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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000935-MR

STEVEN LYN ENGLAND — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00068

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND
VACATING IN PART

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: Steven Lyn England, proceeding *pro se*, appeals from an order of the Graves Circuit Court in which the trial court denied England's motion to vacate his conviction filed pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. On appeal, England raises the same ten allegations of ineffective assistance of counsel he presented to the trial court. We vacate the portion of the trial court's

order dealing with the issue of mitigating evidence and remand that issue to the trial court for further proceedings. Regarding the remaining issues, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Kentucky State Police (KSP) investigated Tyrone McCary for the murder of his ex-girlfriend, Lisa Halvorson. However, the KSP did not have enough evidence to arrest McCary. Eventually, Karl Woodfork contacted the KSP with information implicating the appellant, Steven Lyn England, in Halvorson's murder. After the KSP interviewed Woodfork, Woodfork agreed to be wired for sound and agreed to go to England's home to discuss Halvorson's murder. During Woodfork and England's subsequent meeting, England made incriminating statements regarding Halvorson's murder, which Woodfork recorded.

Based on England's recorded statements, the KSP questioned him. During interrogation, England stated that he accompanied McCary to Halvorson's home and witnessed McCary beat, strangle and run over Halvorson's body with a truck. England denied participating in the murder but admitted that he struck Halvorson, knocking her to the ground. England also claimed that he tried to dissuade McCary from killing Halvorson but was unsuccessful. Additionally, England told the KSP that he and McCary left Halvorson alive lying at the end of her driveway, which is where her body was discovered.

After England gave his statement to the police, he was subsequently indicted for capital murder.[1] The Commonwealth moved the trial court to amend

[1] Tyrone McCary was separately indicted for capital murder.

the indictment to include a charge of complicity to commit murder, which the trial court granted. The Commonwealth also moved the trial court to sever England's trial from McCary's, which was granted. Ultimately, England proceeded to trial and after several days, he was convicted of complicity to commit murder and was sentenced to life in prison without the benefit of probation or parole. After being sentenced, England appealed to the Supreme Court of Kentucky, which upheld his conviction.

England thereafter filed, *pro se*, a motion, pursuant to RCr 11.42, to vacate his conviction and sentence. In his motion and memorandum in support thereof, England raised ten allegations of ineffective assistance of counsel. Without appointing counsel or holding an evidentiary hearing, the trial court summarily denied England's RCr 11.42 motion. After the trial court denied England's motion, he sought relief from this Court.

II. STANDARD OF REVIEW

To succeed on an RCr 11.42 motion, the movant must demonstrate that his trial counsel was ineffective; that his counsel's performance fell below the objective standard of reasonableness; and that his counsel's performance was so prejudicial that the movant was deprived of a fair trial and a reasonable result. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006) (citing *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the trial court must consider counsel's

overall performance in light of the totality of the evidence to determine whether the acts and/or omissions specified by the movant are sufficient to overcome this strong presumption. *Simmons,* 191 S.W.3d at 561. The movant must convincingly demonstrate that he was deprived of some substantial right that would justify the extraordinary relief set forth in RCr 11.42, and the movant must set forth all the facts necessary to demonstrate the existence of a constitutional violation. *Id*. If the movant fails to do so, the trial court is prohibited from presuming that the facts omitted from the motion establish the violation. *Id*.

> A convicted defendant claiming ineffective assistance of counsel has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Id. at 561-562 (citations omitted). Furthermore, an RCr 11.42 motion is limited to those issues that were not, and could not be raised on direct appeal. *Id*. at 561. A movant cannot resurrect an issue that was raised and rejected on direct appeal by later claiming that such issue constituted ineffective assistance of counsel. *Id*.

III. ANALYSIS

On appeal, England raises the same allegations of ineffective assistance of counsel that he raised in the circuit court.

A. CLAIM REGARDING THE COMPLICITY TO COMMIT MURDER INSTRUCTION

According to England, the Commonwealth was required to prove beyond a reasonable doubt that his co-defendant, McCary, had been previously found guilty of murdering Halvorson. Because the Commonwealth did not present evidence that McCary had been previously convicted of murder, England concludes that the evidence did not support the complicity instruction. Consequently, England reasons that his counsel rendered ineffective assistance for failing to object to the jury instruction on complicity to commit murder.

According to Kentucky Revised Statute (KRS) 502.030(1), it is not a defense to a complicity charge that the principal actor, "has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct[.]" *See also Tharp v. Commonwealth,* 40 S.W.3d 356, 366 (Ky. 2000) ("[I]t is immaterial to Appellant's criminal liability or the degree thereof whether [the principal actor] is ever convicted of criminal homicide for causing the death of [the victim], or, if so, of which degree of homicide he is convicted."). Consequently, both the relevant caselaw and statute contradict England's assertion that the Commonwealth had to prove that McCary had been previously found guilty of murdering Halvorson. Thus, this claim is without merit.

In addition, England insists that the complicity instruction was in error because this instruction constituted a "fatal variance" from the original indictment amounting to an impermissible "constructive amendment" of the original

indictment. Furthermore, while England acknowledges that the Commonwealth moved to amend the indictment and the trial court granted the motion, England appears to believe that only a grand jury has the authority to amend an indictment. Thus, he reasons that his trial counsel should have objected to the complicity instruction and, by failing to do so, rendered ineffective assistance of counsel.

According to RCr 6.16, the trial court may allow an indictment to be amended at any time prior to the verdict if the amendment does charge an additional or different charge and if the amendment does not prejudice the substantial rights of the defendant. *See Wolbrecht v. Commonwealth,* 955 S.W.2d 533, 537 (Ky. 1997) ("Our case law provides that an indictment may be amended at any time to conform to the proof providing the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend the offense."). Because the Commonwealth sought and received permission from the trial court to amend the indictment to include complicity to commit murder, this instruction did not "fatally vary" from the indictment nor did it operate as a "constructive amendment." Consequently, all claims brought under this theory lack merit.

B. CLAIM THAT TRIAL COUNSEL ALLOWED THE INTRODUCTION OF VICTIM IMPACT STATEMENTS AND FAILED TO PRESENT MITIGATING EVIDENCE

In England's brief, he claims the trial court failed to hold a presentencing hearing as required by KRS 532.025. According to England, his

counsel failed to object this oversight. However, a review of the record reveals that this hearing was held.

As part of this claim, England argues that when his trial counsel failed to object to the trial court's alleged failure to hold the presentencing hearing, his counsel allowed the Commonwealth to improperly introduce victim impact statements. According to the record, the Commonwealth called Halvorson's sister to the stand to testify about the impact of Halvorson's death. Contrary to England's assertion, the Commonwealth introduced no other victim impact evidence.

Regarding victim impact evidence, KRS 532.025, which controls presentencing hearings in capital murder cases, allows for the introduction of such evidence. *See Bowling v. Commonwealth,* 942 S.W.2d 293, 302-303 (Ky. 1997). Furthermore, KRS 532.055(2)(a)7, which controls sentencing hearings in all felony cases, allows the Commonwealth to introduce the impact of the crime on one victim, as that term is defined by KRS 421.500. *See Terry v. Commonwealth,* 153 S.W.3d 794, 804-805 (Ky. 2005). Halvorson's sister qualified as a victim as defined by KRS 421.500, so her testimony was proper. Accordingly, England's trial counsel was not ineffective regarding this issue.

As well as arguing about victim impact statements, England also claims that his trial counsel failed to present evidence in mitigation of the death penalty to which England was entitled pursuant to KRS 532.025. As a result, England asserts that his trial attorney was ineffective.

Regarding the subject of the mitigating evidence in a death penalty case, the Supreme Court of the United States has recently addressed that subject in two opinions: *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and *Rompilla v. Beard,* 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). In *Wiggins*, the appellant was convicted of capital murder in the state of Maryland. After being convicted, appellant's trial attorneys moved to bifurcate the sentencing. They intended to approach sentencing in two phases. First and foremost, they intended to present evidence to the jury that appellant was not the principal actor. Secondly, if necessary, they intended to introduce evidence in mitigation of the death penalty. The attorneys believed that bifurcation would prevent any mitigating evidence from diluting their claim that appellant was not directly responsible for killing the victim. The trial court denied the motion to bifurcate and, at the sentencing hearing, they did not present any mitigating evidence although they summarized, outside the jury's presence, the mitigating evidence they would have presented if the bifurcation motion had succeeded. After the sentencing hearing, the jury sentenced the appellant to death.

Eventually, the appellant in *Wiggins* filed a post-conviction motion arguing that his attorneys had rendered ineffective assistance of counsel for failing to present mitigating evidence. Upon review by the United States Supreme Court, the Court ruled that the question was not whether the attorneys should have presented mitigating evidence, rather the question was whether the investigation supporting their decision not to present such evidence was reasonable. *Id*. at 523,

123 S. Ct. at 2536. Applying the standards set forth in *Strickland*, the Supreme Court determined that the appellant's attorneys had rendered ineffective assistance of counsel by failing to adequately investigate appellant's background to make a determination regarding the presentation of mitigating evidence. *Id*. at 534, 123 S. Ct. at 2541-2542.

Although the Court in *Wiggins* found that appellant's attorneys were ineffective, it stated,

> In finding that [appellant's attorneys'] investigation did not meet *Strickland's* performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689, 104 S. Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id*. at 690-691, 104 S. Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id*. at 691, 104 S. Ct. 2052.

Wiggins, 539 U.S. at 533, 123 S. Ct. at 2541.

Next, we turn to the second United States Supreme Court decision addressing this issue, *Rompilla,* 545 U.S. 374, 125 S. Ct. 2456. In *Rompilla*, the appellant was convicted of capital murder in Pennsylvania. *Id*. at 378, 125 S. Ct. at 2461. During the sentencing phase, the prosecution presented evidence regarding

three aggravating factors in favor of the death penalty. The appellant's attorneys called five of appellant's relatives to testify in mitigation of the death penalty. Despite the jury's finding the existence of two mitigating factors, it sentenced the appellant to death.

Eventually, the appellant filed a petition for writ of habeas corpus in *Rompilla*, alleging ineffective assistance of counsel. The United States District Court granted appellant's petition holding that his attorneys were ineffective regarding the penalty phase of the appellant's trial. The Court found that "in preparing the mitigation case the defense lawyers had failed to investigate 'pretty obvious signs' that [the appellant] had a troubled childhood and suffered from mental illness and alcoholism, and instead had relied unjustifiably on [appellant's] own description of an unexceptional background." *Id*. at 379, 125 S. Ct. at 2461 (citations omitted).

The Supreme Court affirmed the Court's decision and held

> that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

Id. at 377, 125 S. Ct. at 2460.

Finally, in addition to the Supreme Court's cases, we turn to the case of *Skaggs v. Parker,* 235 F.3d 261 (6th Cir. 2000). In *Skaggs*, the appellant was convicted of capital murder in Kentucky. During the guilt phase of the trial, the

appellant's attorneys called Elya Bresler to testify on the appellant's behalf. Appellant's attorneys hired Bresler as an independent psychiatrist for the defense, acting under the impression that Bresler was a licensed clinical and forensic psychiatrist. During the guilt phase, Bresler testified that the appellant suffered from a "depressive disorder" and "paranoid personality disorder." However, Bresler testified in a rambling and confused fashion and was, "at times, incoherent to the point of being comical."

After the appellant was convicted of murder in *Skaggs*, his attorneys declined to have Bresler testify during the penalty phase given his prior bizarre testimony. Four months thereafter, the trial court convened a second penalty phase before a new jury. Despite the fact that appellant's attorneys had a new opportunity to present mitigating evidence and despite Bresler's prior performance, the attorneys called Bresler to testify in mitigation of the death penalty. After the second sentencing hearing, the appellant was sentenced to death.

After his conviction, the appellant in *Skaggs* appealed to the Kentucky Supreme Court, which upheld his conviction. Eventually, the appellant filed a petition for writ of habeas corpus with the United States District Court for the Western District of Kentucky, which denied the appellant's petition. The appellant then appealed to the Sixth Circuit.

In the Sixth Circuit's opinion reversing the District Court in *Skaggs*, the Court noted that at the evidentiary hearing it was discovered that Bresler had falsified his credentials, was not a licensed clinical and forensic psychiatrist, and

had no psychological training whatsoever. Applying the *Strickland* standards, the Sixth Circuit concluded that, regarding the penalty phase only, the appellant's attorneys had rendered ineffective assistance of counsel. *Id*. at 267.

In coming to this decision, the Sixth Circuit stated

> did counsel have a responsibility to present meaningful mitigating evidence? We think that they did. We find that [the appellant's] counsel acted below an objective standard of reasonableness at sentencing, essentially providing no legitimate mitigating evidence on [appellant's] behalf, and that this failure severely undermines our confidence in the just outcome of this proceeding.
>
> Failure to present mitigating evidence at sentencing constitutes ineffective assistance of counsel. *See Austin v. Bell,* 126 F.3d 843, 849 (6th Cir. 1997) (holding that defense counsel's failure to investigate or present any mitigating evidence because counsel believed that it would be of no benefit constituted ineffective assistance of counsel when several witnesses were available and willing to testify on defendant's behalf, as the failure to present mitigating evidence undermined the adversarial process and rendered the death sentence unreliable); *Glenn v. Tate,* 71 F.3d 1204, 1206-08 (6th Cir. 1995) (holding that counsel provided ineffective assistance when mitigating information was not presented to the jury at sentencing because counsel made virtually no attempt to prepare for sentencing phase). In *Austin*, we recognized that the failure to present mitigating evidence when it was available could not be considered a strategic decision, but rather, an "abdication of advocacy." 126 F.3d at 849. Such an abdication occurred in the present case.

Skaggs, 235 F.3d at 269.

After reviewing these cases, we glean several conclusions. First, regarding mitigating evidence and ineffective assistance of counsel, the United

States Supreme Court has made it clear that the focus is upon the attorney's investigation regarding mitigation and whether that investigation was reasonable and supported counsel's decision regarding presenting mitigating evidence. Second, the Supreme Court held that *Strickland* does not necessarily require the presentation of mitigating evidence in a death penalty case. *See Wiggins,* 539 U.S. at 533, 123 S. Ct. at 2541. Third, the Sixth Circuit, however, has applied *Strickland* more stringently and has held that an attorney's failure to present mitigation in a death penalty case is ineffective assistance of counsel. *See Skaggs,* 235 F.3d at 269. Fourth, regardless, the federal caselaw on the subject demonstrates that the law in the United States clearly favors the presentation of mitigating evidence in death penalty cases.

England's trial attorney did not present mitigating evidence. In the absence of an evidentiary hearing, we are left to guess why no mitigating evidence was presented.

Applying *Wiggins* and *Rompilla*, yet being mindful of the Sixth Circuit's more stringent application of *Strickland*, two pertinent questions need to be reviewed by the trial court: 1) was England's trial counsel's decision not to present mitigation supported by an investigation; and 2) was the counsel's investigation reasonable? Consequently, we vacate and remand that portion of the trial court's order regarding the issue of mitigation for an evidentiary hearing.

C. CLAIM REGARDING THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT

England avers that during the Commonwealth's closing argument, the prosecutor said to the jury, "What do you think Tyrone [McCary] would have said? I bet he would have said Steve England did it all." According to England, the prosecutor's statement was an expression of the prosecutor's personal opinion, which constituted unsworn testimony. Because it was unsworn testimony, England lost the opportunity to cross-examine the prosecutor and lost the opportunity to cross-examine McCary, the alleged declarant. Based on this, England asserts that his attorney rendered ineffective assistance of counsel by not objecting to the prosecutor's remarks.

It has long been recognized in the Commonwealth that counsel has great leeway in making closing arguments. *Brewer v. Commonwealth,* 206 S.W.3d 343, 350 (Ky. 2006). In addition to having great leeway during closing, a prosecutor may also comment on the evidence during closing. *Slaughter v. Commonwealth,* 744 S.W.2d 407, 412 (Ky. 1987). After reviewing the prosecutor's closing argument in context, it is clear that he was not testifying. Rather, he was commenting on the evidence adduced at trial. Because the prosecutor's remarks were permissible, England's counsel's performance did not fall below the objective standard of reasonableness for failing to object.

D. CLAIM REGARDING HEARSAY STATEMENTS MADE BY McCARY

England argues that one of the Commonwealth's witnesses, Cori Poindexter, testified about a conversation she overheard between Halvorson and McCary. She allegedly testified about statements made by McCary. According to

England, the Commonwealth failed to establish that McCary was not available to testify at trial; thus, Poindexter's testimony was inadmissible hearsay. England argues that his counsel failed to object to Poindexter's testimony and, thus, rendered ineffective assistance of counsel because he was denied his Sixth Amendment right to confront the declarant, McCary.

In England's direct appeal to the Supreme Court of Kentucky, he complained about the same testimony from Poindexter but ascribed the hearsay statements to the victim, Halvorson. The Supreme Court determined that the statements were hearsay but fell under the present sense impression and the excited utterance exceptions to the hearsay rule. As we previously stated, a criminal defendant cannot use a RCr 11.42 motion to relitigate issues that were addressed or should have been addressed by direct appeal. *Simmons,* 191 S.W.3d at 561. Whether England ascribes the hearsay statements to Halvorson or McCary, these statements were addressed by direct appeal; thus, England was prohibited from raising the issue again in his RCr 11.42 motion. Consequently, this claim is without merit.

E. CLAIM REGARDING ALLEGED EXCLUSION OF AFRICAN-AMERICANS FROM THE GRAND JURY

According to England, the grand jury had no African-American jurors. Thus, he claims this leads to the presumption that African-Americans were systematically excluded from the grand jury. In addition, England asserts that no African-American has sat on a grand jury in Graves County in the last fifteen

years. On appeal, England argues that his trial counsel rendered ineffective assistance of counsel for failing to object to the systematic exclusion of African-Americans from the grand jury.

In his direct appeal, England asserted that African-Americans had been systematically excluded from the jury panel. The Supreme Court rejected England's claim stating that England had failed to produce even a scintilla of evidence to support his claim. Having failed on direct appeal, England has attempted to breathe new life into this claim by claiming ineffective assistance of counsel. However, this time around, England claims African-Americans were systematically excluded from the grand jury. As we noted earlier, a criminal defendant must set forth in his RCr 11.42 motion all the facts necessary to demonstrate the existence of a constitutional violation. While England claims that African-Americans were systematically excluded from the grand jury, he has not alleged any facts to support this assertion. He also claims African-Americans have been systematically excluded from grand juries in Graves County for the past fifteen years; however, he has not set forth a single fact to support that claim. Accordingly, England has failed to cast any doubt on his attorney's performance regarding this issue.

F. CLAIM REGARDING FAILURE TO USE TRANSCRIPT PREPARED BY DEFENSE

In his brief, England points out that, during closing argument, the prosecutor used a transcript, prepared by the Commonwealth, of the audiotape

recording of the conversation between England and Woodfork. England argues that because the prosecutor used this transcript, he had the right to use his own transcript. According to England, his trial counsel rendered ineffective assistance of counsel by not using the defense's transcript during closing which denied him the opportunity to present a complete and meaningful defense.

During the Commonwealth's closing argument, the prosecutor used excerpts from a transcript the Commonwealth had prepared of the audiotape recording of the conversation between England and the confidential informant, Woodfork. England's trial counsel did not use a similar transcript prepared by the defense; however, England's trial attorney commented extensively on the audiotape and commented extensively on the prosecution's interpretation of the tape giving his own opinion regarding the content of the audiotape. In this particular claim, England is merely disagreeing with his attorney's strategy regarding closing argument. However, "[t]rial strategy will not be second guessed in an RCr 11.42 proceeding." *Hodge v. Commonwealth,* 116 S.W.3d 463, 473 (Ky. 2003) (citation omitted). Thus, England has failed to demonstrate that his counsel's performance fell below the objective standard of reasonableness.

G. CLAIM THAT COUNSEL FAILED TO MAKE A PRETRIAL OBJECTION TO THE INDICTMENT

England avers that his counsel objected to the indictment during trial claiming that it did not contain aggravating circumstances; however, England argues that RCr 8.18 requires that such an objection be made prior to trial.

Consequently, England reasons that his counsel rendered ineffective assistance of counsel by failing to make a pretrial objection to the indictment.

On direct appeal, the Supreme Court addressed the issue of the lack of aggravating circumstances in the indictment. While the Court noted that the issue was not preserved for appeal because RCr 8.18 required the issue to be raised by pretrial motion, the Supreme Court still addressed the merits of the argument. So, despite his trial counsel's error in failing to address the issue pretrial, England suffered no prejudice. Furthermore, England is trying to relitigate an issue that was addressed on direct appeal by claiming it constituted ineffective assistance of counsel, which is prohibited. *Simmons,* 191 S.W.3d at 561. Accordingly, England is prohibited from raising this issue via his RCr 11.42 motion.

H. CLAIM REGARDING CHANGE OF VENUE

According to England, his case was highly publicized. He also claims that many articles were published that "told of an alleged confession by England to the murder of Halvorson[.]" England asserts that his counsel should have moved for a change of venue due to the publicity. Because his counsel did not file a motion for change of venue, England claims that his attorney was ineffective.

According to *McKinney v. Commonwealth,* 445 S.W.2d 874, 877 (Ky. 1969), the decision whether or not to request a change of venue falls within trial counsel's discretion. Furthermore, upon appeal, in determining whether trial counsel was ineffective, we must give deference to the attorney's performance. *Harper v. Commonwealth,* 978 S.W.2d 311, 315 (Ky. 1998). In the present case,

England does not explain how he was prejudiced by his counsel's decision not to seek a change of venue; moreover, he does not claim that he did not receive a fair trial in Graves County. Given the lack of supporting facts and given the strong presumption that the performance of England's counsel fell within the wide range of reasonable professional assistance, we find that that this claim did not establish ineffective assistance of counsel.

I. CLAIM REGARDING FAILURE TO MOVE FOR SUPPRESSION OF AUDIOTAPE AS VIOLATING 18 U.S.C. § 2511

According to England, Woodfork wore a "wire" and recorded England's incriminating statements. England argues that this constituted a "wiretap" pursuant to 18 U.S.C. § 2511. England points out that 18 U.S.C. § 2511 requires the government to seek a prior court order to intercept a person's communication through a "wiretap." According to England, the KSP did not seek a prior court order to "wiretap" his conversation with Woodfork. England reasons that his trial counsel rendered ineffective assistance of counsel by failing to suppress the audiotape based on the KSP's failure to comply with 18 U.S.C. § 2511.

First, England argued on direct appeal that the audiotape should have been excluded under the Fourth Amendment because the KSP failed to obtain a search warrant; the Supreme Court of Kentucky rejected this claim. In his RCr

11.42 motion, England attempts to resurrect this issue, but, instead of arguing that the Commonwealth violated the Fourth Amendment, England argues that the Commonwealth violated 18 U.S.C. § 2511. Despite this difference, this current issue is the same as the one previously raised and rejected on direct appeal. As a result, England was and is barred from raising it again.

Second, even if this claim is not barred, England has failed to show error on the part of his trial counsel. If the government acquires the consent to record from one person involved in a conversation, then the government has no need to obtain a court order under 18 U.S.C. § 2511. *United States v. Barone,* 913 F.2d 46, 49 (2d Cir. 1990). In the present case, the KSP acquired Woodfork's consent to record his conversation with England. Thus, there was no need for the KSP to obtain a court order to "wiretap" England and Woodfork's conversation. England's attorney, therefore, did not render ineffective assistance of counsel by failing to suppress the audiotape pursuant to 18 U.S.C. § 2511, because that statute simply did not apply.

IV. CONCLUSION

Regarding the issue of trial counsel's decision not to present mitigating evidence during the sentencing phase, we vacate that portion of the Graves Circuit Court's order and remand with instructions for the trial court to conduct an evidentiary hearing that conforms to the instructions in this opinion. Regarding all other issues, the order of the Graves Circuit Court is affirmed.

ALL CONCUR.

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