

RENDERED: AUGUST 15, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-002042-MR

LAWRENCE PATE

APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 02-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Lawrence Pate appeals from a denial of his RCr 11.42 motion. He argues that he was given ineffective assistance of counsel and that a key witness' testimony was perjured. After careful review of the record, we affirm the judgment of the Pendleton Circuit Court.

Pate was convicted of manufacturing methamphetamine and was sentenced to twenty years' imprisonment. He appealed his conviction as a matter of right to the Kentucky Supreme Court. We hereby adopt the Supreme Court's summary of the facts as follows:

On May 9, 2002, Kathy Pate (a/k/a Katherine Pate), [Pate's] wife, who had come to the Pendleton County Sheriff's Office to make a domestic violence complaint against [Pate], informed Deputy Sheriff Craig Peoples that on the previous weekend, she, [Pate], and Alicia Aulick Gregg (a/k/a Alicia Aulick or Alicia Gregg) had gone to Illinois and returned with a tank of anhydrous ammonia that [Pate] stored behind Alicia Gregg's trailer-residence. She also informed Deputy Peoples that [Pate] was armed with a .38 handgun and provided him with a description of [Pate]'s vehicle and its license plate number.

Deputy Peoples testified that he proceeded immediately to Gregg's residence because of the extremely volatile nature of anhydrous ammonia. He located the tank, discovered that the anhydrous ammonia was housed in an unapproved container, and based upon the discoloration of the tank's brass fittings, he determined that the tank created a risk of exploding. He contacted the Fire Department and the Drug Enforcement Administration to facilitate the destruction of the tank.

A short time later, Deputy Peoples noticed a vehicle, much like the one that Kathy Pate had described as [Pate]'s, approaching Gregg's residence. The vehicle stopped, as if to turn around, and Deputy Peoples drove up behind the vehicle, blocking it, confirmed the license plate number, and recognized the driver as [Pate]. He then ordered [Pate] out of the car and onto the ground where he was handcuffed and placed under arrest. Alicia Gregg was a passenger in [Pate]'s vehicle.

Deputy Peoples frisked [Pate], attempting to locate the .38 weapon that Kathy Pate had stated [Pate] would be carrying. He did not find the handgun; however, he found a pocket knife on [Pate]'s person and a search of the car revealed a quantity of .38 shells. The search of

the vehicle also revealed an array of methamphetamine precursors. Specifically, Deputy Peoples discovered camping fuel, a butane torch, table salt, two packs of lithium batteries, Rooto drain opener, STP Oil Treatment, three boxes of pseudoephedrine, three boxes of suphedrine, five boxes of nasal decongestant, a plastic tea jug, mixing spoons, and plastic tubing. Receipts, in the name of Katherine Pate, for nasal decongestant and muriatic acid<sup>1</sup> were also found in the car, along with maps of all Wal-Mart and Dollar General Store locations within a fifty-mile radius of Cincinnati, Ohio.<sup>2</sup> [Pate] was charged with Manufacturing Methamphetamine and Carrying a Concealed Deadly Weapon.<sup>3</sup>

The Kentucky Supreme Court affirmed Pate's convictions.

Thereafter, on June 6, 2007, Pate filed a motion pursuant to RCr 11.42 in the Pendleton Circuit Court. He alleged that his counsel was ineffective for failing to move for a mistrial or file a narrative statement after the Commonwealth made certain alleged statements about a witness in front of the jury. Furthermore, he alleged ineffective assistance due to the attorney's failure to make a motion regarding the alleged incompetency of Kathy Pate, his wife and a witness for the Commonwealth. He further stated that counsel failed to investigate and call

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<sup>1</sup> The muriatic acid was later located in a storage facility. Kathy Pate had informed the police of the storage unit, provided them with a key, and gave the police permission to enter the unit. Therein, the police found a plastic container of muriatic acid. Pate admitted at trial that the muriatic acid found in the storage facility belonged to him; he claimed, however, that he intended to use it to clean stains from a concrete porch and not for use in the manufacture of methamphetamine.

<sup>2</sup> The significance of the maps was explained by Deputy Peoples during direct examination by the Commonwealth: "The significance [of the maps] is they can go from store, to store, to store to buy their amphetamine or any other by-products or precursors, and they don't throw up any red flags, and the police are not notified if you buy the over allotted number of boxes."

<sup>3</sup> Pate was acquitted of the charge of Carrying a Concealed Deadly Weapon.

witnesses he desired and that counsel chose not to strike a juror despite his request to do so. Moreover, he argued that it was not trial strategy to not invoke the marital privilege with respect to Kathy Pate. Finally, he asserted that Kathy Pate's testimony was perjured.

The court below denied Pate's motion summarily in an order entered on June 12, 2007, concluding that "the record in this case refutes the defendant's allegations." Pate filed a motion to set aside the order denying RCr 11.42 relief. He raised the same issues as in the original motion and asserted that he was entitled to an evidentiary hearing. The trial court again denied the motion, adopting as its findings the Commonwealth's response in its entirety. Pate now appeals from that order.

Pate first argues that the introduction of Kathy Pate's alleged perjured testimony resulted in a violation of his right to due process and thus entitled him to relief under RCr 11.42. Pate cites *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999), in support of his position. *Spaulding*, however, is distinguishable in that it dealt with the application of CR 60.02, specifically with allegations of perjured testimony as "newly discovered evidence," rather than RCr 11.42. Pate overlooks the longstanding Kentucky precedent that clearly states that "perjured testimony will not be a basis for impeaching a jury verdict in an RCr 11.42 proceeding." See *Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky.App. 1989); see also, e.g., *Fields v. Commonwealth*, 408 S.W.2d 638 (Ky. 1966)(establishing the rule that perjured testimony is not a grounds for relief under

RCr 11.42); *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970)(affirming the rule established in *Fields*); *Hargrove v. Commonwealth*, 396 S.W.2d 75, 76 (Ky. 1965)(holding that false evidence is a question for the jury and is not a ground for relief under RCr 11.42). We therefore find no grounds for relief.

Pate argues next that he was given ineffective assistance of counsel, raising various specific allegations. The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires the court to first find that there was an error in counsel's performance. If the court so finds, the court must then find that the error was prejudicial to the defendant, meaning that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The trial court must then determine whether counsel's deficient performance rendered the result of the trial unreliable or the proceedings fundamentally unfair so as to deprive a defendant of a substantive or procedural due process right.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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 counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is,

the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

*Id.* at 689-90 (internal citations omitted).

First, Pate contends that his counsel erred in failing to raise the issue of an alleged *ex parte* comment by the Commonwealth Attorney to the jury regarding the impact of drugs on Kathy Pate. The record reflects, however, that this statement was not *ex parte* but actually made during closing arguments. The Commonwealth's Attorney, in his closing argument, commented, "[w]hy do you think [Kathy Pate] is in the state she is in today? She said right there, 'Methamphetamine did this to me.'" Therefore, we find there was no error on the part of counsel, and no further analysis is required.

Next, Pate alleges that his counsel erred in not challenging Kathy Pate's competency as a witness. The issue was, however, raised in a motion for new trial on January 6, 2003, which the trial court denied. We again find no error.

Pate asserts his counsel erred by not following his desire to invoke spousal privilege to prevent Kathy Pate from testifying. The record, however, reflects otherwise. Kathy Pate, herself, attempted to invoke spousal privilege, which was denied. The Kentucky Supreme Court held that Kathy Pate had no right to the privilege and that:

[Pate]'s failure to assert his adverse testimony privilege to preclude Kathy Pate from testifying could very well have been trial strategy. Kathy Pate did not testify voluntarily, and the prosecutor was granted permission to treat her as a hostile witness. Based on Kathy Pate's

reluctance to testify against him, it is certainly possible that [Pate] assumed that her testimony overall might be beneficial to his case.

*Pate*, 134 S.W.3d at 600. Furthermore,

[t]here is no privilege under KRE 504 when ‘[i]n any criminal proceeding . . . sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charge.’ [footnote omitted]. By Kathy Pate’s own admission, she accompanied [Pate] on his trip to acquire anhydrous ammonia. Thus, it is doubtful if Kathy Pate was entitled to assert the spousal privilege, or if Pate, himself, could assert that privilege and prevent her from testifying against him.

*Pate*, 134 S.W.3d at 600. We find the Kentucky Supreme Court’s reasoning and conclusions sound and therefore also conclude that the decision not to assert spousal privilege could have been trial strategy. Alternatively, we find, as did the Supreme Court, that the outcome would not have been different if the privilege had been asserted in light of Kathy Pate’s admission that she was an accomplice to Pate.

Pate additionally contends that his counsel should have investigated more thoroughly and called certain witnesses. Decisions as to what witnesses to call is a matter of trial strategy and not cognizable on RCr 11.42 review. *See Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000). Therefore, we again find no error.

Pate complains that his counsel failed to strike a juror despite his request. Again, voir dire decisions are considered trial strategy and are not subject

to RCr 11.42 attack. *See Hodge v. Commonwealth*, 17 S.W.3d 824, 837 (Ky. 2000). Accordingly, we find no error.

Pate finally makes the case that it was an error for the trial court to deny him an evidentiary hearing on his RCr 11.42 motion. A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion reasonably require such a hearing for determination. On the other hand, a hearing is not required if the motion, on its face, does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965). As discussed previously in this opinion, the allegations of ineffective assistance raised by Pate are conclusively resolved from the record; thus, the trial court did not err by failing to conduct an evidentiary hearing.

For the foregoing reasons, we affirm the trial court's denial of Pate's RCr 11.42 motion.

ALL CONCUR.

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