RENDERED: JUNE 8, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000268-MR

LANCE A. CONN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 94-CR-00148

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Lance Conn has appealed the Franklin Circuit Court's denial of his RCr[1] 11.42 motion wherein he sought to have his convictions and sentences for murder and robbery vacated. Having concluded that Conn was not entitled to relief under RCr 11.42, we affirm.

[1]Kentucky Rules of Criminal Procedure.

Conn was indicted on August 24, 1994, by a Franklin Circuit Court grand jury for the offenses of Capital Murder[2] and Robbery in the First Degree, a Class B Felony.[3] Special Judge David L. Knox was assigned to the case on September 29, 1994. On July 18, 1995, Conn filed a motion to suppress certain inculpatory statements he made to a Kentucky State Police detective and a polygraph examiner. The motion was denied on August 7, 1995.

On August 21, 1995, Conn filed a motion to enter a conditional guilty plea, reserving his right to appeal the trial court's denial of his motion to suppress. A sentencing hearing was held on February 14, 1996, and on February 29, 1996, the trial court entered its judgment and sentence. Conn was sentenced to life imprisonment for the murder conviction and to 20 years for the robbery in the first degree conviction, with the terms to be served concurrently. Following Conn's direct appeal, the Supreme Court of Kentucky affirmed the trial court's denial of the suppression motion.[4]

On December 28, 1999, Conn filed his pro se RCr 11.42 motion wherein he asked for an evidentiary hearing and appointment of counsel with leave to amend his motion. The

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[2]Kentucky Revised Statutes (KRS) 507.020.

[3]KRS 515.020.

[4]1996-SC-000238, rendered June 17, 1999.

Franklin Circuit Court denied the RCr 11.42 motion on January 20, 2000, stating:

> This court takes great care when accepting a guilty plea to ensure that each Defendant has not been offered promises with respect to sentencing by either the Commonwealth or defense counsel. This Court finds that Conn had several opportunities to make the Court aware of any concerns he may have had during the guilty plea before the Court, and failed to do so. This Court finds no basis in Conn's claims for ineffective assistance of counsel, and this Court finds no constitutional invalidity in plea proceedings or in Conn's judgment.

Since the trial court denied Conn's RCr 11.42 motion without an evidentiary hearing, we must determine "whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction."[5] Conn's first claim is that Judge Graham improperly heard and decided his RCr 11.42 motion; and that Special Judge Knox, who heard the prior proceedings and sentenced him, was the proper judge to hear the motion since he was familiar with the case. Conn also alleges that Judge Graham was biased in his ruling. In support of this claim, he points to the language in the order and to the fact that Judge Graham denied him relief without the Commonwealth even filing a response.

It is critical to our justice system that all cases and controversies be decided by our courts fairly and without passion

[5]Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

or prejudice. A judge is required to hear a case and not to recuse himself from his obligation of exercising the duties of his office if the parties and the subject matter of the litigation are properly before him.[6] While a judge should disqualify himself where his impartiality might reasonably be questioned,[7] absent a showing of bias or prejudice, there is no basis for recusal.[8] A party's mere belief that a judge will not afford him a fair and impartial trial is not a sufficient ground to require the judge to disqualify himself. The asserted claim of disqualification must be based upon stated facts showing bias or prejudice sufficient to prevent the judge from fairly or impartially trying the case.[9]

It is clear from the record that Conn's RCr 11.42 motion was properly before Judge Graham; and there is nothing in the record to show that Judge Graham's partiality was ever in question. Conn's contention that the language in the order and that the judge's denial of his motion without requiring a response from the Commonwealth show bias is unconvincing. The language of the order and the denial of the hearing do not show bias, but are merely manifestations that Judge Graham was

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[6]Pessin v. Keeneland Ass'n, 274 F.Supp. 513 (E.D.Ky. 1967).

[7]Lovett v. Commonwealth, Ky.App., 858 S.W.2d 205 (1993).

[8]Id.; Kentucky Rules of the Supreme Court 4.300.

[9]Howerton v. Price, Ky., 449 S.W.2d 746 (1970); KRS 23.230(1).

satisfied from the record that there was no need for an evidentiary hearing or for a response from the Commonwealth.

Conn next argues that the trial court erred in denying his RCr 11.42 motion without holding an evidentiary hearing. Conn claims that the record fails to show where the trial court and trial counsel adequately advised him of his constitutional rights. Thus, he claims a hearing is required to establish the validity of his allegations.

RCr 11.42(5) requires a hearing "if the answer raises a material issue of fact that cannot be determined on the face of the record."[10] However, "even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing."[11] If the record refutes the claims of error, there is no need for an evidentiary hearing.[12] In this case, the record before this Court does not contain a transcript of the hearing when the guilty plea was taken or a narrative statement pursuant to CR[13] 75.13.[14] Thus, our review is limited to making a

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[10]Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743 (1993), cert. denied, 510 U.S. 1049 (1994).

[11]Stanford, supra (citing Skaggs v. Commonwealth, Ky., 803 S.W.2d 573, 576 (1990), cert. denied, 502 U.S. 844 (1991)).

[12]See Lovett, supra.

[13]Kentucky Rules of Civil Procedure.

[14]CR 75.13 states:

> (1) In the event no videotape, mechanical or stenographic record of the evidence or

(continued...)

determination as to whether the pleadings support the judgment; and as to the issues of fact that are in dispute, we are required to assume that the evidence below supported the findings in the lower court.[15] The record does contain a transcript of the suppression hearing and a videotape of the sentencing hearing; but to the extent it is necessary, it is the duty of the appellant to present a full and complete record on appeal.[16]

(...continued)

> proceedings at a hearing or trial was taken or made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient mechanical recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.
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> (2) By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or mechanical recording.

[15]Porter v. Harper, Ky., 477 S.W.2d 778 (1972); Travelers Indemnity Co. v. Patrick, Ky., 386 S.W.2d 256 (1964)(in absence of evidence in the record, it is presumed that judgment is supported by the evidence).

[16]Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

Conn's most significant allegation in this regard is that neither the trial court nor his trial counsel adequately advised him of his constitutional rights. However, there is no transcript or videotape of the colloquy between the trial court and Conn when he entered his guilty plea; and Conn had the burden of presenting us with an adequate record. The rules of procedure provided him with an opportunity to supplement the record with a narrative statement detailing the alleged deficiencies of the proceedings. In the absence of such evidence, this Court is required to assume that since the pleadings support the judgment, that the evidence supports the trial court's findings. We note that Conn signed a motion to enter a conditional guilty plea, which not only detailed the constitutional rights he would be waiving if he pled guilty, but also set out the possible punishments he could receive for the convictions. The motion clearly stated that, "[n]o one has promised me any benefit in return for my guilty plea . . . ." Accordingly, we are convinced by the record before us that the evidence supports the circuit court's findings as to the guilty plea and its denial of an evidentiary hearing.

Conn next contends he was denied effective assistance of counsel by counsel's failure to investigate and prepare available defenses, in violation of his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and Sections 2, 7 and 11 of the Kentucky Constitution. In support of this argument he asserts that (1)

counsel only prepared three pre-trial motions for his case; (2) counsel never sought a psychological evaluation to determine his competence to stand trial and to make decisions regarding the advice counsel gave him; (3) counsel would have discovered no physical evidence linking him to the murder scene had an investigation occurred; (4) counsel failed to interview any witnesses as counsel was involved in another case and would not be able to investigate or apply himself to Conn's case; and (5) counsel never investigated because counsel never intended to take Conn's case to trial, effectively becoming a "player" on the Commonwealth's team.

Obviously, trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary.[17] A reasonable investigation is not, however, the investigation that the best defense lawyer with unlimited time and resources and the benefit of hindsight would conduct.[18] As the Supreme Court stated in Baze, "[d]epending on the circumstances, there are many ways a case may be tried. The test for effective assistance of counsel is not what the best attorney would have done, but whether a

[17]Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

[18]Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000) (quoting Kokoraleis v. Gilmore, 131 F.3d 692, 693 (7th Cir. 1997); Stewart v. Gramley, 74 F.3d 132, 135 (7th Cir. 1996); Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995)(en banc)).

reasonable attorney would have acted, under the circumstances, as defense counsel did at trial" [citation omitted].[19]

Conn claims that his trial counsel was ineffective in filing only three pre-trial motions for this death penalty case. However, as the Commonwealth points out, Conn has failed to state which motions should have been filed and what affect they might have had on his case. The burden is on Conn to show that but for his counsel's unprofessional errors, the result of the proceedings would have been different; even a reasonable probability is a probability sufficient to undermine confidence in the outcome.[20] However, Conn clearly has not met this burden by his mere allegation that more pre-trial motions should have been filed in his case.

Conn claims that his trial counsel's investigation should have included a psychological evaluation of his competence to stand trial and his ability to make decisions regarding his defense. In Kentucky, "the presumption that a defendant is competent to stand trial disappears when there are reasonable grounds to hold a competency hearing" [emphasis added].[21] In Foley v. Commonwealth,[22] the Supreme Court found trial counsel

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[19]Id.

[20]Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998); U.S.C.A. Const.Amend. 6.

[21]Gabbard v. Commonwealth, Ky., 887 S.W.2d 547 (1994); KRS 504.100(3).

[22]Ky., 17 S.W.3d 878, 885-86 (2000).

was not ineffective for declining to request medical competency hearing before defendant's double murder trial where defendant "assisted him in defense, . . [and] seemed lucid and was able to converse with attorney and others. Foley testified in his own defense for over one and one-half hours. . . [and] was able to answer questions both on direct and cross-examination. The only evidence introduced indicating any bizarre behavior were letters supposedly written by Foley to his deceased grandmother shortly before trial [and] although family members spoke of various head injuries suffered by Foley during childhood, no medical records were presented to support such testimony."

In the case sub judice, Conn offered no evidence to support his claim that he may have been incompetent to stand trial or to make decisions to assist in his case. From our review of the transcript of the suppression hearing and the videotape of the sentencing hearing, it is apparent that Conn testified at both hearings with lucidity and without any apparent problem. He has offered no medical testimony to support his incompetency argument. The only evidence that he presented that even has a slight relation to this issue is that he suffered verbal, emotional and perhaps some physical abuse as a child. However, these allegations alone are insufficient to establish that his trial counsel was ineffective in not seeking a competency hearing. Since there was no apparent reason to question Conn's competency, it was not ineffective assistance of

counsel for his trial counsel not to seek a psychological evaluation.

Conn argues that if his trial counsel had investigated his case, trial counsel would have discovered there was no physical evidence linking him to the murder scene. What Conn conveniently fails to mention, however, is that he had already confessed his involvement in the robbery of Ms. Vaughn to Nevada authorities. His involvement in that felony, as will be discussed infra, subjected him to legal culpability for her murder. Trial counsel may or may not have been aware of a lack of physical evidence linking Conn to the crime scene; but trial counsel indeed knew that Conn had already given the information about his involvement in the crime to authorities. Even if counsel had conducted the most thorough investigation of physical evidence, the outcome would have been the same: Conn would have been charged with the murder through his involvement in the robbery. As any claimed failure to investigate the physical evidence would not have affected the outcome of the case, Conn has failed to meet his burden for relief under RCr 11.42.

Conn contends that his trial counsel told him he could not interview witnesses, as he was involved in another case. Even if this Court accepted this bald allegation as true, Conn still failed to meet his burden of showing that but for his counsel's unprofessional errors, the result of the proceedings

would have been different.[23] Conn has not provided any names of witnesses and or any specific evidence that counsel could have found which would have significantly assisted in his defense. Since there is no basis to conclude that the alleged failure of trial counsel to interview witnesses would have provided a reasonable probability for a different outcome, Conn has not met his burden.

Conn also makes the bald assertion that his trial counsel did not investigate his case because counsel never intended to take the case to trial, and that his counsel effectively became a "player" on the Commonwealth's team. Again, such bald assertions carry no weight. We believe that in light of the information given by Conn to Nevada and Kentucky authorities, the Commonwealth's seeking of the death penalty and the general horror of the crime committed, counsel that trial acted reasonably and was not ineffective.

Conn claims his trial counsel violated his constitutional rights by advising him to plead guilty to a crime he did not commit, i.e., the murder of Geneva Vaughn. Conn has admitted his involvement with two co-defendants in a plot to rob Ms. Vaughn. While Conn claims that he did not physically kill her, he admitted that he took part in the robbery and that he helped Marshall place her body in the car after the murder. Conn's participation in these crimes meets the legal requirements for the murder conviction. As the Commonwealth points out in its

[23] See Moore, supra.

brief, the Commentary to KRS 507.020 proposes that if a jury should determine from all the circumstances surrounding the felony, i.e., the robbery, that a defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).

Conn's trial counsel was appraised of the Commonwealth's intention to seek the death penalty. Counsel was similarly aware that Conn's inculpatory statements to the Nevada police and Kentucky police were ruled admissible at trial. Co-defendant Ware's counsel stated at the sentencing hearing that Ware had at all times planned to testify against Conn at trial. It is certainly proper for trial counsel to influence a guilty defendant to plead guilty in order to obtain a lighter sentence than a jury might impose.[24] In Conn's case, trial counsel had a client who admitted to his involvement in a felony robbery which resulted in the victim's death which provided a basis for Conn'S murder conviction. Trial counsel's advice that Conn plead guilty and that he should turn state's witness in an attempt to avoid the death penalty was certainly not unreasonable or ineffective assistance of counsel.

Conn claims that a mitigation expert explained to him before trial that a conditional guilty plea would, among other things, eliminate the possibility that he would receive either the death penalty or a life sentence for his crime. He claims

[24]Harris v. Commonwealth, Ky., 456 S.W.2d 690 (1970).

that this guilty plea agreement was a tool employed by his counsel to mislead him into believing that if he pled guilty and agreed to testify against co-defendant Marshall, he would receive two, 20-year prison terms running concurrently. He argues that counsel knew the Commonwealth would take no stance on sentencing, and he posits that had he understood the agreement to plead guilty would not result in a reduced sentence of some sort, he would not have pled guilty, would not have cooperated with the Commonwealth, and would have taken his chances at trial, where the possible penalties would have been no different than those involved at the sentencing hearing before the trial court.

The record in this case clearly indicates that the potential penalties Conn faced for the charge of murder ranged from 20 years to death and for the charge of robbery from 10 to 20 years. Conn cites Haight v. Commonwealth,[25] and likens himself to the defendant in that case who had been "assured that an agreement had been reached whereby he would be sentenced in accordance with the recommendation of the Commonwealth, but a meaningless ritual was required in which he would have to say that no promise had been made to him in return for his guilty plea."[26] However, the Haight case is factually distinguishable. There, the trial court and counsel for both sides had engaged in several conversations concerning a plea agreement, and the trial

[25]Ky., 760 S.W.2d 84 (1988).

[26]Id. at 86.

court explained that while it generally followed the Commonwealth's sentencing recommendations, it could not bind itself by law to a predetermined sentence without reviewing a sentencing report. When the trial court rejected the recommended sentence and imposed the death penalty, Haight appealed and the Supreme Court found that the trial court's comment that it would give great weight to the Commonwealth's recommendations, along with the fact that the trial court would follow the Commonwealth's recommendations absent any unforeseen circumstances, rendered Haight's guilty plea invalid.

Conn has not identified anything in the record which supports his allegation that he merely went through the motions of pleading guilty with the understanding that he would receive an agreed upon sentence in accordance with the plea agreement. He signed the guilty plea form which clearly stated the possible penalties he faced. That form did not contain any language indicating that all Conn would receive on a plea of guilty was two, 20-year sentences. The record refutes Conn's allegation that his counsel misled him into believing the plea agreement required a sentence of two, 20-year terms.

Conn next argues that his plea agreement was breached at the sentencing hearing, and that counsel should have brought the breach of the agreement to the trial court's attention. He claims his trial counsel failed to advise him that he had a right to withdraw his guilty plea once the trial court refused to follow the plea agreement and that such failure constituted

ineffective assistance of counsel. Obviously, for Conn to succeed on this issue he must first demonstrate that the plea agreement required two, 20-year sentences. As we have discussed previously, the guilty plea form signed by Conns states nothing about the Commonwealth recommending two, 20-year sentences. To the contrary, the agreement listed several possible sentences. Since the plea agreement did not require a certain sentence, there could not be a breach of such at the sentencing hearing. Accordingly, trial counsel was not ineffective in failing to object or in failing to advise Conn that he could withdraw the guilty plea.

Conn also claims his trial counsel failed him by not making independent pre-trial investigations to determine the adequacy of his plea advice. He claims that he was required to forego the right to interview witnesses before deciding whether to accept the plea agreement and to enter a guilty plea; that he was required to forego the right to confront his accusers; that his right against self-incrimination and "several other constitutional rights were denied"; that counsel never intended to take his case to trial and therefore did not adequately prepare during the critical pre-trial phase; and that counsel neglected his duty to interview potential witnesses and to make an independent examination of the factual circumstances of the case.

We have already addressed many of these same arguments. Therefore, our discussion here will be limited to addressing

Conn's argument that he was forced to waive his constitutional rights before a proper investigation had been made to determine the adequacy of the advice he was given to plead guilty. As has been stated previously, trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[27] A reasonable investigation, however, does not require an investigation by the best possible defense lawyer who has unlimited time and resources and the benefit of hindsight.[28] As our Supreme Court stated in Baze, supra, "[d]epending on the circumstances, there are many ways a case may be tried. The test for effective assistance of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial" [citation omitted].[29]

Conn's counsel knew Conn had made inculpatory statements which had been ruled admissible at trial, he knew Conn had planned with his co-conspirators to rob Ms. Vaughn, and he knew Conn had helped place Ms. Vaughn's body in the trunk of the car. Counsel's investigation, which included hiring a mitigation expert for help in presenting mitigation evidence at the sentencing hearing, apparently led counsel to believe that the best course of action for Conn would be to plead guilty and to

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[27]See Strickland, supra.

[28]See Thompson, supra.

[29]Baze, supra at 625.

turn state's evidence, as opposed to facing a jury in a death penalty case. In light of the totality of the circumstances, it was not ineffective for counsel to advise Conn to plead guilty based on the information counsel had and the reasonable investigation he had conducted.

Conn also makes the serious charge that his counsel withheld exculpatory evidence contained in discovery materials from him until after he pled guilty. Conn argues that if he had known of details about witness testimony and fingerprint evidence contained in this exculpatory evidence that he would not have pled guilty.

We begin our analysis of this issue by stating the fundamental rule that for a defendant's guilty plea to be valid it must be given knowingly, voluntarily and intelligently.[30] The plea must be made with knowledge of the "relevant circumstances and likely consequences."[31] Determining whether a plea was made voluntarily requires an evaluation of all the relevant circumstances surrounding the plea.[32] The ultimate question is whether the plea was in fact given knowingly, voluntarily and intelligently.[33]

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[30]Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

[31]Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

[32]Caudell v. Jago, 747 F.2d 1046, 1050 (6th Cir. 1984).

[33]Pitts v. United States, 763 F.2d 197, 200 (6th Cir. 1985).

Conn's claim that his counsel misled him into believing that his co-defendant and former girlfriend, Ware, would testify against him is not supported by the record. Rather, the record supports counsel's advice that Ware would, in fact, testify against Conn. The record of the sentencing hearing directly refutes Conn's contention that Ware would not testify against him. Her counsel clearly stated that she, at all times, had been ready and willing to testify against Conn. Since the record refutes this argument, an evidentiary hearing was not required;[34] and there was no evidence of ineffective assistance of counsel concerning this claim.

Conn also claims that counsel told him that his prints were on Ms. Vaughn's glasses, and that he did not discover that, in fact, those prints belonged to co-defendant Marshall until after he pled guilty. This claim poses a more difficult question. We do not take these serious accusations lightly; however, Conn is required to show not only that his trial counsel's performance was deficient, but that this deficiency resulted in actual prejudice. If counsel's performance is deemed ineffective, but the end result would have been same, then a movant is not entitled to relief under RCr 11.42.[35]

Conn's assertion that his counsel lied to him and withheld discovery materials from him is not refuted on the face of the record; however, even if this violation occurred, it would

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[34]See Sanborn, supra.

[35]Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863 (1986).

not constitute actual prejudice to Conn. The record clearly demonstrates that Conn admitted his involvement in the robbery and the moving of the victim's body to both the Nevada and Kentucky police. Thus, even if Conn had known that the fingerprints on Ms. Vaughn's glasses belonged to Marshall and not to him, it would not have changed the fact that he took part in a felony resulting in her death, and that he could still be found guilty of murder. Since Conn has failed to show actual prejudice, he cannot prevail on his ineffective assistance of counsel claim.

The standard for determining ineffective assistance of counsel announced in Strickland, supra, was adopted by this Court in Gall v. Commonwealth.[36] Strickland requires a movant to show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[37] In addition, Strickland mandates that judicial scrutiny be highly deferential. A court making this evaluation "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[38]

A court in considering an ineffectiveness claim must "consider the totality of the evidence before the judge or jury" and "assess counsel's overall performance throughout the case in

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[36]Ky., 702 S.W.2d 37 (1985), cert. denied 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

[37]Strickland, 466 U.S. at 687.

[38]Id. 466 U.S. at 689.

order to determine whether the "indentified acts or omissions" overcome the presumption that counsel rendered reasonable assistance."[39] We do not believe that in light of all of the circumstances, counsel's performance was "outside of the wide range of professionally competent professional assistance."[40]

Conn also argues that the cumulative impact of his counsel's errors requires that his conviction and sentence be set aside. As we have concluded that no prejudicial error occurred, a combination of non-errors does not suddenly require reversal.[41]

For the reasons set forth above, we hold that the Franklin Circuit Court's order denying Conn an evidentiary hearing and denying him any relief under RCr 11.42 is affirmed.

ALL CONCUR.

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[39]Id.

[40]Id. 466 U.S. at 690.

[41]Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 278 (1992); see also Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1992); and McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986).