RENDERED: NOVEMBER 30, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000652-MR

MARK ANTHONY PRICE — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 01-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

HOWARD, JUDGE: Mark Anthony Price (hereinafter Price) appeals from the order of the Campbell Circuit Court denying his motion, pursuant to RCr 11.42, to set aside his criminal conviction for theft by unlawful taking over $300 and for being a persistent felony offender in the first degree. Finding no error, we affirm.

Price was indicted by the Campbell County Grand Jury on March 23, 2001, charging him with theft by unlawful taking over $300 and with being a persistent felony

[1] Senior Judge David Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

offender in the first degree. He was convicted by a jury after a trial which commenced on November 29, 2001, and was sentenced by the Campbell Circuit Court on February 12, 2002, to serve seventeen years' imprisonment. On direct appeal, we affirmed that judgment and sentence, by an unpublished opinion,[2] rendered July 11, 2003. The Kentucky Supreme Court denied discretionary review.[3] In our opinion, we summarized the pertinent facts of the case as follows:

> On January 22, 2001, Michael Roberts was performing construction work outside the Mansion Hill Tavern in Newport, Kentucky. He owned a 1992 Chevrolet Silvarado pickup truck which he had parked leaving the keys inside. After an employee of the tavern arrived, Roberts stepped inside to get warm. Price entered the bar, used the restroom, and exited. Shortly thereafter, the employee told Roberts that someone had entered his truck. After Roberts looked out the window and saw someone sitting in his truck, he walked outside and approached the passenger side of the truck. He saw Price sitting in the driver's seat. Price then backed up the truck and hit an older light blue Cadillac. He sped off and the Cadillac, driven by a woman, followed. Roberts notified police of the theft.
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> On January 23, 2001, Cincinnati Police Officer David Ivey received a tip regarding a stolen vehicle and went to 2585 Eastern Avenue, Apartment B, and knocked on the door. Loretta Fischer answered, and after obtaining consent, the officer went to the garage area where he found Roberts' truck.
>
> Detective Flowers of the Newport Police Department and Roberts went to the Cincinnati address where the truck was found and observed a light blue Cadillac with a Kentucky license plate registered in Kenton County. Based on the registration information, Detective Flowers obtained a copy

[2] *Price v. Commonwealth,* 2002-CA-000428-MR.

[3] *Price v. Commonwealth,* 2003-SC-0571-D.

> of Price's driver's license photograph. Upon Roberts being able to pick Price from a photo lineup, Price was arrested.
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> At Price's trial the Commonwealth introduced, through Debbie Lynn, Deputy Clerk of the Kenton County Clerk's Office, that a proof of insurance document is a document regularly kept and maintained by the clerk's office and is required to be presented when a person registers a vehicle in Kentucky. Price's proof of insurance for a 1988 Cadillac, license number 217-BEB, listed Price's address as 2585 Eastern Avenue, Cincinnati, Ohio, and the insurance company was Buyers Choice Insurance. She further testified that Price, the owner of the vehicle, supplied her office with this information.

On August 26, 2004, after his conviction was affirmed on direct appeal, Price filed a motion pursuant to RCr 11.42, alleging that his trial counsel was constitutionally deficient and provided ineffective assistance. The trial court appointed counsel to assist Price on the motion and conducted an evidentiary hearing. The court heard testimony from two witnesses; Price's trial counsel, Patrick Walsh, Esq., and Kim McVey, the employee of the bar who was present at the time of the offense. After the hearing, the motion was overruled. This appeal followed.

The Department of Public Advocacy was initially ordered to represent Price for purposes of this appeal. After a review of the record, the Department of Public Advocacy moved to be relieved from the case, indicating that the appeal was "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). The request to withdraw was granted by this Court and Price has proceeded with this appeal *pro se*.

On appeal, Price raises three issues: first, whether counsel provided ineffective assistance when he failed to interview or call the bar employee as a witness at trial; second, whether counsel provided ineffective assistance in response to evidence relating to Price's ownership of the Cadillac and a proof of insurance record disclosing an address in Cincinnati; and third, whether counsel failed to effectively challenge the persistent felony offender charge. We have reviewed each argument and the record, in detail, and find no error.

In order to prevail on a claim of ineffective assistance of counsel, Price must show that counsel's performance was deficient to such an extent that the integrity of the trial was impaired. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard which must be met to show ineffective assistance of counsel in Kentucky, under RCr 11.42, was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), *cert. denied,* 534 U.S. 998, 122 S.Ct. 471, 151 L.Ed.2d. 386 (2001):

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The 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.

Haight, 41 S.W.3d at 441.

Mr. Walsh, Price's trial counsel, testified at the evidentiary hearing that although the name of the bar employee, Ms. McVey, was listed in his file, he did not remember talking to her. She testified that she had never been interviewed by counsel prior to the trial. However, the record does not support Price's assertion that Ms. McVey's testimony would have created an alibi or exonerated him. She testified at the hearing that although she remembered a man entering the bar to use the restroom she could not say whether or not it was Price. She did not see the person who stole the truck. She did, however, see Mr. Roberts, the owner of the truck, go outside and approach the passenger side of the truck before it drove off. We agree with the finding of the trial court that her testimony would have been equivocal at best, and may have tended to support Roberts' testimony, rather than refute it as Price claims. It would have been well within the realm of legitimate trial strategy to have chosen not to call her as a witness. *See Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968). Counsel was not ineffective in this regard.

Price next claims that counsel was ineffective because he failed to challenge evidence relating to the location where police found the stolen truck, along with a light blue Cadillac registered in his name. Records were introduced, through the testimony of a Kenton County Deputy Clerk, that Price's proof of insurance, filed with that office, listed the address in Cincinnati where the vehicles were found as his address. Price contends that this proof of insurance record should not have been admitted because it was

not provided through discovery prior to trial and was thrust upon counsel by surprise, but that counsel failed to object to its introduction. He also argues that the proof of insurance contained hearsay. This second argument was raised and rejected, both at trial and on his first appeal. RCr 11.42 is not available to raise issues that either were or could have been raised on direct appeal. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

The record refutes the claim that trial counsel was surprised, or that there was any basis for objection to the introduction of the proof of insurance record. Mr. Walsh testified that he requested discovery through the proper mechanisms and that the Campbell County Commonwealth's Attorney had an "open file policy" regarding discovery. *See* RCr 7.24; RCr 7.26. He testified that his file contained information from the prosecutor listing witnesses, and that among them was the Kenton County Clerk who was "to bring registration information as of January 2, 2001, on Cadillac auto 217-BEB." The fact that the actual document was not provided either to the prosecutor or to defense counsel until the day of trial, when it was brought from a neighboring county by the deputy clerk, is of no consequence. The record reflects that counsel's actions in conducting discovery were not lacking and that he was not surprised in this regard. It is not ineffective assistance of counsel to fail to object to admissible evidence. *Bowling v. Commonwealth,* 80 S.W.3d 405 (Ky. 2002). The contention that counsel provided ineffective assistance in this regard is without merit.

Price's final argument is that the indictment, as it related to the persistent felony offender charge, was deficient and that counsel failed to object or move to dismiss

this charge. An indictment is sufficient if it "informs the accused of the specific offense which is charged and does not mislead the accused." *Parrish v. Commonwealth,* 121 S.W.3d 198, 202 (Ky. 2003). The indictment was in narrative form and, as Price points out, did not list each specific prior offense used to justify the charge of being a persistent felony offender. But there is no requirement as to how specific an indictment must be, so long as it is sufficient to provide notice of the charges. This indictment meets that criteria.

Counsel testified that he was provided and reviewed, before trial, the certified records of all of Price's prior felony convictions. The record discloses the specifics of six prior felony convictions which were presented during the penalty phase of the trial. Price does not collaterally attack any of those prior convictions. There was no error in the indictment. Counsel provided effective assistance as it relates to the persistent felony offender charge.

We will not disturb the trial court's ruling regarding a RCr 11.42 motion absent a showing that it was clearly erroneous. *Johnson v. Commonwealth,* 180 S.W.3d 494 (Ky.App. 2005). We find nothing in the record to indicate there was any error in the ruling denying Price's motion in this case.

The Order of the Campbell Circuit Court denying Price's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Anthony Price, *pro se*
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BRIEF FOR APPELLEE:

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