

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000184-MR

ANDRE DRAPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CR-001369

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: On May 6, 2004, Andre Draper was indicted by the Jefferson County grand jury on two counts of second-degree burglary and one count of being a first-degree persistent felony offender (PFO I). The charges stemmed from a March 2004 arrest, which occurred after a police detective

¹ Senior Judge William L. Knopf presiding as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

observed Draper loading electronic equipment from a private residence into a U-Haul. Although Draper left the scene in the U-Haul, he was followed and questioned by the detective. Draper initially denied the burglary, but he later made inconsistent statements to police. At trial, Draper was convicted of one count of second-degree burglary and being a PFO I. He was sentenced to a total of twelve years' imprisonment.

Thereafter, Draper filed an appeal claiming that the trial court erred by denying Draper's request to instruct the jury on the charges of receiving stolen property and facilitation of second-degree burglary. He also argued that the trial court erred by instructing the jury on the charge of PFO when there was insufficient evidence to prove the charge. This Court disagreed with Draper and affirmed the judgment of the circuit court.²

Draper then filed a motion to vacate, set aside, or correct his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He argued that his conviction should be vacated because he received ineffective assistance of counsel. The trial court summarily dismissed his motion. Draper now appeals again to this Court.

Draper claims that his burglary conviction was a result of ineffective assistance of counsel because his attorney failed to investigate potential defenses, contact witnesses, preserve issues for appeal, challenge the sufficiency of the indictment, and request a polling of the jury. Because of these alleged

² *Andre Draper v. Commonwealth of Kentucky*, 2004-CA-002572-MR (not to be published).

deficiencies, Draper requests that his conviction be vacated and the case remanded to the circuit court for a new trial. We disagree with Draper's claims and affirm the order of the circuit court.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89. Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 691.

Draper argues that his trial counsel failed to investigate and present evidence favorable to his case. Counsel has the duty to conduct a reasonable investigation, including potential defenses. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all circumstances." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001). The decision of whether to investigate particular defenses must be judged by a reasonableness standard.

Strickland, 466 U.S. at 691. The Court must assess what a reasonable attorney in those circumstances would do, while maintaining profound deference to defense counsel. *Id.* Moreover, under the second prong of the *Strickland* test, Draper also has the burden to show within a reasonable probability that a reasonable investigation would have changed the outcome of his trial. *Id.*

While Draper maintains that his counsel should have called previous clients from his moving business to testify, he does not state how such testimony would have changed the outcome of the trial. Simply because counsel chose not to call witnesses does not mean that various defenses were not explored. In fact, a review of the trial video tape shows that although defense counsel did not call witnesses, a clear defense was nonetheless presented through cross-examination and arguments.

Moreover, Draper does not make any showing that the testimony of his proposed witnesses would have been beneficial. In *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), the Kentucky Supreme Court held:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from the counsel's perspective at the time There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Because Draper generally stated that his counsel failed to investigate potential defenses, with no support that the outcome would have changed, he failed to show grounds for relief under RCr 11.42.

Draper also claims that defense counsel should have done more to heighten his chances of being found not guilty. However, his trial counsel sought and obtained a directed verdict on one of the two second-degree burglary counts. The jury obviously found ample evidence to convict him on the other count of second-degree burglary. Defense counsel is not deemed ineffective by the sole fact that his or her client is convicted. Instead, counsel is deemed ineffective when, but for the attorney's egregious errors, the defendant probably would have not been convicted. *Haight*, 41 S.W.3d at 441.

In this case, Draper only claimed that his attorney did not properly investigate his case. Draper does not identify any potential defenses that were overlooked. Draper did not detail any conversations with his attorney that should have resulted in further investigation. Consequently, Draper failed to provide proof of his allegation that counsel failed to investigate any defense.

Draper also claims that trial counsel failed to object to several errors, thereby failing to properly preserve those issues for appeal. He claims that defense counsel failed to object to comments made by the lead detective concerning Draper's *modus operandi*, which indicated that Draper had a prior criminal history. Draper further claims that defense counsel should have objected to the trial court's verbal instruction to the jury. He also claims that defense counsel should have

requested a polling of the jury. Although Draper makes these allegations of fault against his defense counsel, he does not explain how the errors, if they are truly erroneous, directly lead to his conviction.

The Commonwealth's case consisted primarily of testimony from an eyewitness police detective and the victim whose home was burglarized. The detective also testified as to inconsistent statements made by Draper during a police interrogation. Given this evidence and the absence of more specific examples of defenses overlooked at trial, Draper has failed to show that his counsel's representation prejudiced his defense.

Finally, Draper argues that his counsel was ineffective because he failed to secure a jury instruction on the charge of receiving stolen property as a lesser-included charge to second-degree burglary. A defendant may not raise an argument that was argued or should have been argued on direct appeal simply by cloaking it in an RCr 11.42 motion. *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990). Whether a lesser-included offense should have been presented to the jury is such an issue. In fact, Draper raised the issue in his direct appeal. Thus, the issue is improper for an RCr 11.42 review.

In conclusion, given the ample evidence of Draper's guilt and trial counsel's clearly argued defense, Draper failed to prove any error by counsel, which directly led to his conviction. Simply because the jury found Draper guilty does not mean that his attorney ineffectively represented him. Therefore, the trial court properly denied his motion for relief.

Accordingly, we affirm the order of the Jefferson Circuit Court denying Draper's motion pursuant to RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andre Draper, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky