RENDERED: OCTOBER 3, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001643-MR

MIKE BROWN APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00075

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

COMBS, CHIEF JUDGE: Michael Brown appeals from an order of the Clinton Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his sentence and conviction, to grant a new trial, and to grant an evidentiary hearing. After our review of the record, we affirm.

At approximately 7:00 a.m. on May 14, 2003, while Michael Brown was traveling north on Highway 558 in Clinton County, his car dropped off the

right shoulder. As he attempted to come back onto the road, Brown over-corrected and crossed into the southbound lane, hitting Christie Branham's car nearly head-on and sending it over an embankment. Brown's car then spun around multiple times and finally stopped. It came to rest against the front of a southbound school bus that was loaded with children.

Witnesses to the aftermath testified that Brown emerged from his car appearing confused and smelling of alcohol. Investigating police officers observed one beer can in the back seat of his car and another in the middle of the road near the site of impact. Based on this evidence, the Kentucky State Police (KSP) sought blood and urine samples from Brown approximately one and one-half hours after the collision. Since Brown was unconscious and could not consent to the test, the nurses at Clinton County Hospital provided KSP with the samples. The tests subsequently revealed that Brown had a blood alcohol level of .09% and that his urine contained constituents of marijuana indicating that he had consumed marijuana within the previous 36 hours.

Fortunately, the bus driver, Bradley Bell, had observed Brown's vehicle in time to stop the school bus completely so that none of the bus's occupants was injured. However, Ms. Branham and her three children suffered a far different outcome. First responders to the Branham car found that only two-year-old Kristen was conscious. Nine-year-old Jonathan had a visible skull fracture and was airlifted from the scene to the University of Kentucky Medical Center in Lexington. Seven-year-old Jacob was initially taken to Clinton County

Hospital in Albany along with his sister, Kristen, and their mother, Christie. However, their injuries proved to be so extensive that they were airlifted to UK later that day.

Kristen had a broken femur because the driver's seat slammed backward into her car seat. She also suffered a broken right hand and scars on her face from shattered glass. Jonathan had a depressed skull fracture; treatment included removal of a portion of his brain. He has pins and plates under the fracture.

Jacob's injuries were grave – as are their ongoing consequences. He suffered a head injury that resulted in stroke-like effects. He is unable to speak, swallow, or control his bowels. He cannot hold up his head and receives nutrition through a feeding tube. Jacob will require extensive care for life.

Their mother, Christie, suffered a crushed lower leg, ruptured spleen, crushed tailbone, broken hand, broken pelvis, punctured lung, broken ribs, broken shoulder, and a concussion. She still experiences difficulty walking and has limited function of the shoulder that was broken. Additionally, even minor infections pose a high risk for her because her spleen had to be removed.

In September 2003, a Clinton County grand jury indicted Brown on one count of driving under the influence (DUI), operating a motor vehicle on a license suspended for a DUI, and four counts of first-degree assault. The trial was in March 2004. The jury found Brown guilty of the DUI and four counts of first-

degree assault. He received a combined sentence of imprisonment of fifty years – to be served consecutively. In January 2006, the Supreme Court of Kentucky affirmed the conviction following Brown's direct appeal. In response, Brown filed his RCr. 11.42 motion seeking to vacate his sentence and conviction and asking for a new trial and an evidentiary hearing. The Clinton Circuit Court denied his motion, and this appeal follows.

Ineffective Counsel

Brown's arguments are all derived from his claim that he received ineffective counsel. Accordingly, our standard of review focuses on the legal test for the elements establishing ineffective assistance of counsel.

The Supreme Court of the United States has set forth a precise two-pronged test describing the defendant's burden of proof in such a case:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both prongs must be met in order for the test to be satisfied. The Court also observed as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

> reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id*. at 695-96.

<u>Pre-trial Investigation and Preparation</u>

Brown first argues that trial counsel failed to investigate and to prepare adequately for trial. The Supreme Court of Kentucky has addressed the role of counsel in conducting pre-trial investigation:

> This Court has recognized the necessity for complete investigation by defense counsel. [C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be *reasonable under all the circumstances*.

Haight v. Commonwealth, 41 S.W.3d 436, 446 (Ky. 2001), (emphasis added) (citations omitted). Brown's allegations of lack of preparation are based on the fact that his trial counsel was disbarred approximately fourteenth months after the trial. However, we note the reasoning of our Supreme Court that "the test for effective assistance of counsel is . . . whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial." *Baze v.*

Commonwealth, 23 S.W.3d 619 (Ky. 2000), citing *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). It is irrelevant and inappropriate to speculate upon events involving trial counsel in an unrelated, subsequent matter. See *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002)

Brown claims in particular that his attorney failed to interview potential witnesses, failed to obtain expert witnesses, and failed to object to the blood alcohol testing procedures. We have determined that the record contradicts one of these claims and that the other two allegations do not rise to the level of prejudice required by *Strickland*.

First, the record substantiates that Brown's trial counsel *did* object to the blood alcohol testing procedures. Kentucky Revised Statutes (KRS) § 189A.103 provides that:

> Any person who operates or is in physical control of a motor vehicle . . .
> (1) . . . is deemed to have given his consent to one (1) or more tests of his blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability, if arrested for any offense arising out of a violation of KRS 189A.010(1) or 189.520(1).
> (2) Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal is deemed not to have withdrawn the consent provided in subsection (1) of this section, and the test may be given.
> (3) The breath, blood, and urine tests administered pursuant to this section shall be administered at the direction of a peace officer having reasonable grounds to believe the person has committed a violation of KRS 189A.010(1) or 189.520(1).

Brown came within the ambit of the statute, and the court did not err in overruling his objection to the procedure. Additionally, the trial court properly ruled that the prosecution established the chain of custody for the samples and test results.

Second, the lack of expert witnesses at trial was not unreasonable because both an eye witness and a KSP accident reconstructionist testified at trial. Brown did not object to their accounts of the events. Brown has only contested the cause of the accident (his own intoxication), and the witnesses he claims to have been omitted could not have overcome the evidence of the blood test so as to affect the outcome. Our Supreme Court has addressed this contention in *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003), holding that: "The mere fact that other witnesses *might have been available* or that other testimony *might have been elicited* from those who testified is not a sufficient ground to prove ineffectiveness of counsel." (emphasis added) (citation omitted).

Likewise, the only potential witness whom Brown mentions with particularity is his sister, who allegedly would have testified that Brown did not drink alcohol before the accident. In *Haight*, 41 S.W.3d at 441, the Supreme Court of Kentucky elaborated on the standard for ineffective assistance of counsel as being "not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory."

The testimony that someone did not personally observe Brown drinking prior to the accident simply could not as a matter of scientific reality refute the results of a blood test. KRS 189A.010(1)(a) criminalizes operating or

being in physical control of a motor vehicle while "having an alcohol concentration of .08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle." Although courts may admit evidence indicating contributory or mitigating circumstances, its omission in this case was not likely to overcome the scientific evidence. Thus, we cannot conclude that Brown suffered prejudice as a result of the absence of his sister's probable testimony.

Brown also argues that his counsel was ineffective for failing to obtain expert witnesses. He speculates that expert witnesses "could have" or "may have been able" to provide testimony that would have discredited the evidence presented at court concerning both Ms. Branham's driving and the accuracy of his blood test. In *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005), the Supreme Court directed that post-conviction claims involving expert witnesses *must be specific* as to the identity of the prospective expert and the probable content of his testimony: "A claim that certain facts *might* be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr 11.42 relief." *Id*. at 328. Additionally, the Court has held that "the purpose of an RCr. 11.42 motion is to provide a forum for known grievances and not an opportunity to conduct a fishing expedition for potential grievances." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 910 (Ky. 1998).

Brown has not named any specific experts nor has he identified any potential testimony to meet "his burden of showing that there is a reasonable probability that [such] testimony . . . would have changed the outcome of the proceeding." *Mills*, 170 S.W.3d at 329. As the Commonwealth correctly notes, it was likely prudent trial strategy for the defense not to call expert witnesses. The eyewitness to the accident was very credible. The Commonwealth observed that:

> given the amount of evidence already against [Brown], trial counsel most likely did not want to put an expert on the stand that on cross-examination would have to concede that appellant's blood alcohol level would have likely been higher at the time of the accident or to testify that marijuana may enhance the effect of alcohol.

Appellee's Brief at 11. Accordingly, we conclude that the trial court did not err in overruling Brown's 11.42 motion.

<u>Admission of Inadmissible Evidence</u>

Brown next argues that his counsel was ineffective because his trial attorney failed to advise him to refrain from testifying at trial. Because Brown testified, evidence of his prior DUI convictions was admitted in the guilt phase of the trial. Among those convictions was one that involved an accident in which his own children were injured.

Before trial, Brown's counsel filed a motion to exclude evidence of the prior convictions. The court's order and the Commonwealth's brief both suggest that Brown was present for the trial court's ruling on the admissibility of the prior DUI convictions, but the video record does not corroborate this claim.

Nonetheless, the record shows that the trial court allowed it to be used for impeachment purposes.

Our Supreme Court has held that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Here, the totality of the circumstances indicates that even without reference to the prior convictions, the prosecution presented sufficient evidence for the jury to find Brown guilty. Regardless of the fact that Brown's testimony resulted in the use of the earlier convictions for impeachment purposes, the evidence of the prior convictions would have been admitted during the penalty phase. We find no error on this point.

Failure to Give Advice Concerning the Law and Facts

Brown's final claim of ineffective counsel is that his attorney did not advise him of the relevant law and facts of the case. In corroboration of that contention, he offers only generalized examples of objections that he believes his trial counsel should have made. As to one example (*i.e.*, photographs of the accident scene), trial counsel did in fact object.

RCr. 11.42(2) requires that a motion for relief "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The burden rests upon the movant to "establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding." *Haight*, 41 S.W.3d at 442, citing *Dorton v. Commonwealth*, 433 S.W.2d 117, 118

(Ky. 1968). That burden entails "more than a shotgun allegation of complaints. . . . It is inappropriate for a movant to seek a hearing hoping, in the words of Mr. Micawber that 'something would turn up.'" *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993). Brown's allegations amount to a quest for something that might have turned up, and the trial court was correct in dismissing his motion.

Lack of Evidentiary Hearing

Brown argues that the Clinton Circuit Court should have granted him an evidentiary hearing before denying his RCr. 11.42 motion. RCr. 11.42(5) requires an evidentiary hearing if "the [Commonwealth's] answer raises a material issue of fact that cannot be determined on the face of the record." In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001), the Supreme Court set the parameters for a trial judge's evaluation of a record for eligibility for an evidentiary hearing:

> 2. After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing 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.

Even if the allegations are not refuted by the record, an evidentiary hearing will not be granted if they are insufficient to overcome the verdict. *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970).

In this case, Brown's allegations in support of an evidentiary hearing were either resolved by the record or were insufficient to affect the outcome of the

case. The Clinton Circuit Court did not err in not granting the motion for a hearing.

Cumulative Error

Brown last argues that his motion should have been granted based on the cumulative errors made by the trial court. Because we find no errors at all, that argument is inapplicable. See *Sanborn*, 975 S.W.2d at 913.

We affirm the order of the Clinton Circuit Court denying Brown's 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Neil Brown, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky