

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000580-MR

RICKEY MOON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 95-CR-001633

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL,¹ JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Rickey Moon has appealed from an order entered by the Jefferson Circuit Court on February 9, 2001, denying his RCr² 11.42 motion to set aside his judgment and conviction, to appoint him counsel, and to grant him a full evidentiary hearing. Having concluded that the trial court correctly denied all of Moon's claims, we affirm.

On the afternoon of May 2, 1995, Moon was pulled over by Officer Beat of the Louisville Police Department for having

¹Judge Gudgel concurred in this opinion prior to his retirement effective November 1, 2002.

²Kentucky Rules of Criminal Procedure.

expired registration tags on his car.³ According to the officer, Moon got out of his car and began approaching him. The officer asked Moon to produce his driver's license, at which time he returned to his truck, grabbed something off the dashboard and took off running. Moon was apprehended shortly thereafter by another officer and then turned over to Officer Beat. Upon searching Moon incident to the arrest, Officer Beat found almost \$700.00 in cash and a pager. Officer Beat then searched the truck and found on the floorboard a box of single-edge razor blades and a brown paper bag filled with baggies. Officer Beat then took Moon to the Jefferson County Jail and turned him over to the corrections officers, advising them to be on the alert for drugs.

Corrections Officer Eric Berman took Moon into the "grill area," removed his handcuffs and began to search him. Officer Berman testified that he noticed a white film around Moon's mouth, and that Moon began to act "antsy." Officer Berman suspected that Moon had something in his mouth and repeatedly requested that Moon spit it out. When Moon did not comply, Officer Berman told him to put his hands against the wall. As Officer Berman attempted to handcuff Moon, Moon began to struggle. It ultimately took six corrections officers to restrain Moon. Finally, one of the officers got Moon in a choke-

³The recited facts were obtained from this Court's unpublished opinion in Moon v. Commonwealth, No. 97-CA-0184-MR, which affirmed Moon's conviction and sentence.

hold and he spit out five small bags containing a white substance, which was later determined to be cocaine.

After Moon was placed in a holding cell, he began to complain of breathing problems and numbness. Moon was examined by the jail's nurse and immediately taken to the hospital for treatment for a drug overdose. Officer Deward Burdette went to the hospital and stayed with Moon. According to Officer Burdette, after Moon was placed in a room for stabilization, he stated, "Get this stuff out of me. I never did drugs, I just sold them." According to medical records introduced at trial, when Moon was giving his medical history he admitted to the treating physician that he had spit out bags of cocaine. Moon's examination revealed a very low blood pressure and a rapid heart rate. The medical records noted that cocaine ingestion was indicated. Moon was treated for acute cocaine toxicity and eventually released.

On July 6, 1995, a Jefferson County grand jury charged Moon with trafficking in a controlled substance in the first degree,⁴ promoting contraband in the first degree,⁵ illegal possession of drug paraphernalia,⁶ attempting to elude police,⁷

⁴Kentucky Revised Statutes 218A.1412 and 218A.140(a)1.

⁵KRS 520.050.

⁶KRS 218A.500(2) and 218A.500(5).

⁷KRS 189.393.

operating a motor vehicle while license suspended,⁸ not having motor vehicle insurance,⁹ operating a motor vehicle with an expired license plate,¹⁰ and being a persistent felony offender in the first degree (PFO I).¹¹

Moon was represented by Fred R. Radolovich at his jury trial on November 21-25, 1996. He was found guilty of trafficking in a controlled substance in the first degree, promoting contraband in the first degree, attempting to elude police and operating a motor vehicle while license suspended. Following the jury's finding of guilt on these underlying offenses, Moon entered a guilty plea to being a PFO I. Under the plea agreement, Moon agreed to accept a ten-year sentence on the trafficking conviction, enhanced to 15 years by his PFO I conviction, and a five-year sentence on the promoting contraband conviction, enhanced to ten years by his PFO I conviction. Moon was sentenced in accordance with the plea agreement to a total of 15 years' imprisonment by judgment entered on January 15, 1997. This Court affirmed Moon's conviction and sentence in an unpublished opinion that became final on November 25, 1998, and the Supreme Court of Kentucky denied discretionary review.

On October 26, 2000, Moon, pro se, filed a motion to proceed in forma pauperis and a RCr 11.42 motion alleging

⁸KRS 186.602(2).

⁹KRS 304.39-080.

¹⁰KRS 186.170.

¹¹KRS 532.080.

ineffective assistance of counsel. Moon requested that the trial court appoint him counsel, grant a full evidentiary hearing and set aside his judgment and conviction. On February 9, 2001, the circuit court entered its order granting Moon's request to proceed in forma pauperis but denying his RCr 11.42 motion. The trial court ruled that procedurally Moon's RCr 11.42 was untimely under RCr 11.42(10), since it was filed more than three years after his conviction and none of the exceptions applied. The trial court nonetheless addressed Moon's claims on the merits and found that he had established no grounds for relief. This appeal followed.

Moon raises seven assignments of error on appeal:¹² (1) the trial court erred by failing to appoint counsel to supplement the pleadings and by failing to hold an evidentiary hearing to properly determine the merits of the issues raised; (2) he received ineffective assistance of counsel because his trial counsel deceived him and gave him faulty legal advice; (3) he received ineffective assistance of counsel because his trial counsel failed to communicate to him the Commonwealth's plea bargain offer of two years and he went to trial without knowledge of the plea offer, was found guilty, and sentenced to 15 years; (4) he received ineffective assistance of counsel because his trial counsel failed to conduct a thorough investigation of the facts surrounding the charges and possible defenses; (5) he

¹²The Commonwealth fails to raise the untimeliness of the RCr 11.42 motion as a defense.

received ineffective assistance of counsel because his trial counsel failed to impeach the Commonwealth's key witness with a prior inconsistent statement; (6) the trial court erred by failing to disallow certain testimony; and (7) he was denied substantial due process under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution as a result of cumulative error.

The United States Supreme Court has determined the applicable standard required to demonstrate a claim of ineffective assistance of counsel.¹³ "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹⁴ In Strickland, the Supreme Court held:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence

¹³Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

¹⁴Id. at 686.

resulted from a breakdown in the adversary process that renders the result unreliable.¹⁵

Thus, Moon must first demonstrate that Radolovich's performance was deficient, and then demonstrate that Radolovich's deficient performance prejudiced his defense.

"In analyzing a trial counsel's performance, the court must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'"¹⁶ Since Moon plead guilty to PFO I and his sentence was set by an agreement, we note that the United States Supreme Court has also applied the Strickland standard for ineffective assistance of counsel claims to guilty pleas.¹⁷

Moon's first assignment of error is that the trial court erred in denying his RCr 11.42 motion because it failed to hold an evidentiary hearing and it failed to appoint counsel to supplement the pleadings. Moon claims that the issues he has raised could not be disproved on the face of the record.

RCr 11.42(5) provides, in part, as follows:

. . . If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent

¹⁵Id. at 687.

¹⁶Phon v. Commonwealth, Ky. App., 51 S.W.3d 456, 459 (citing) Strickland, 466 U.S. at 689).

¹⁷Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 360, 88 L.Ed.2d 203 (1985).

the movant in the proceeding, including appeal.

If the allegations in the motion can be resolved on the face of the record, an evidentiary hearing is not required.¹⁸ "A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e. conclusively proved or disproved, by an examination of the record."¹⁹ "If an evidentiary hearing is not required, counsel need not be appointed. . . ."²⁰ As will be discussed in detail as to the various claims raised by Moon, all of his claims are conclusively disproved on the face of the record. Moon was not entitled to appointment of counsel or an evidentiary hearing.

Moon's second assignment of error is that he received ineffective assistance of counsel because his trial counsel deceived him and gave him faulty legal advice. Moon argues that Radolovich deceived him into entering a guilty plea, resulting in his decision to forgo jury sentencing and to plead guilty to PFO I. Moon claims: "Under the plea agreement explained to [him], he was pleading guilty to a fifteen year sentence, not an enhanced fifteen year sentence. [He] was led to believe he would be serving the minimum parole eligibility on fifteen years before being eligible for parole."

¹⁸Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

¹⁹Id. at 452; Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994).

²⁰Id.

Moon specifically claims that he was led to believe that he would receive a ten-year sentence, making him eligible for parole after serving three years. He claims that he attempted to withdraw his guilty plea to the PFO I charge at his sentencing hearing because he had not been advised regarding his parole eligibility. This argument was previously raised by Moon in his direct appeal to this Court, where this Court stated that "[a]t the sentencing hearing, Moon asked to withdraw his plea because he claimed he was not advised that he would not be eligible for parole in ten years due to the PFO I conviction and maintained he would not have pled guilty had he known this." This Court, citing Turner v. Commonwealth,²¹ held that Moon's lack of knowledge concerning parole eligibility did not invalidate his guilty plea. This Court held that Moon's guilty plea was knowingly, voluntarily, and intelligently entered, which the record clearly supports.

Thus, Moon is attempting to relitigate in this appeal an issue already decided on direct appeal. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court."²² A RCr 11.42 motion is "limited to the issues that were not and could not be raised on direct appeal. Any issue raised and rejected on direct appeal

²¹Ky. App., 647 S.W.2d 500 (1982).

²²Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972).

may not be relitigated in such proceedings by claiming that they amount to ineffective assistance of counsel."²³ Moon's attempt to present this argument as one of ineffective assistance of counsel is precluded because the issue was decided on direct appeal.

When the trial court was advised that a plea agreement had been reached at the penalty phase of the trial, the trial judge asked the prosecutor to state the terms of the agreement. The prosecutor stated: "[T]he defendant is going to be pleading guilty to a PFO I and that will enhance the trafficking charge from five to ten, to ten to twenty. The offer will be fifteen years on a PFO I trafficking" The videotape record clearly indicates that Moon was present in the courtroom when the terms of the offer were explained to the trial court. The record further indicates that Moon understood that by pleading guilty to PFO I, his penalty would be enhanced to between ten and 20 years. On the record, Moon stated that he was "very much so" satisfied with Radolovich's representation.

The record clearly indicates that Moon understood that his sentence involved PFO I enhancement. Therefore, Moon's claim that Radolovich deceived him is conclusively refuted by the record. Moon was repeatedly informed that the status to which he was pleading guilty was PFO I. Moon argues that, had he known that the Commonwealth's offer would not provide parole

²³Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990)).

eligibility after three years, he would not have pled guilty because "he would not have made it that easy on them." The United States Supreme Court has "never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary" ²⁴ Because Moon is unable to demonstrate that Radolovich's performance was deficient, there is no need to even consider the second prong of Strickland.

Moon's third assignment of error is that he received ineffective assistance of counsel because his trial counsel failed to communicate to him the Commonwealth's "plea bargain offer of two years [and he] went to trial without knowledge of the plea, was found guilty, and sentenced to fifteen years" in the penitentiary. Moon alleges that the Commonwealth offered him a two-year sentence in return for a guilty plea and that Radolovich was ineffective in failing to communicate this offer to him. This claim is refuted on the face of the record.

On the morning of the trial, Radolovich put on the record that the Commonwealth's offer had been and continued to be ten years. On the record, Moon acknowledged that Radolovich had informed him of the Commonwealth's offer. In its response to motion to vacate, the Commonwealth maintained that there had never been an offer of two years and that the plea offer was for ten years. Since the record conclusively establishes that there

²⁴Hill, 474 U.S. at 56.

was never an offer for two years, there can be no ineffective assistance of counsel for failure to communicate an offer that was never made. The trial court properly denied Moon's RCr 11.42 motion on this ground.

Moon's fourth assignment of error is that he received ineffective assistance of counsel because his trial counsel failed to conduct a thorough investigation of the facts surrounding the charges and possible defenses leading up to his indictment and convictions. Moon specifically alleges that there is clear evidence of perjurious statements being made before the grand jury; that Radolovich made no meaningful attempt to investigate the facts; that Officer Beat committed perjury regarding "who" owned the truck; that Radolovich did not interview any defense witnesses or attempt to contact the two people who had been with Moon prior to his arrest; and that Radolovich failed to obtain the "booking video" to determine defense issues.

The argument that the testimony of Officer Beat and Officer Berman was perjurious relates to the conflicting evidence presented before the grand jury regarding the location of the razor blades and baggies. Officer Beat, the arresting officer, testified before the grand jury he that "didn't find drugs in [Moon's] car, but [Moon] had a plastic bag filled with empty baggies stuffed in it and a couple of razor blades that were on the floorboard of the vehicle, stuffed under the seats. . . ." Officer Berman testified before the grand jury that the drug

paraphernalia was found when Moon took it out of his pockets at the jail.

In July 1995 Radolovich requested a transcript of the grand jury proceedings, so prior to trial he knew the contents of both Officer Beat's and Officer Berman's grand jury testimony. Radolovich used the grand jury transcript to impeach Officer Beat's testimony during Moon's jury trial. At trial Officer Beat testified that there was no plastic bag filled with empty baggies, but before the grand jury he had testified that the drug paraphernalia was found in a plastic bag. The record reflects that, after exposing this inconsistency, Radolovich asked: "Minimally, under oath, if you stated it was a plastic bag, that would be considered an inaccurate statement under oath?" Officer Beat replied, "Yes."

In his memorandum of law in support of motion to vacate, Moon argued that, at trial, Officer Berman never testified about any baggies and razor blades that were confiscated from his person. However, as mentioned previously, Officer Berman testified before the grand jury that the drug paraphernalia was found when Moon took it out of his pockets at the jail. Moon claims that Radolovich's failure to pursue this inconsistency amounts to ineffective assistance of counsel.

However, this Court has held that "[t]here is a strong presumption that, under the circumstances, the actions of counsel

might be considered sound trial strategy."²⁵ Additionally, "[a] reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided."²⁶

As the Commonwealth correctly observes, "[t]his record supports the conclusion that if defense counsel elected not to impeach Officer Berman at trial with grand jury testimony that the razor blades and baggies were found on [Moon's] person, it was a matter of trial strategy." This Court has held that "effective assistance of counsel does not guarantee error free representation, nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case."²⁷ The record reveals that Radolovich was familiar with and did investigate the grand jury testimony. He had already impeached Officer Beat; this Court will not second-guess his decision not to impeach Officer Berman. It was a matter of trial strategy and within the wide range of professionally competent assistance. Moreover, Moon was acquitted on the drug paraphernalia charge.

Moon argues that Officer Beat committed perjury regarding "who" owned the truck. Officer Beat testified at trial

²⁵Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999) (citing Strickland, 466 U.S. at 689).

²⁶Russell, supra at 875 (citing Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998)).

²⁷Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642, 644 (1978).

that the pickup truck was registered to Moon, but Moon claims that he was not the registered owner of the pickup truck. However, as previously stated, Moon was acquitted of the drug paraphernalia charge involving the baggies and razor blades found in the pickup truck. It is unclear what result Moon is seeking regarding the effect of this allegedly perjurious testimony. Although Moon may not be the registered owner of the pickup truck, during direct examination Radolovich elicited testimony from Moon that his brother had given the truck to him. Radolovich inquired into the ownership of the truck; this refutes any claim of ineffective assistance of counsel concerning who owned the truck.

Moon also argues that there is no showing that Radolovich interviewed any defense witnesses, or attempted to contact the two people who had been with him prior to his arrest. The record reveals that Radolovich questioned Officer Beat as to why he did not take the other two people into custody. The record also reveals that Radolovich questioned why Officer Beat was not suspicious of the other two passengers in the pickup truck.

"The Strickland standard requires that a movant show that counsel's performance was deficient and that the deficient performance prejudiced the defense."²⁸ Furthermore, Moon "must also demonstrate that, absent the errors by trial counsel, there

²⁸Norton v. Commonwealth, Ky., 63 S.W.3d 175, 177 (2001); Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (citing) Strickland, 466 U.S. at 687).

is a 'reasonable probability' that the jury would have reached a different result" [emphasis original].²⁹

In the case sub judice, the record reveals that Radolovich's performance was not deficient. He challenged Officer Beat's decision not to take the two passengers into custody. However, even if it were determined that Radolovich was deficient in failing to contact the two passengers, it can hardly be said that this deficient performance prejudiced Moon. There was overwhelming evidence of Moon's guilt. The record is devoid of any indication that contacting these two people would have had any influence upon the jury's verdict. Moon has failed to demonstrate that, absent Radolovich's alleged errors, there was a "reasonable probability" that the jury would have acquitted him.³⁰

Our Supreme Court has recently held that "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory."³¹ Evidence of Moon's guilt was exceedingly strong. There was testimony presented that, after attempting to swallow the contraband, Moon stated, "Get this stuff out of me. I never did drugs, I just sold them." The record conclusively refutes any claim that Radolovich's failure

²⁹Id.

³⁰Norton, supra at 177.

³¹Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000), citing U.S. v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

to contact the two passengers "caused [Moon] to lose what he otherwise would probably have won."³²

Moon additionally argues that Radolovich failed to obtain the "booking video" to evaluate any defense issues. The record clearly reflects that Radolovich questioned Officer Berman as to how many times he had viewed the booking videotape. Radolovich further asked Officer Berman if he knew why the video alternates between "slow-motion" and "fast-forward" portions. Radolovich was clearly familiar with the booking videotape. Although Moon argues that Radolovich made no attempt to obtain the video, the record reflects that Radolovich was familiar with it.

Moon's argument of ineffective assistance of counsel concerning Radolovich's alleged failure to conduct a thorough investigation of the facts surrounding the charges and possible defenses is conclusively refuted by the record. The trial court properly denied Moon's RCr 11.42 motion on this ground.

Moon's fifth assignment of error is that he received ineffective assistance of counsel because his trial counsel failed to impeach the Commonwealth's key witness with a prior inconsistent statement. Moon again argues that the discrepancy in testimony between Officer Beat and Officer Berman regarding the location of the drug paraphernalia warrants a finding of ineffective assistance of counsel.

³²Foley, supra at 884.

This is the same argument Moon presented within his fourth assignment of error. As such, this argument has already been considered and rejected. Radolovich used the grand jury transcript to impeach Officer Beat during trial, and Moon was acquitted of the drug paraphernalia charge. There was no ineffective assistance of counsel. Any allegation of ineffective assistance of counsel regarding this argument is conclusively refuted by the record. The trial court properly denied Moon's RCr 11.42 Motion on this ground.

Moon's sixth assignment of error is that trial court erred by failing to disallow certain testimony that violated the disclosure requirement of RCr 7.24. Moon alleges that the Commonwealth did not disclose prior to trial that Correctional Officer Burdette had heard Moon make incriminating statements. On direct examination, Officer Burdette stated that, while at the hospital, Moon exclaimed, "Get this stuff out of me. I never did drugs, I only sold them." During cross-examination, Officer Burdette testified that he neither wrote down these statements nor reported them to anyone. Thus, Radolovich questioned Officer Burdette about Moon's statements.

Moon is correct in his claim that the Commonwealth failed to disclose that Officer Burchett was a witness to Moon's incriminating statements. However, the record clearly reflects that on October 5, 1995, more than one year before Moon's trial, the Commonwealth filed a supplemental response to the court's pretrial order for discovery. In this supplemental response,

Carrie Howard, Assistant Commonwealth's Attorney, submitted the following: "The defendant made the following statements: (2) The defendant told transport officers Burdette and Stalwart that he was not a drug user, he was a seller. He kept saying, 'Get this stuff out of me.'" Howard mailed a copy of this supplemental response to Radolovich on October 5, 1995.

Moon's argument is premised upon Howard's failure to include Officer Burchett as a witness to Moon's statements along with Officers Burdette and Stalwart in the supplemental response. In the Commonwealth's original response to court's order of discovery, Howard did include Officer Burchett as a general witness along with 12 other witnesses. However, in her supplemental response, Howard omitted Officer Burchett as a witness to these incriminating statements, including only Officers Burdette and Stalwart.

Radolovich moved the trial court to suppress Moon's incriminating statements. He also moved for a mistrial, arguing that he had no notice that Officer Burchett would testify to Moon's statements. The trial court ruled that while there was no prejudice requiring a mistrial, Officer Burchett would be precluded from testifying to Moon's statements. Judge Shake stated, "Let's just hear from Burdette on the statement. He's going to say the same thing?" Officer Burdette then testified that Moon had made the incriminating statements. Moon was not prejudiced by the Commonwealth's failure to disclose that Officer Burchett had heard Moon's incriminating statements, since the

trial court granted Radolovich's motion to disallow Officer Burchett's testimony as to Moon's incriminating statements. Moon attained the exact result he wanted.

Additionally, this is an issue that should have been raised in Moon's direct appeal. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court."³³

Moon also argues that no chain of evidence was provided for the cocaine, baggies, and razor blades. He alleges that the "prejudice from this is clear in that conflicting accounts exist as to where the razor blades and baggies were recovered, and the alleged cocaine was not properly documented as having been recovered from [him]." The record reflects that Radolovich challenged the chain of custody regarding the cocaine. At trial, he argued that nothing on the envelope containing the cocaine indicated who received it at the Kentucky State Police Jefferson Regional Forensic Laboratory. During cross-examination of Cheryl Vogel, a forensic drug chemist at the Kentucky State Police Crime Lab, Radolovich elicited testimony that the forensic laboratory never tested the contents of the envelope to determine if it was cocaine.

However, Moon's argument regarding chain of custody lacks merit. On two separate occasions during the trial, Moon

³³Thacker, 476 S.W.2d at 839.

admitted that the substance he spit out was cocaine. On direct examination, Moon acknowledged that, after being arrested by Officer Beat, he "was chewing the cocaine, trying to get rid of it, in the backseat of [Beat's] vehicle." During cross-examination, Moon admitted that the substance in his mouth was cocaine, that it was in his mouth when he was arrested by Officer Beat, and that he still had the cocaine in his mouth in the booking room at the jail. In his brief, Moon emphasizes the absence of a chain of custody, apparently to create a question as to whether the substance was cocaine. However, in that very same brief, he admits that, when he was taken to jail, "he was suffering from cocaine overdose at that time." This argument is without merit. Furthermore, this is an issue that should have been raised on direct appeal.³⁴

Moon's seventh and final assignment of error is that he was denied substantial due process under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution as a result of cumulative error. Moon argues that he is entitled to RCr 11.42 relief due to the cumulative effect of his six previous assignments of error.

All six of Moon's arguments are unconvincing. This Court finds that there is no support for a claim of cumulative error. In that no error existed in regard to Moon's six

³⁴Thacker, supra at 839.

arguments, "consequently we find no cumulative error."³⁵ Therefore, where "individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect."³⁶ The trial court properly denied RCr 11.42 relief. There was no error.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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³⁵Woodall v. Commonwealth Ky., 63 S.W.3d 104, 134 (2001); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 682 (1991).

³⁶Sanborn, supra at 913; McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986).