wide range of professionally competent assistance. Strickland v. Washington, 466 U.S. at 689-90, 104 S. Ct. at 2065-66; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). Counsel's performance is based on an objective standard of reasonableness. Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064. Prejudice is defined as proof that there is a reasonable probability that, but for counsel's unprofessional errors, the

results would have been different. Id. at 694, 104 S. Ct. at 2068; Commonwealth v. Gilpin, Ky., 777 S.W.2d 603, 605 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068.

One of Perez's major complaints involving several of counsel's alleged errors concerns the handling of information related to Marino, who he asserts was the owner of the vehicle. Perez argues that the trial was rendered unconstitutional because counsel did not produce Marino as a witness or more forcefully present his defense that Marino was the true owner of the drugs. Perez's complaints, however, do not rise to the level of ineffective assistance of counsel. First, Perez has not shown that trial counsel even knew where Marino was located or could compel his attendance. Second, Perez has presented no evidence that Marino would have provided any exculpatory testimony on the ownership of the drugs. Third, Perez clearly was in constructive possession of the drugs by being the driver of the vehicle. Fourth, Special Agent Tennant testified at trial that Perez admitted ownership of the drugs. Fifth, Perez testified at trial that the drugs were not his, and there was testimony that he did not legally own the vehicle. Sixth, the evidence at trial on who owned the vehicle was ambiguous because the troopers also testified that the vehicle was registered to a third-party other than Marino. Therefore, the question of ownership of the drugs was presented to the jury. Further, defense counsel forcefully argued during

closing argument that Perez did not own the vehicle and claimed he was unaware of the marijuana.

A fair assessment of an attorney's performance requires the elimination of hindsight and evaluation of counsel's conduct at the time. Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. Perez has failed to demonstrate that trial counsel's performance was deficient or that he suffered actual prejudice with respect to his complaints concerning Marino. Perez also asserts that the trial court erred by limiting testimony on Marino during the trial, but this issue is not cognizable in a RCr 11.42 motion because it could have been raised in the direct appeal. See Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 338 (1984); Hoskins v. Commonwealth, Ky., 420 S.W.2d 560 (1967).

Similarly, Perez argues that counsel did not adequately challenge an alleged inconsistency in Trooper Stevens's testimony concerning the hidden compartment in the vehicle. This argument is without merit because Perez does not challenge the legality of the stop or of the search. The troopers searched the vehicle pursuant to Perez's voluntary written consent. Thus, counsel had no legitimate reason to challenge Trooper Stevens's testimony, and any inconsistency would not have impacted the trial.

During the RCr 11.42 hearing, Perez raised two arguments, the first involving counsel's failure to move to suppress his confession on grounds his Miranda rights were not given to him, and the second involving counsel's failure to attempt to obtain fingerprints from the drug bundles. We note that in reviewing a

circuit court's decision on a RCr 11.42 motion, the trial judge's findings of fact after a hearing are binding unless they are clearly erroneous. Commonwealth v. Payton, Ky., 945 S.W.2d 424 (1997); Bell v. Commonwealth, Ky., 395 S.W.2d 784, 785, (1965) cert. denied, 382 U.S. 1020, 86 S. Ct. 640, 15 L. Ed. 2d 535 (1965).

Trial counsel testified at the hearing that she did not move to suppress the confession because Special Agent Tennant stated to her that he had informed Perez of his Miranda rights, and Perez never told her he did not receive the Miranda warning. The trial court noted that this was Perez's second drug conviction, and Perez has not claimed he was unaware of the requirement that a person be advised of his Miranda rights before being interrogated. Perez has not demonstrated that counsel's performance was deficient. Counsel investigated the circumstances of the confession and interviewed Special Agent Tennant, who was brought into the case specifically because he spoke fluent Spanish. Counsel spoke with Perez about the police interview prior to trial. In addition, Special Agent Tennant testified at trial that he had given Perez his Miranda rights, but Perez never informed counsel at that time that he challenged this testimony. Counsel's failure to move to suppress the confession was not outside the range of competent legal assistance.

As to the failure to test for fingerprints on the drug packages, counsel testified at the hearing that this was part of a trial strategy to raise reasonable doubt about ownership of the

drugs. She stated that Perez was equivocal about whether his fingerprints could be on the packages; so rather than create possible incriminating evidence, counsel decided to attack the Commonwealth's case by challenging the thoroughness of the investigation and the lack of fingerprint evidence. As the court in Strickland indicated, judicial scrutiny of counsel's performance must be highly deferential, and "the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)); McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 700 (1987). In addition, counsel's actions must be evaluated with reference to information obtained from the defendant.

And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland v. Washington, 466 U.S. at 691, 104 S. Ct. at 2066 (citation omitted). The Sixth Amendment right to effective assistance of counsel does not guarantee error-free representation, nor does it deny counsel freedom of discretion in determining the means of presenting the client's case. Hibbs v. Commonwealth, Ky., 570 S.W.2d 642, 642 (1978). Given the circumstances, counsel's

decision not to seek fingerprint testing of the drug packages was not unreasonable and did not constitute ineffective assistance of counsel.

Perez's final complaint involves the amendment of the indictment. He maintains that the trial court committed error by amending the indictment on its own and that there is no record of the original wording in the indictment. Again, this issue is not cognizable under RCr 11.42 because it could have been raised in the direct appeal. Commonwealth v. Stamps, 672 S.W.2d at 338. Nevertheless, a review of the record reveals that this claim must be rejected on the merits. The original indictment is in fact the first page of the record. The Commonwealth made an oral motion on the date originally set for trial to amend the indictment to include language referring to the applicable state of mind, that being possession of the drugs "knowingly and unlawfully." Consistent with RCr 6.16, the trial court permitted the amendment and granted Perez's motion for a continuance of the trial. The trial court acted appropriately, and Perez suffered no prejudice.

For the foregoing reasons, we affirm the order of the Hardin Circuit Court.

ALL CONCUR.

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