RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-001737-MR

ROSCOE DEES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 98-CR-00327

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Roscoe Dees has appealed from an order of the Fayette Circuit Court entered on August 1, 2003, which denied, without holding an evidentiary hearing, Dees's motion to vacate, set aside, or correct judgment brought pursuant to RCr[1] 11.42. Dees's motion alleged ineffective assistance of counsel associated with his conditional guilty plea to possession of

[1] Kentucky Rules of Criminal Procedure.

drug paraphernalia (second offense)[2] and to being a persistent felony offender in the first degree (PFO I).[3] Having concluded that Dees has failed to establish that he received ineffective assistance of counsel, we affirm.

While on routine patrol on the night of January 29, 1998, in an area known for high drug activity, Officer Ed Hart of the Lexington Division of Police observed a black male approach and get in on the passenger side of a vehicle being driven by Dees shortly after it stopped next to the curb on Elm Street. After approximately one minute, Officer Hart saw the passenger exit the vehicle, and he approached to investigate based on his experience with drug activity in this specific area. Officer Hart motioned for Dees, who is African-American, to wait while he went to speak with the other suspect. Dees initially acknowledged Officer Hart's request, but then drove away. Officer Hart radioed for assistance and Dees was stopped a few blocks away by Officer Pike Spraggins. During a protective Terry[4] pat-down search, the police recovered a crack pipe in Dees's pants pocket. The police arrested Dees and seized a piece of crack cocaine found in a search of his vehicle.

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[2] Kentucky Revised Statutes (KRS) 218A.500.

[3] KRS 532.080.

[4] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

On March 24, 1998, a Fayette County grand jury indicted Dees on one felony count of possession of a controlled substance (cocaine) in the first degree,[5] one felony count of possession of drug paraphernalia (second offense), and for PFO I. The indictment listed six felony convictions in Ohio and Kentucky between 1975 and 1997 as support for the PFO I count. On April 10 and 24, 1998, the trial court conducted hearings on Dees's motion to suppress the evidence seized in the stop and search of him based on the alleged lack of reasonable articulable suspicion to support the stop under the requirements of Terry. Officer Hart and Officer Spraggins testified at the hearings. The trial court denied the motion holding that there was sufficient cause to justify the stop.

On May 8, 1998, Dees entered a conditional plea of guilty to possession of drug paraphernalia (second offense) and PFO I. At the guilty plea hearing, the Commonwealth stated the parties had reached an agreement whereby Dees would plead guilty in return for a recommendation for a sentence of one year on the charge of possession of drug paraphernalia (second offense) enhanced to ten years for PFO I and dismissal of the charge for possession of a controlled substance (cocaine) in the first degree. The Commonwealth also asked that the record show that Dees agreed not to file an RCr 11.42 based on the grounds that

[5] KRS 218A.1415.

the then-recent amendment to KRS 532.080(8),[6] which was to become effective on July 15, 1998, and which stated that no conviction for possession of drug paraphernalia would be subject to PFO enhancement, might be available to him. Dees engaged in a short conversation with his attorney and then expressed an understanding that he could not later claim he was unaware of the new law and that his attorney had not explained to him it did not apply to his situation. Dees also acknowledged that he was subject to a possible sentence of one to five years on the count for possession of drug paraphernalia[7] that could be enhanced to ten to 20 years for conviction under the count for PFO I,[8] that no one had promised he would be probated, and that the trial court was not bound to follow the Commonwealth's recommendation. The trial court accepted the plea but postponed sentencing pending review of the pre-sentence investigation report.

On May 29, 1998, the trial court conducted the sentencing hearing where Dees moved for probation despite his

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[6] The amendment consisted of adding Subsection 8, which provides as follows: "No conviction, plea of guilty, or Alford plea to a violation of KRS 218A.500 shall bring a defendant within the purview of or be used as a conviction eligible for making a person a persistent felony offender under this section."

[7] Possession of drug paraphernalia is a Class A misdemeanor for the first offense and a Class D felony for the second offense. See KRS 218A.500(5); and KRS 532.020(1)(a)(stating Class D felony punishable by one to five years imprisonment).

[8] See KRS 532.080(6)(b).

long criminal history, conditioned on drug abuse treatment. Bishop Lucian Booker, the director of the Road to Deliverance rehabilitation program appeared to explain his willingness to accept Dees into his program. The trial court stated that it would be willing to grant probation subject, however, to certain conditions and a longer sentence of 20 years. Dees's attorney explained to him that the trial court was increasing the sentence to 20 years. The trial court told Dees that he could withdraw his guilty plea, rather than accept the new terms associated with the grant of probation. Dees's counsel also told him that he could ask the court to adhere to the original terms offered by the Commonwealth. Dees assured the trial court that he was willing to accept the new terms offered by the trial court. The trial court sentenced Dees to two years for possession of drug paraphernalia (second offense) enhanced to 20 years for PFO I, but suspended imposition of sentence and granted probation for five years subject to several conditions including good behavior, refraining from violating the law, complying with the regulations of Probation and Parole, enrollment in the Road to Deliverance program, and completion of drug treatment.

In July 1998 Dees's probation officer filed an affidavit with the circuit court requesting revocation of Dees's probation for his failure to complete drug treatment, his

admitted use of illegal drugs, and his failure to obey the law associated with an arrest for driving without a license or insurance and theft by unlawful taking. On July 31, 1998, the trial court conducted a hearing at which Dees stipulated to the probation violations, but stated the Road to Deliverance program had agreed to readmit him. The trial court told Dees that it would continue his probation but warned that it would be unwilling to accept further violations.

In September 1998 Dees's probation officer filed another affidavit with request to revoke probation for Dees's failure to complete the Road to Deliverance program and to pay supervision fees. The affidavit also noted that Dees had been arrested on August 28, 1998, for possession of drug paraphernalia, wanton endangerment in the first degree, reckless driving, operating on a suspended license, and having no vehicle insurance. Following a hearing on October 23, 1998, the trial court revoked Dees's probation for his failure to complete the Road to Deliverance program, not paying supervision fees, and his failure to refrain from violating the law as evidenced by his August 1998 arrest. Dees immediately filed a notice of appeal.

While the direct appeal was pending, the attorney who represented Dees on the probation revocation filed a motion to

vacate judgment pursuant to CR[9] 60.02 on January 27, 1999, based on the fact that the criminal statutes had been amended to prohibit the enhancement of the sentence for conviction of possession of drug paraphernalia because of PFO status. On January 29, 1999, the trial court summarily denied the motion after a hearing. Dees appealed the denial of this motion.

On May 5, 1999, Dees filed a pro se motion to vacate pursuant to CR 60.02(f) arguing the possession of drug paraphernalia (second offense) could not be used as an underlying felony offense subject to enhancement under the PFO statute because it had already been enhanced from a misdemeanor offense because of a repeat violation. On May 18, 1999, the trial court summarily denied this motion. Dees appealed the order denying this motion.

On December 16, 1999, the Supreme Court of Kentucky issued an unpublished memorandum opinion affirming the trial court's judgment and order revoking Dees's probation on direct appeal, as well as the trial court's denial of his first CR 60.02 motion.[10] The Court stated the record demonstrated that Dees entered his plea freely, voluntarily, and knowingly in that he had agreed to the longer sentence without coercion. The Court held that the amendment to KRS 532.080(8) did not apply

[9] Kentucky Rules of Civil Procedure.

[10] Dees v. Commonwealth, 1999-SC-000056-T.

because Dees's conviction became final ten days after his sentencing on June 2, 1998, which was prior to the effective date of the amendment of July 15, 1998, and the statute did not apply retroactively. On August 24, 2000, the Supreme Court issued another opinion affirming the trial court's denial of Dees's pro se CR 60.02(f) motion.[11] The Court held that Dees was not subjected to double enhancement because the PFO I count was supported by several prior felony convictions and did not rely on the same prior conviction to support both the underlying possession of drug paraphernalia (second offense) conviction and the PFO conviction.[12]

On November 2, 2000, Dees filed a second pro se CR 60.02(f) motion arguing that the 1998 amendment to KRS 532.080(8) should be applied retroactively because it served a mitigating or ameliorative purpose by prohibiting use of a felony conviction for possession of drug paraphernalia in a prosecution as a PFO.[13] The trial court summarily denied the motion. On March 29, 2002, this Court affirmed the trial

[11] Dees v. Commonwealth, 1999-SC-000683-TR (not-to-be-published).

[12] See Commonwealth v. Grimes, Ky., 698 S.W.2d 836 (1985); Eary v. Commonwealth, Ky., 659 S.W.2d 198 (1983); and Newcomb v. Commonwealth, Ky.App., 964 S.W.2d 228 (1998).

[13] See KRS 446.110.

court's denial of this CR 60.02 motion noting that the Supreme Court previously found this argument without merit.[14]

On November 6, 2002, Dees filed a pro se RCr 11.42 motion alleging several instances of ineffective assistance of counsel. Dees asserted that defense counsel was ineffective for failing to challenge the PFO charge, for providing faulty information on the maximum sentence, and for failing to challenge the police stop on racial grounds. Dees also filed motions requesting appointment of counsel and an evidentiary hearing. The trial court appointed counsel to represent Dees, who informed the court that she had determined there was no need to supplement the record and requested a ruling on the motion on the then-existing record. On August 1, 2003, the trial court entered an order denying the RCr 11.42 motion. The court held Dees failed to establish that he received ineffective assistance and noted the extensive prior litigation of his guilty plea. This appeal followed.

Dees raises several issues involving ineffective assistance of counsel related to his guilty plea. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice

[14] Dees v. Commonwealth, 2001-CA-000228-MR (not to be published).

resulting in a proceeding that was fundamentally unfair.[15] Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,[16] and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial.[17] The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.[18] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[19] "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably

[15] 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); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

[16] McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); Phon v. Commonwealth, Ky.App., 51 S.W.3d 456, 459 (2001).

[17] Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, Ky.App., 992 S.W.2d 871 (1999).

[18] Strickland, 466 U.S. at 689; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

[19] Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998); Russell, 992 S.W.2d at 875.

effective assistance.'"[20] Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of fact and law.[21] While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to independent or de novo review on appeal.[22]

Dees also asserts that the trial court erred by failing to conduct an evidentiary hearing. RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant is not automatically entitled to an evidentiary hearing on the motion.[23] An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the

[20] Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 911 (quoting McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997)).

[21] Strickland, 466 U.S. at 698; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997).

[22] See McQueen v. Scroggy, 99 F.3d 1302, 1310-11 (6th Cir. 1996); and Groseclose, 130 F.3d. at 1164.

[23] Harper, 978 S.W.2d at 314; Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998); Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002).

conviction.[24] While often involving factual issues, even claims of ineffective assistance of counsel may be rejected without an evidentiary hearing if they are refuted on the record.[25]

Dees first maintains that defense counsel was ineffective for not requesting that the PFO charge be dismissed during plea negotiations with the Commonwealth. Dees asserts that counsel told him there was "no way" the Commonwealth would dismiss the PFO charge because "this prosecutor did not do that," but he notes that authorities in Ohio did not prosecute him as a habitual offender despite his extensive criminal record because his prior convictions involved non-violent offenses. Dees argues the PFO charge was based in part on a misdemeanor conviction for possession of drug paraphernalia that was used to enhance the subsequent or second possession of drug paraphernalia offense to felony status.

These arguments are without merit. To the extent that the latter argument suggests that the PFO charge was invalid, the Supreme Court has already rejected Dees's challenge to the PFO conviction based on double enhancement. In addition, at the guilty plea hearing, the Commonwealth expressed a willingness to dismiss either count one of the indictment (possession of

[24] Sanborn, 975 S.W.2d at 909; Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001); Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

[25] Haight, 41 S.W.3d at 442; Sanders, 89 S.W.3d at 385.

controlled substance) or count two (possession of drug paraphernalia), but not the PFO charge, and it also included a requirement that Dees not file a RCr 11.42 motion concerning application of the amendment to KRS 532.080(8). These factors demonstrate that the Commonwealth was not inclined to dismiss the PFO charge as part of a plea bargain. Thus, Dees has not shown that even if defense counsel did not request dismissal of the PFO charge in plea negotiations, he was prejudiced because there is no evidence suggesting a reasonable probability the prosecutor would have assented to do so.

Dees claims defense counsel was ineffective for not specifically informing the trial court that the Commonwealth did not oppose probation. He asserts that the Commonwealth's lack of opposition to probation was an implied aspect of the plea agreement and was important in the trial court's decision to reject the lower ten-year sentence recommended by the Commonwealth in favor of the 20-year sentence in association with a grant of probation. This assertion is sheer speculation. The trial court informed Dees at the guilty plea hearing that the Commonwealth's recommendation was not binding on it and Dees confirmed that no one had promised him probation. The Commonwealth did not voice opposition to Dees's request for probation, so defense counsel's express affirmation of this fact would have added little to the proceedings. Probation is

discretionary with the trial court.[26] The trial court gave Dees an opportunity to withdraw his guilty plea after fully explaining to him that the grant of probation was conditioned on the longer 20-year sentence. In addition, Dees's attorney advised him that he could request adherence to the original plea agreement with the Commonwealth. Nevertheless, Dees emphatically indicated that he wanted to accept the new offer with the longer sentence. The Supreme Court held that this procedure complied with RCr 8.10.[27] Consequently, defense counsel was not deficient and Dees suffered no actual prejudice in connection with counsel's failure to assert the Commonwealth's lack of objection to probation.

Dees's third issue involves a claim that defense counsel erroneously advised him that he would have been subject to a sentence of 40 years had he gone to trial. He further contends that counsel was ineffective for advising him to accept the offer presented by the trial court of the longer 20-year sentence with probation knowing that he was a poor candidate for probation given his extensive history of drug abuse. This

[26] See KRS 533.010; and Aviles v. Commonwealth, Ky.App., 17 S.W.3d 534 (2000)(holding that 1998 amendments to KRS 533.010 did not entitle defendant to probation and retained discretion of trial court).

[27] Dees asserts in his brief that the trial court did not have authority to impose the 20-year sentence citing to Galusha v. Commonwealth, Ky.App., 834 S.W.2d 696 (1992). Galusha is distinguishable because it involved increasing a sentence in connection with granting shock probation and modifying an original final sentence. Cf. Stallworth v. Commonwealth, Ky., 102 S.W.3d 918 (2003).

argument lacks merit because during the guilty plea proceeding the trial court specifically advised Dees that the maximum sentence for the charges against him was 20 years. Furthermore, the document signed by Dees and entitled Waiver of Further Proceedings with Petition to Enter Plea of Guilty explicitly states that the maximum sentence for the offenses charged in the indictment of possession of a controlled substance in the first degree, possession of drug paraphernalia (second offense), and PFO I was 20 years. Even if defense counsel erroneously advised him on the maximum sentence he faced at trial, the record shows that Dees was provided, and acknowledged, prior to entering his guilty plea, that the maximum sentence he could have received upon conviction at trial was 20 years. Thus, assuming defense counsel was deficient for providing faulty sentencing information, Dees has not shown that he was prejudiced because he was aware of the correct potential maximum sentence before he entered into the plea agreement and accepted the trial court's guilty plea. During the proceedings, Dees persisted in his request for probation and assured the trial court that he could conquer his drug addiction with assistance. The defense attorney advised Dees that he could request adherence to the Commonwealth's original offer of 10 years without probation. Defense counsel did not pressure Dees to accept the trial court's terms and left the ultimate decision to Dees. We

discern no deficient performance by counsel in seeking probation and his handling of the new terms presented by the trial court.

Dees's fifth issue involves a claim that defense counsel was ineffective for allegedly failing to disclose to him the mitigating effects of the amendment to KRS 532.080(8). Dees complains that counsel made no effort to research and to seek to have the mitigating effects of the new law apply to him. As discussed earlier, the application and effect of the amendment was fully addressed at the guilty plea hearing. Dees was fully aware of the modification in the law and agreed not to challenge his conviction based on the modifications. The Supreme Court held that the modifications did not apply to Dees and that he entered his guilty plea knowingly, voluntarily, and intelligently. This claim is without merit.

Finally, Dees contends that defense counsel was ineffective for failing to challenge the stop and search of him by the police based on racial profiling during the suppression hearing. Dees asserts that he mentioned this issue to his attorney but was ignored. Racial profiling generally involves associating members of particular racial groups with particular crimes often based on statistical differences in crime rates or patterns of criminal involvement among groups. In the criminal arena, racial profiling often involves allegations of selective

enforcement of laws by police against minority races.[28]

Racial profiling implicates both the unreasonable search and seizure clause of the Fourth Amendment, and the equal protection clause of the Fourteenth Amendment.[29] These two constitutional provisions embody different interests with unique standards, so compliance with one does not necessarily resolve the question of compliance with the other.[30] For instance, discriminatory motivation is an essential aspect of an equal protection violation while the subjective motivation of the police is irrelevant for Fourth Amendment purposes. In Whren v. United States,[31] the United States Supreme Court specifically rejected the claim that a racial motivation of police rendered a stop and/or search of an individual "unreasonable" under the Fourth Amendment. The Court did indicate, however, that such a motivation raised equal protection concerns.

> We think these cases foreclose any argument that the constitutional

[28] See, e.g., Samuel R. Gross and Debra Livingston, Racial Profiling Under Attack, 102 Colum.L.Rev. 1413, 1415 (2002)("'racial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating").

[29] See, e.g., United States v. Chavez, 281 F.3d 479 (5th Cir. 2002); United States v. Avery, 137 F.3d 343 (6th Cir. 1997); United States v. Mesa-Roche, 288 F.Supp.2d 1172 (D.Kan. 2003); and State v. Velez, 763 A.2d 290 (N.J.Super.App.Div. 2000).

[30] See Marshall v. Columbia Lea Regional Hospital, 345 F.3d 1157, 1166 (10th Cir. 2003); and Bradley v. United States, 299 F.3d 197, 205 (3d Cir. 2002).

[31] 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

> reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[32]

With equal protection racial profiling claims, the courts have generally analogized selective enforcement associated with alleged racial profiling with selective prosecution, and applied the standards delineated in United States v. Armstrong.[33] In order to state a claim of selective enforcement, a claimant must show that the government official singled out a person of an identifiable group, that the official was primarily or partially motivated by a discriminatory purpose or intent, and that the action had a discriminatory effect.[34] To establish discriminatory effect, a claimant must show that the law was enforced against him, but not similarly situated

[32] Whren, 517 U.S. at 813. See also Wilson v. Commonwealth, Ky., 37 S.W.3d 745, 749 (2001).

[33] 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). See, e.g., United States v. Barlow, 310 F.3d 1007, 1010 (7th Cir. 2002); Bradley, 299 F.3d at 205-06; Gardenshire v. Schubert, 205 F.3d 303, 319 (6th Cir. 2000); and Johnson v. Crooks, 326 F.3d 995, 1000 (8th Cir. 2003).

[34] See Armstrong, 517 U.S. at 464; Gardenshire, 205 F.3d at 303; Barlow, 310 F.3d at 1010; and State v. Ballard, 752 A.2d 735, 740 (N.J.Super.App.Div. 2000).

individuals of other races.[35] Discriminatory effect can be shown by naming such individuals or through the use of statistics that are reliable and relevant.[36] Statistics and circumstantial evidence also may be utilized to create an inference of discriminatory purpose, but rarely will statistics alone be sufficient to establish discriminatory intent.[37] Discriminatory purpose implies more than intent as awareness of consequences, and implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of," rather than "in spite of" its adverse effects on an identifiable group.[38] Once a claimant makes a prima facie showing of both discretionary effect and discriminatory purpose, the burden of producing evidence shifts to the government to rebut the inferences, but the claimant retains the ultimate burden of proving discrimination.[39]

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[35] Armstrong, 517 U.S. at 465; Bradley, 299 F.3d at 206; United States v. Duque-Nava, 315 F.Supp.2d 1144 (D.Kan. 2004).

[36] See Barlow, 310 F.3d at 1011; Chavez v. Illinois State Police, 251 F.3d 612, 637-38 (7th Cir. 2001); Avery, 137 F.3d at 355-57.

[37] See, e.g., Chavez, 251 F.3d at 647-48 (citing McClesky v. Kemp, 481 U.S. 279, 293 n.12, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)); and Avery, 137 F.3d at 356-57.

[38] McClesky, 481 U.S. at 298; Wayte v. United States, 470 U.S. 598, 610, 105 S.Ct. 1524, 1531-32, 84 L.Ed.2d 547 (1985); Chavez, 251 F.3d at 645; United States v. Hare, 308 F.Supp.2d 955, 991 (D.Neb. 2004)(claimant must show automobile stop partially or primarily motivated by race).

[39] See Avery, 137 F.3d at 356; United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996); Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 539 (6th Cir. 2002)(police may rebut inference of intent by presenting evidence decision motivated by race-neutral reasons and they would

In the current case, Officer Hart approached Dees after seeing him engaged in actions that Officer Hart was personally aware were consistent with drug transactions in an area of known high drug activity. After Officer Hart motioned for Dees to stay while he went to speak with the other suspect, Dees drove off. Factors such as suspicious behavior in a high crime area and flight are recognized factors supporting reasonable suspicion for a Terry stop.[40] A protective pat-down search of Dees by Officer Spraggins uncovered a crack pipe and a subsequent search of Dees's vehicle incident to arrest led to discovery of crack cocaine. The trial court held that the stop was supported by reasonable articulable suspicion. The search of Dees's person was a justified protective pat-down search and the search of his vehicle was supported by probable cause and subject to the exception for searches incident to arrest. Defense counsel attacked the validity of the police officers' actions under the Fourth Amendment as lacking reasonable articulable suspicion and did not render ineffective assistance with respect to this issue.[41]

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have acted regardless of discretionary motive); Hare, 308 F.Supp.2d at 992; and State v. Soto, 734 A.2d 350, 360 (N.J.Super.Ct.Law Div. 1996).

[40] See Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); and Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001).

[41] We note that Dees did not challenge the validity of the stop and search under the Fourth Amendment on direct appeal, although that issue was preserved by his conditional guilty plea, nor in his prior CR 60.02 motions.

Much of Dees's argument in his brief goes to the validity of the stop. He contends that the stop was motivated by racial bias because Officer Hart did not have reasonable suspicion that a crime had occurred or was occurring. To the extent this raises a Fourth Amendment challenge, it lacks merit because the subjective motives of the police officer are irrelevant to the existence of reasonable articulable suspicion under the Fourth Amendment.[42] To the extent Dees raises an Equal Protection claim based on racial profiling, he has failed to present sufficient evidence to create even a prima facie case. He presents no statistical or circumstantial evidence to support his claim, other than the fact that he is African-American. Dees simply has not offered sufficient evidence of discriminatory effect or discriminatory purpose to support a claim of selective enforcement. His attempt to draw an inference of racial motivation under the situation in this case is unpersuasive. As a result, Dees has not demonstrated that defense counsel was deficient in not raising this issue at the suppression hearing, or that he suffered actual prejudice in that there was a reasonable probability of success on such a challenge had counsel raised it.[43]

[42] See Whren, 517 U.S. at 816.

[43] See Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 415 (2002)(counsel not ineffective for failing to perform futile act).

In conclusion, we hold that all of Dees's claims of ineffective assistance of counsel are refuted on the record, and the trial court did not err in denying the RCr 11.42 motion without a hearing.

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

ALL CONCUR.

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