

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003079-MR

CURTIS COWHERD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 94-CR-001372

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel. We affirm.

Appellant, Curtis Cowherd (Cowherd), was indicted on charges of possession of a controlled substance in the first degree (cocaine) (KRS 218A.1415), illegal use or possession of drug paraphernalia (KRS 218A.500), possession of a controlled substance (marijuana) (KRS 218A.140), and for being a persistent felony offender (PFO) in the second degree (KRS 532.080). Cowherd was found guilty of all charges after a two-day jury trial and sentenced to six years' imprisonment. Cowherd's

conviction was affirmed on direct appeal in a non-published opinion rendered December 20, 1996 (Court of Appeals No. 95-CA-1514-MR).

On October 21, 1997, Cowherd filed an RCR 11.42 motion alleging ineffective assistance of counsel. In his motion appellant alleged he was denied his constitutional rights of due process and equal protection of the law because he received ineffective assistance of counsel. Specifically, Cowherd contends that his attorney represented a co-defendant more vigorously than himself, all to his detriment and that his counsel failed to object to a comment made by a Commonwealth's witness concerning his silence at the time of his arrest. Cowherd moved the trial court to appoint him counsel pursuant to RCr 11.42(5) and for an evidentiary hearing. On November 10, 1997, the trial court overruled Cowherd's RCr 11.42 motion. The trial court also found that appointment of counsel and an evidentiary hearing were not necessary, in that, the allegations made by appellant were refuted by the record. This appeal followed.

To prevail on a claim of ineffective assistance of counsel, Cowherd must prove: (1) that his counsel's performance was deficient, and (2) that he was so prejudiced by the deficiencies that there is a reasonable likelihood that, without his counsel's errors, the result would have been different. 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 burden is on Cowherd to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). Where the trial court denies a motion for an evidentiary hearing on an RCr 11.42 motion, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). If the record refutes the allegations, the circuit court does not need to hold an evidentiary hearing or appoint counsel. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985).

On appeal, appellant claims he received ineffective assistance of counsel when his attorney failed to object and failed to move for a mistrial after the following exchange:

Counsel: What evidence is there that they were in possession?

Detective: There is not one of these defendants that made a statement that they had nothing to do with the drugs at the time they were placed under arrest. They didn't deny that they were in possession, they didn't deny that. Those accusations were made later... .

Counsel: (To Judge): Judge, may I ask the court to admonish the witness to be responsive to the question?

Judge: The Court will instruct you on the law of the case including of course upon the law with reference to the defendants right to remain silent. Under all circumstances, silence by an accused person should not be considered as evidence for any purpose whatsoever.

This claim of error was addressed by the Court of Appeals in Cowherd's direct appeal. Although the appellate court indicated that trial counsel had not directly requested an admonition or mistrial after the detective's comments, the appellate court noted that "the trial court, sua sponte, admonished the jury regarding the co-defendants' silence and that it was not to be used as evidence for any purpose whatsoever." In the direct appeal the Court went on to state, "[t]he law presumes an admonition controls the jury and removes the prejudice which brought about the admonition. Carpenter v. Commonwealth, Ky., 256 S.W.2d 509 (1953); Neeley v. Commonwealth, Ky., 591 S.W.2d 366 (1979)."

In order to grant a mistrial, there must appear in the record "a manifest necessity for such action or an urgent or real necessity." Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 621 (1989), cert. denied, 494 U.S. 1058 (1990), citing Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert. denied, 476 U.S. 1130 (1986). "[T]he trial court has broad discretion to determine whether a violation of proper courtroom conduct requires a mistrial." Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 547 (1993) (citation omitted). Cowherd demonstrates no such manifest necessity nor abuse of discretion. The trial court admonished the jury to disregard the detective's mention of the co-defendant's silence. The admonition was sufficient to cure the error, if any.

The record refutes Cowherd's claims. As such, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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