

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001747-MR

BECKHAM B. BARNES

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Beckham B. Barnes appeals from an order of the Wayne Circuit Court denying his motion for post-conviction relief pursuant to RCr² 11.42. Barnes contends that he received ineffective assistance of counsel

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

because trial counsel failed to obtain all available discovery from the Commonwealth and because trial counsel failed to retain expert witness to testify concerning gunshot residue and fingerprint evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Barnes and victim Troy Miller were friends and had a business relationship.³ Barnes was a civil engineer and land surveyor, and had hired Miller as an apprentice shortly after Miller graduated from high school. After several years, Miller started his own business. However, he continued to seek Barnes's assistance and to use the maps, computer, and other equipment in Barnes's office. When Miller did seek Barnes's help on a project, he would pay Barnes a fee of twenty percent.

Barnes was helping Miller with such a project at his office on the evening of April 1, 1999. The office computer showed initial activity on that project from 9:45 p.m. until 10:07 p.m. However, when the two finished, Barnes would not permit Miller to print the project. Apparently, they had agreed to settle their accounts on a quarterly basis, but Miller had not paid Barnes for his assistance for the last quarter of 1998 and the first quarter of 1999. Barnes told Miller that he could print the project only when he paid what he owed. According to Barnes, Miller did not seem overly upset by this interdiction and left the office

³ The factual background as stated herein is adapted from Justice Cooper's recitation in *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002).

peacefully. Barnes also went home (his residence is across the road from the barn constituting his office) and fell asleep watching television.

Barnes alleged that he was awakened sometime in the early morning hours of April 2, 1999, by the sound of his dog barking. The dog led him to his office. The night was foggy, but Barnes saw movement by the light of the office computer screen. He crept towards the office, opened a door, and yelled “freeze.” He heard loud gunshots, returned fire with a rifle that he kept in the office, and ran back to his residence, where he informed his wife, Paula Barnes, that it appeared that he had shot an unidentified intruder. Barnes claimed that he did not realize that Miller was the intruder until he was informed of that fact sometime later that morning.

Paula Barnes called the “911” emergency operator at 2:13 a.m. She reported to the operator that a male had been shot, but gave little other information. Law enforcement authorities arrived at approximately 2:38 a.m. Deputy Sheriff Garner testified that it was so foggy he had to shine his spotlight on the ditches in order to stay on the roadway. The police described Barnes and his wife as relatively “close-lipped.” Barnes testified at trial that he did not trust one of the investigating officers, Scott Hammond, whose family had had previous disagreements with the Barnes family. In any event, he told the officers little more than that the intruder was “in the barn” and that “I saw him go down.” Barnes then informed the police that he would not say anything else until his lawyer arrived. He refused a gunshot residue test. Paula Barnes had also called Barnes’s parents,

Wilbur and Margie Barnes, who arrived at their son's residence shortly after the police.

Police found Troy Miller dead on the floor of Barnes's office. He had been killed by two shots to the chest from a hunting rifle. Next to Miller's hand was a .38 caliber pistol, which police later determined was owned by Miller's girlfriend, Kathy Wade. Three spent rounds from the .38 caliber pistol were found embedded in the walls and shelving of the office, including one in the doorframe where Barnes alleged that he had entered the office. The pistol was later determined to be an "emitter," i.e., it had a tendency to emit antimony, but a gunshot residue expert found an "insignificant" amount of antimony on Miller's hands. However, she clarified that "this does not eliminate the possibility that [Miller] handled or discharged a firearm." No fingerprints were found on that pistol. The pistol also appeared to the police to be clean of blood, although no formal test was ever conducted to confirm this observation.

The office computer's internal log showed that there had been additional activity on Miller's project beginning at 12:40 a.m. and ending at 1:52 a.m. The police found Miller's truck parked one-half mile away from the office at a house used by the community, including Miller and Appellant, for activities like hunting. Police found a second gun wrapped in a T-shirt in Miller's truck which had no discernable relevance to Miller's death except that Barnes had owned a gun of the same make and model⁴ and the serial numbers had recently been filed off the

⁴ Barnes claimed that he had given that gun (of the same make and model as the gun found in Miller's truck) to a woman with whom he had had an affair, that this woman had given the gun to

gun. A solitary shaving from the filings of that gun was found on a sock Miller was wearing when he died. No shavings were found on the clothes Barnes was wearing at the time of his arrest. This gun had not been recently fired.

The Commonwealth's theory was that Barnes had “cold-bloodedly” killed Miller and afterwards “doctored” the crime scene with the help of his father. Under this theory, Wilbur Barnes arrived before the law enforcement officers. Wilbur then filed the serial numbers off the gun that was eventually found in Miller's truck with the intention that it would serve as the “throw-down” gun. However, after the filing was complete, they discovered Wade's pistol in Miller's truck, and decided to use that as the “throw-down” weapon instead. They then left the first gun in Miller's truck and went to the crime scene, fired three shots from Wade's pistol into the walls and shelving of the office, wiped the pistol clean of fingerprints, and placed it next to Miller's hand, being careful not to leave any footprints in the blood pooling on the floor. The two then drove Miller's truck to the house one-half mile away, and returned together to Barnes's residence. Wilbur Barnes then drove home to clean up before returning to Appellant's residence, arriving shortly after the police.

In support of its theory that Barnes had doctored the crime scene, the Commonwealth offered law enforcement testimony that Wilbur Barnes was alone when he drove into Barnes's driveway. This was inconsistent with Wilbur and

Miller, and that Miller had in turn paid Barnes for the gun. However, while the woman admitted that she had given a gun to Miller, she denied that the gun she had given to Miller was the same gun as the one found in the truck.

Margie Barnes's testimony that they drove together and with the fact that Margie Barnes was present at her son's home that night. Although Margie testified at the grand jury proceeding that she and Wilbur had walked to the house together after parking, both Wilbur and Margie testified at the trial that Wilbur had first dropped Margie off at the house and then parked. The Commonwealth also argued that because Margie Barnes had heard her son invoke his rights to counsel and silence to an officer, and that Barnes had invoked his rights to an officer before Wilbur arrived, Margie must have been present at the house before Wilbur arrived. Defense counsel pointed out that Barnes invoked his rights to several officers that night at several different times.

There was no evidence that Barnes had any motive to kill Miller, although the prosecutor noted during closing argument that Barnes and Miller were business competitors and speculated that Appellant would get more business if Miller were out of the way.

On April 19, 1999, Barnes was indicted for the murder of Troy Miller by a Russell County Grand Jury. A change of venue was granted to Wayne County due to difficulty in impaneling a jury in Russell County. In May of 2001, Barnes was convicted of intentional murder and sentenced to 22 years' imprisonment in accordance with the jury's recommendation. On direct appeal the Supreme Court reversed and remanded for a new trial. *See Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002) ("Barnes I"). In the second trial ("Barnes II"), also held in Wayne County, Barnes was again convicted of murder

and was sentenced, as recommended by the jury, to 25 years' imprisonment. Barnes appealed his conviction and sentence to the Supreme Court, and while the appeal was pending, Barnes, through an open records request to the State Police, obtained information that fingerprint testing had not been conducted by the State Police to the extent implied by witnesses and the prosecutor at trial. Based upon this newly discovered evidence, Barnes filed a motion for a new trial pursuant to CR⁵ 60.02, which was denied by the trial court. Barnes appealed to this Court, and the case was transferred to the Supreme Court to be decided along with the direct appeal.

On March 23, 2006, the Supreme Court rendered an opinion addressing both the direct appeal and the CR 60.02 motion. *See Barnes v. Commonwealth*, 2006 WL 734006 (Ky. 2006). The opinion affirmed Barnes's conviction, and determined that he was not entitled to a new trial based upon the newly discovered evidence.

On March 13, 2007, Barnes filed a motion for a new trial pursuant to RCr 11.42. The motion contended that Barnes received ineffective assistance of counsel in Barnes II because trial counsel failed to obtain all available discovery from the Commonwealth, and because trial counsel failed to retain an expert witness to testify concerning gunshot residue and fingerprint evidence. On July 27, 2007, the trial court entered an order denying Barnes's motion without having conducted an evidentiary hearing. This appeal followed.

⁵ Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

In order to prove ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The major focus is whether the proceeding was fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993). The burden is on the defendant to establish ineffective assistance. *Strickland*, 466 U.S. at 690.

In measuring prejudice, the relevant inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002).

Further, “[a] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). It has been repeatedly reiterated that “a strong presumption [exists] that counsel's conduct falls within the wide range of reasonable professional assistance.” *Id.*

FAILURE TO SECURE ALL AVAILABLE DISCOVERY

Barnes contends that he received ineffective assistance of counsel upon the basis that trial counsel failed to obtain all available discovery materials from the Commonwealth relating to gunshot residue and fingerprint evidence.

In the course of discovery, State Police forensic analyst Zenobia Skinner provided a report she had prepared reflecting her analysis of the gunshot residue evidence. The report stated that the gunshot residue test performed on Miller's hands did disclose the presence of antimony, but did not indicate a presence of barium or lead;⁶ however, at trial, she testified that the residue test did disclose significant amounts of lead and the presence of barium. Barnes alleges that he received ineffective assistance of counsel because trial counsel failed to obtain the "undisclosed" test results reflecting the presence of barium and lead. In its decision in *Barnes II*, the Supreme Court addressed this issue as follows:

Appellant further argues that the Commonwealth failed to provide "exculpatory" material in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), entitling him to a new trial. This claim arises because Skinner's report on the victim, Miller, did not indicate a presence of barium or lead, yet she testified at trial that there were significant amounts of lead and the presence of barium on the swabs of Miller's hand, allowing the inference that he had fired a gun. This was to Appellant's advantage. The live testimony was more favorable than the report. It also revealed an

⁶ In a gunshot residue test, swabs of the putative gun shooter's hands are taken and then tested for antimony, barium, and lead. Depending upon the levels of these materials present on the hands, experts are able to form an opinion on the likelihood of whether the person being tested has recently fired a gun. Based upon the amounts of antimony, barium, and lead found on Miller's hands, Officer Skinner was unable to form a definite opinion on whether he had recently fired a gun.

inconsistency that Appellant's counsel used to attack Skinner's testimony.

While the Commonwealth's failure to furnish appellant with a report that accurately disclosed investigatory findings of probable gunshot residue on the victim's hands was likely a Brady violation, Skinner's testimony at trial cured the violation by presenting the jury directly with the exculpatory evidence. Accordingly, we find that any error with respect to the Brady violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Barnes II at *3 (footnote citations moved to text).

An issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by simply claiming that it amounts to ineffective assistance of counsel. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006).

The issue relating to Skinner's incomplete report was raised and rejected in Barnes's direct appeal in *Barnes II*. In the present proceeding, Barnes simply recasts the same issue as ineffective assistance of counsel. Because this is impermissible, we reject Barnes's claim that he received ineffective assistance of counsel on the basis that trial counsel failed to obtain the full results of Skinner's gunshot residue testing.

In the same vein, Barnes alleges that he received ineffective assistance of counsel because trial counsel failed to uncover State Police Lab documents which reflected that the gun had not been tested for fingerprint evidence to the extent represented by the Commonwealth at trial. This evidence was discovered

after the trial in Barnes II through an open records request while Barnes's direct appeal was pending before the Supreme Court, and was the basis for his aforementioned CR 60.02 motion for a new trial. As previously noted, Barnes's appeal of the trial court's denial of the motion was transferred to the Supreme Court, and the issue was addressed in its March 23, 2006, opinion. The Supreme Court addressed the issue as follows:

Finally, Appellant argues that statements made by the prosecutor during opening statement, and by police witnesses about whether the weapon found beside the victim was "clean" of fingerprints entitle Appellant to a new trial under CR 60.02 based on newly discovered evidence. Appellant timely filed a motion for a new trial as required by CR 60.02 and upon denial of the motion appealed to the Court of Appeals. That appeal was transferred to this Court and consolidated with the matter of right appeal.

During the Commonwealth's opening statement the prosecutor stated that Detective Hill had inspected the gun with a magnifying glass, that he could not find any blood or fingerprints, and "[i]t was a totally clean gun planted at the scene." Hill and Freels both testified at trial that they checked for fingerprints and found none. Hill also testified that the victim, Miller, had blood on both hands and his upper body, but none was detected on the gun by naked eye examination or by use of a magnifying glass. Hill did not check further for prints but sent it to the lab for latent prints, blood, body fluids, and test firing for gun residue. Freels stated that the gun was dusted and no prints were found. However, Appellant discovered through an open records request to the Kentucky State Police that the pistol and bullets were not examined for fingerprints.

The difference between the trial testimony of finding no fingerprints and the post-trial revelation that no laboratory examination was actually made is Appellant's

basis for claiming a new trial under CR 60.02. This inconsistency between the testimony of the two officers and what actually occurred is, perhaps, the most troubling aspect of this appeal.

The trial court, however, addressed those concerns and found them as unworthy and even characterized them as speculative.

The Court does not find that the information the Defendant recently obtained from the Kentucky State Police is contrary to representations made by the Commonwealth Attorney or the evidence presented by the Commonwealth. Furthermore, the Defendant does not claim that the Commonwealth deliberately withheld information from the Defendant, and the Defendant had more than three years to review the discovery provided by the Commonwealth, [sic] Both Sgt. Ken Hill and Ronnie Frees [sic] testified at an earlier trial of the case and the Defendant does not claim their testimony changed substantially from the first trial. If the Defendant had questions about the exact type of analysis conducted on the pistol, based on the discovery provided by the Commonwealth and the earlier testimony of Sgt. Ken Hill and Mr. Ronnie Frees, the Defendant could have raised those concerns long before now. It is speculation at best to suggest that if further tests had been conducted on the pistol the victim's fingerprints would have been found on the pistol.

We agree that failure of the laboratory to test for fingerprints provides no basis for CR 60.02 relief. Our decision in *Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky.2001). requires discovery of evidence of such a character that “it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.” *Id.* at 814. This standard has not been met.

Barnes II at *5 - *6.

As noted above, an issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by simply claiming that it amounts to ineffective assistance of counsel. *Simmons v. Commonwealth*, 191 S.W.3d at 561. We believe the same principle applies to Barnes's appeal of the denial of his CR 60.02 motion, which, in effect, became a part of his direct appeal. Accordingly, trial counsel's failure to obtain the undisclosed State Police records relating to fingerprint testing (or lack thereof) on the allegedly planted gun may not serve as a basis for an ineffective assistance of counsel claim.

In summary, in *Barnes II* the Supreme Court held that no reversible error occurred as a result of the Commonwealth's failure to disclose (and/or misrepresentations concerning) gunshot residue and fingerprint testing results. In the present RCr 11.42 proceeding, Barnes attempts to recast as ineffective assistance of counsel trial counsel's failure to obtain the very same information. As this is impermissible, Barnes may not obtain post-conviction relief upon these grounds.

FAILURE TO RETAIN EXPERT WITNESSES

Barnes contends that he received ineffective assistance because trial counsel failed “to obtain independent expert witnesses in the area of forensic investigation, fingerprint analysis, and gunshot residue testing.”

As discussed above, Skinner testified at trial that she was unable to reach a conclusion concerning whether Skinner had fired the allegedly planted pistol. Barnes does not cite us to an expert who would have been able to testify, based upon the available testing data, that Miller had fired the pistol. Hence, it appears that any expert trial counsel would have obtained could have, at best, simply testified in agreement with Skinner; i.e., that no definite conclusion could be drawn. While this additional testimony may have better driven the point home to the jury, nevertheless, it would have been redundant evidence. The jury was made aware that the gunshot residue testing was inconclusive and from that could have inferred that Miller fired the pistol. As such, we do not believe that the second prong of the *Strickland* test is met; that is, even if trial counsel had obtained a gunshot residue expert, there is not a reasonable probability that the outcome of the trial would have been different.

The same is true regarding trial counsel’s decision not to retain a fingerprint evidence expert. Barnes states that “[h]ad the jury heard independent expert testimony to demonstrate the gun and bullets in question were not properly analyzed – and thus Miller’s prints could have been on the gun or bullets – or if

independent experts had examined the gun or bullets and found fingerprints – the jury’s verdict would have been different.”

As part of his efforts for post-conviction relief, Barnes does not allege that he has had the gun tested and that Miller’s fingerprints were found thereon.⁷ Thus, it is entirely speculative that if trial counsel had obtained a fingerprint expert, the expert’s testing would have revealed Miller’s fingerprints. Further, if the expert’s testing revealed no prints, the expert’s testimony would have disadvantaged Barnes.

We further note that it was not simply the lack of fingerprints on the gun that cast doubt on Barnes’s theory. There was also a lack of blood on the gun, even though it was an exceedingly bloody crime scene.

Based upon the foregoing, we are unpersuaded that trial counsel’s retaining of a fingerprint expert would have resulted in a reasonable probability that the outcome of the trial would have been different. Thus, this allegation of ineffective assistance also fails the second prong of the *Strickland* test.

ENTITLEMENT TO A HEARING

Finally, Barnes contends that the trial court erred by denying his RCr 11.42 motion without having conducted an evidentiary hearing.

An evidentiary hearing upon an RCr 11.42 motion “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. The trial judge may not

⁷ Presumably the evidentiary integrity of the gun has been preserved and testing could have been done in connection with this proceeding.

simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001).

As discussed in the preceding sections of this opinion, the allegations of ineffective assistance raised by Barnes are conclusively resolved from the record, and the trial court did not err by failing to conduct an evidentiary hearing.

CONCLUSION

For the foregoing reasons the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

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