

RENDERED: May 22, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-1654-MR

MARCUS WAYNE ALLEN WHITE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 93-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: GUIDUGLI, KNOX, and MILLER, JUDGES.

KNOX, JUDGE. Marcus Wayne Allen White (White) brings this pro se appeal from an order of the Fayette Circuit Court entered on June 20, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After a review of the record and the applicable law, we affirm.

On the night of October 3, 1992, White and his friend, Tim Gentry, decided to go to a party, but they needed to get some money from Gentry's mother, who was visiting a friend at her

house on Aspendale Drive in Lexington, Kentucky. White and Gentry had to walk several blocks from Gentry's residence to Aspendale in order to talk with Gentry's mother. As the pair walked along Sixth Street, they saw several people standing on the sidewalk along the front of but between two apartment buildings located on the other side of the street. Included in the group were Antwan Smith and Robin Tichenor, with whom White had had a dispute in the past over a girlfriend.

Shortly after passing the group of people, White and Gentry heard a sound similar to the slide of a shotgun being pumped as if a shotgun round was being loaded into the chamber. As the pair turned toward the direction of the sound, they saw Antwan Smith holding a sawed-off shotgun that was pointed downward toward the ground. After seeing Smith, White and Gentry started running along Sixth Street and away from the area. As they ran, however, White pulled a .25 caliber handgun he was carrying in the belt of his pants and fired five shots into the group of people. Smith fired the shotgun in return striking both White and Gentry with small pellets and resulting in superficial wounds. Will Carter, who was one of the individuals in the group, was struck in the chest by one of the bullets fired by White. Carter died a short time later.

The Lexington police were notified immediately of the incident, but they were unable to discover evidence of the shooting when they arrived in the area. Shortly after receiving additional information, the police found Will Carter's body lying

between the two apartment buildings near Sixth and Toner Streets. Meanwhile, White and Gentry returned to Gentry's residence where White stayed that night. The next morning, based on information from witnesses, the police went to Gentry's residence and took White into custody.

After taking White to police headquarters, the police attempted unsuccessfully several times to contact the seventeen-year-old White's parents prior to conducting a formal interview. Despite being unable to contact White's parents, the police took an audiotaped statement from White in which he admitted his participation in the shooting, but claimed he acted in self-defense. The police recovered the handgun at Gentry's house shortly after White was detained. The shotgun believed to have been involved in the incident also was recovered later by the police. A subsequent examination by a ballistics expert at the Kentucky State Police Crime Laboratory indicated the bullet that killed Carter was fired from White's handgun. After an examination of the shotgun, the ballistics expert found a match between five empty shell casings found at the scene and the shotgun.

In November 1992, White's case was transferred by the district court to circuit court for further proceedings against White as an adult. On January 25, 1993, the Fayette County Grand Jury indicted White on one felony count of murder (Kentucky Revised Statute (KRS) 507.020). At the jury trial held on May 10 and 11, 1993, White testified that he fired at the persons in the

group in self-defense. During the trial, the Commonwealth introduced and played for the jury, White's taped statement to the police. The jury found White guilty of wanton murder and recommended a sentence of twenty years in prison.

In June 1993, the trial court sentenced White to twenty years in prison, but he was ordered held in juvenile custody by the Cabinet for Human Resources until he turned eighteen years of age in August. On September 10, 1993, the trial court re-evaluated the judgment of sentence pursuant to KRS 640.030 and ordered White to serve the remainder of the twenty-year sentence in prison as an adult. White's conviction was affirmed on direct appeal by the Supreme Court. (White v. Commonwealth, 93-SC-441, as modified, September 1, 1994). In April 1997, White filed an RCr 11.42 motion alleging primarily ineffective assistance of counsel. On June 20, 1997, the trial court denied the motion. This appeal followed.

The issues on appeal involve the admission at trial of White's taped statement to the police taken on October 4, 1992. Despite being unable to contact his parents or other legal guardian, the police took White's statement after advising him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Chapter 610 of the Unified Juvenile Code deals with procedural matters involving various proceedings affecting juveniles. KRS 610.200(1) provides:

When a peace officer has taken or received a child into custody on a charge of committing an offense, the officer shall immediately inform the child of his constitutional rights

and afford him the protections required thereunder, notify the parent, or if the child is committed, the cabinet, and if the parent is not available, then a relative, guardian, person exercising custodial control or supervision of the child, that the child has been taken into custody, give an account of specific charges against the child, including the specific statute alleged to have been violated, and the reasons for taking the child into custody.

White maintains that his statements to the police were inadmissible at trial because they were obtained in violation of KRS 610.200(1). More specifically, he argues that the audiotaped statement constituted a confession that was not given knowingly and voluntarily with the procedural safeguards provided by the juvenile statute.

White's first argument is a direct attack on the conviction based on the admission of the taped statement. This issue is not cognizable through a collateral action under RCr 11.42. It is not the purpose of RCr 11.42 to give a defendant a vehicle for pursuing issues which could and should have been raised in his direct appeal. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990). RCr 11.42 was not designed to give "a convicted defendant an additional appeal or a review of trial errors that should have been addressed upon the direct appeal." Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989). See also Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983) (RCr 11.42 provides a vehicle to attack erroneous judgment for reasons not accessible by direct appeal.) White brought a direct appeal of his conviction but did not raise the issue of

the alleged improper admission of his statement. White was fully aware of the essential facts necessary to challenge the validity of the procedure used to obtain his statements at the time he brought the direct appeal. Admission at trial of an illegally obtained confession should be raised on direct appeal. See Maggard v. Commonwealth, Ky., 394 S.W.2d 893 (1965).

White's second issue on appeal also involves the admission of his statement to the police, but in the context of a claim of ineffective assistance of counsel. Although an ineffective assistance of counsel claim may be brought on direct appeal, this type of claim generally is cognizable under RCr 11.42. See Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642 (1978); Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922, 928 (1977); Humphrey v. Commonwealth, Ky., \_\_\_ S.W.2d \_\_\_, 1998 WL 79154 (Feb. 19, 1998). White contends that his attorney was ineffective for failing to challenge the admissibility of his statement to the police.

The Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, so this right focuses on whether the proceeding at issue was fundamentally unfair or unreliable, Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 112 L. Ed. 2d 180 (1993). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and 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). Judicial scrutiny of counsel's performance must necessarily be highly deferential in order not to interfere with the constitutionally protected independence of counsel. Strickland, 460 U.S. at 689, 104 S.Ct. at 2065. A court must indulge in a strong presumption that counsel is competent, and the burden rests on the appellant to overcome the presumption by demonstrating a constitutional violation. Id.; Brewster v. Commonwealth, Ky., 723 S.W.2d 863, 865 (1986). Similarly, the appellant bears the burden of showing that he suffered actual prejudice in that there is a reasonable probability that absent counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Commonwealth v. Gilpin, Ky., 777 S.W.2d 602, 605 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, supra, at 694, 104 S. Ct. at 2068; Cox v. Norris, 133 F.3d 565, 573 (8th Cir. 1997). While we review the circuit court's findings of fact on the issue of ineffective assistance of counsel for clear error, the performance and prejudice components of the Strickland test are considered mixed questions of law and fact, and are thus subject to de novo review by an appellate court. Strickland, 466 U.S. at 698, 104 S. Ct. at 2070; McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996), cert. denied, \_\_\_ U.S. \_\_\_, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997).

In assessing the performance prong, counsel's action or failure to act are reviewed based on an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878-79 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). White contends that the statement was illegally obtained in violation of KRS 610.200(1) because the statement was given before the police had contacted his parents and informed them of the situation. While KRS 610.200 imposes some extra obligations on police when a juvenile is taken into custody, this statute does not necessarily compel the police to refrain from questioning or taking a statement from a juvenile before notifying his parents.

White's reliance on Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972) is misplaced. In Lewis, the Indiana Supreme Court adopted a per se rule prohibiting the admission at trial of a juvenile's statement or confession unless both he and his parents or guardian are informed of his right to an attorney and to remain silent prior to giving the statement. Id. at 439, 288 N.E.2d at 142. However, this per se approach has been rejected by several other courts. See Rone v. Wyrick, 764 F.2d 532, 534-35 (8th Cir. 1985); McDonald v. Black, 661 F. Supp. 660, 663-64 (D. Neb. 1986), aff'd, 820 F.2d 260 (8th Cir. 1987). While the waiver of constitutional rights by a juvenile should be given greater scrutiny by the courts, the standard of review for "a juvenile's privilege against self-incrimination is whether, under

the totality of the circumstances, the confession was obtained in violation of due process." Rone, 764 F.2d at 534 (citing Gallegos v. Colorado, 370 U.S. 49, 55, 82 S. Ct. 1209, 1213, 8 L. Ed. 2d 325, 329 (1962)). Constitutional due process does not require that a juvenile's parents be notified prior to obtaining a confession. See Fare v. Michael C., 442 U.S. 707, 725-27, 99 S. Ct. 2560, 2571-73, 61 L. Ed. 2d 197 (1979); Stone v. Farley, 86 F.3d 712, 717 (7th Cir. 1996), cert. denied, \_\_\_ U.S. \_\_\_, 117 S.Ct. 973, 136 L.Ed.2d 857 (1997). In addition, the decision in Lewis was based in part on Indiana state law. This Court is not bound by an Indiana state court's decision.

Although White's complaint is couched in terms of a constitutional violation of the Fifth and Fourteenth Amendments, he relies primarily on the notification procedures imposed under KRS 610.200. A statute requiring notification of parents does not create either a statutory or constitutional right to have the parents present before a juvenile may give a valid statement to the police. See United States v. White Bear, 668 F.2d 409 (8th Cir. 1982) (involving federal juvenile delinquency statute); Miller v. State of Maryland, 577 F.2d 1158 (4th Cir. 1978) (involving a Maryland state statute); Rone, supra (involving a Missouri state statute); McDonald v. Black, 820 F.2d 260 (8th Cir. 1987) (involving Nebraska state statute). In West v. United States, 399 F.2d 467, 469 (5th Cir. 1968), cert. denied, 393 U.S. 1102, 89 S. Ct. 903, 21 L. Ed. 2d 795 (1969), the court enunciated nine factors for determining the voluntariness of a

juvenile's confession: 1) age; 2) education; 3) whether the accused had knowledge of the substance of the charges and his right to an attorney and to remain silent; 4) whether the accused was allowed to consult with relatives, friends, or an attorney; 5) whether the accused was interrogated before or after being formally charged; 6) methods used in the interrogation; 7) length of the interrogation; 8) whether the accused had refused to voluntarily give statements on prior occasions; 9) whether the accused had repudiated his extrajudicial statement at a later date. While age is one factor in assessing the totality of circumstances involving a defendant's confession, "[y]outh by itself is not a ground for holding a confession inadmissible." Williams v. Peyton, 404 F.2d 528, 530 (4th Cir. 1968).

Kentucky case law has rejected a per se approach. In Hayden v. Commonwealth, Ky., 563 S.W.2d 720 (1978), the court held that a juvenile's confession could be admitted where it was given voluntarily in compliance with Miranda v. Arizona, supra. The court noted: "`Most courts hold that a minor may waive his rights and confess without first seeing a lawyer or his parents, although waiver may be more difficult to prove because of the suspect's age.'" 563 S.W.2d at 722. White's reliance on Davidson v. Commonwealth, Ky. App., 613 S.W.2d 431 (1981) is unavailing. In Davidson, the court held that the confession of an eleven year old was inadmissible where the police both failed to properly advise the juvenile of his Miranda rights and failed to inform the juvenile's guardian of his constitutional rights

when they had the opportunity to do so. Davidson is factually distinguishable.

In the case at bar, White was just over seventeen years old at the time of the incident, and he had had prior experience with the juvenile criminal justice system. Prior to taking the statement, the police fully advised him of the Miranda rights including that he had the right to remain silent, the right to have an attorney present, and that the statement could be used against him. In addition, he gave the statement within only a few hours after being taken into custody. White's performance during the taped statement reveals that he was of at least average intelligence. At the time of the incident, White had already obtained a graduate equivalency diploma (G.E.D.). These factors militate against finding that the statement was involuntary or that White was incapable of making an intelligent waiver of his constitutional rights. More importantly, White has failed to give any specific facts indicating the statement was not voluntary. While he alleges that the statement was coerced, he relies primarily on the fact that his parents were not notified prior to the questioning by police and present at the giving of the statement. His claim of coercion is merely conclusory and unsupported by the record. Absent more facts suggesting that the statement was not voluntary and defense counsel had knowledge of information on which to base a suppression motion, White has not demonstrated that counsel acted unreasonably.

In addition, counsel's failure to challenge admission of the statement could have been trial strategy. As the court stated in Strickland,

Because of the difficulties inherent in making the [performance] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689, 104 S. Ct. at 2065 (citations omitted). See also Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986).

In the statement given by White, he admitted participation in the shooting, but claimed he shot in self-defense. White's defense at trial was based on self-defense. Several witnesses told the police and testified that White shot at the group first, so having White testify at the trial was necessary. Defense counsel could have reasonably decided not to challenge admission of the statement because it was consistent with White's testimony at trial and with the defense theory of the case. White has not overcome the presumption that counsel's failure to act was a tactical decision of trial strategy. As a result, White has not established that counsel's performance was constitutionally deficient. See Gall v. Commonwealth, Ky., 702 S.W.2d at 40 (1986) (reasonable trial tactics cannot constitute deficient performance for ineffective assistance of counsel).

Even assuming counsel erred, White has not demonstrated actual prejudice because of counsel's error. In order to

establish prejudice, White would have to show both that the statement would probably have been suppressed and that admission of the statement affected the outcome of the trial. See, e.g., Nickel v. Hannigan, 97 F.3d 403 (10th Cir. 1996), cert. denied, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1112, 137 L. Ed. 2d 313 (1997). As discussed earlier, White's argument that the statement was obtained illegally and should have been suppressed is highly questionable. An attorney's failure to raise a losing argument does not constitute ineffective assistance of counsel. Stone v. Farley, 86 F.3d at 717. White has failed to show a reasonable probability that his statement would have been suppressed even if counsel had filed a motion. See Nickel v. Hannigan, 97 F.3d at 411 (holding absence of prejudice for counsel's failure to seek suppression of confession).

Assuming the statement was subject to suppression, its admission did not significantly affect the outcome of the trial. Several witnesses identified White as the person who fired the handgun toward the victim. The ballistics evidence confirmed that the fatal bullet was fired from White's handgun. White testified that he shot at the young men in the group. The only issue at trial involved White's intent and the question of self-defense. White's taped statement was consistent with his trial testimony and the defense theory of the case. White's allegation that the statement had a substantial negative impact on the trial is unsupported. Based on a review of the record, the outcome of the trial would not have been different even if the statement had

been excluded. Consequently, White has failed to satisfy either of the two prongs of the Strickland standard for ineffective assistance of counsel. Given White's failure to establish ineffective assistance of counsel, the trial court properly denied the RCr 11.42 motion.

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

ALL CONCUR.

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