

RENDERED: OCTOBER 24, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002278-MR

CHARLES DARWIN SMITH

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 02-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM, SPECIAL JUDGE.

THOMPSON, JUDGE: Charles Darwin Smith appeals from an order of the Boyd Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm.

On January 25, 2002, Smith and Steven Young entered a convenience store and attempted to cash a forged check belonging to Erica Davis. The store

clerk testified that Smith and Young used Davis' driver's license as identification. Knowing Davis since high school, the clerk informed her manager of the situation and police were notified. After police arrived, the two men were arrested.

On March 28, 2002, Smith was indicted by a Boyd County grand jury for criminal possession of a forged instrument in the second-degree and for being a persistent felony offender in the first degree (PFO I). Following his jury trial, he was found guilty of the criminal possession charge. During his PFO hearing, the Commonwealth introduced Smith's three prior convictions to prove the PFO I charge.

His first conviction was in a federal case wherein Smith was sentenced to eight-months' imprisonment. His second conviction was a Fayette Circuit Court case wherein he pled guilty to second-degree escape. The certification page for this judgment was attached to the judgment in the federal case. His third conviction was a Boyd Circuit Court case which the trial court admitted without certification. Based on these "prior convictions," the Commonwealth asked the jury to find Smith guilty of being a PFO I. After the jury agreed with the Commonwealth, the trial court sentenced Smith to eighteen-years' imprisonment in accordance with the jury's recommendation.

This Court affirmed Smith's conviction on direct appeal in Case No. 2002-CA-002460-MR. On October 17, 2006, Smith filed a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel. After an evidentiary hearing,

the trial court denied Smith's motion for post-conviction relief. This appeal followed.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must demonstrate the following: (1) that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously that there is a reasonable likelihood that the outcome of the trial would have been different absent the errors. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

On review of a denied motion for post-conviction relief, we are required to defer to the trial court's findings of fact and determinations regarding the credibility of witnesses. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). These findings and determinations will be conclusive if they are supported by substantial evidence. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004). Findings of fact are supported by substantial evidence when the evidence is sufficient to affirm the findings in the minds of reasonable people. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Smith contends that he received ineffective assistance of counsel when his counsel failed to propose instructions on the lesser included offenses of facilitation, conspiracy, and attempted forgery. Contending that the evidence at

trial supported these instructions, Smith argues that he suffered a constitutional deprivation when his counsel failed to ensure their submission to the jury. We disagree.

During the evidentiary hearing, Smith's counsel testified that he discussed the possibility of proposing instructions for lesser included offenses to forgery. Counsel testified that Smith informed him that he did not want other instructions submitted to the jury but desired an "all or nothing" strategy. Counsel accepted Smith's wishes and did not offer instructions on the lesser included offenses. During his testimony, Smith stated that he did not recall discussing the matter with his counsel.

At the conclusion of a criminal trial, the trial court is required to give every instruction supported to any extent by the testimony, including giving instructions for lesser included offenses. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360-62 (Ky. 1999). Despite this duty, trial courts are not required to provide instructions on lesser included offenses if the defense declines this option due to its trial strategy. *McKinney v. Commonwealth*, 60 S.W.3d 499, 507 (Ky. 2001). An "all or nothing" strategy precludes the jury from reaching a compromise verdict on a lesser included offense when the defendant believes he has established reasonable doubt regarding the charged offense and will be acquitted.

The trial court's finding that Smith made a conscious decision not to submit lesser included instructions is supported by substantial evidence. Smith's counsel testified that the decision to forego instructions on the lesser included

offenses was trial strategy. Smith did not deny his counsel's testimony but merely stated that he did not recall their conversation. Therefore, although the decision to pursue this strategy was unsuccessful, Smith's counsel did not render ineffective assistance when he made this strategic decision.

Smith next contends that he received ineffective assistance of counsel when his counsel failed to challenge the convictions introduced to support his PFO I conviction.

First, he contends that the use of his federal conviction was improper because his sentence in the case was not for the requisite one or more years as required in Kentucky Revised Statutes (KRS) 532.080(3)(a). Second, he contends that the jury was confused and his case was prejudiced when the certification page for his Fayette Circuit Court conviction was attached to his federal judgment. Third, Smith contends that his Boyd and Fayette Circuit judgments of conviction were not properly certified and should have been excluded. Smith contends that these errors warrant the reversal of his PFO I conviction. We disagree.

While Smith correctly contends that the federal conviction could not be used to support his PFO conviction because he did not receive at least a one-year sentence as required by KRS 532.080(3), his two Kentucky convictions were sufficient to support his PFO I conviction. *Id.* Regarding his contentions of confusion and certification defects, the record forecloses the possibility that Smith's judgment of conviction was so fundamentally unfair as to deny him due process of law. The attachment of the certification page of the Fayette Circuit

Court conviction to his federal case was not a constitutional error. Had his counsel objected, the trial court could have permitted the attachment of the Fayette Circuit certification page to the Fayette Circuit Court judgment of conviction.

Furthermore, the trial court could have granted a recess to permit the circuit clerk to prepare a certification page for its judgment or to personally testify to prove the Boyd Circuit Court conviction. Essentially, the Commonwealth introduced two valid Kentucky felony convictions against Smith during the PFO hearing. Consequently, Smith has failed to establish that his PFO I conviction amounts to a denial of due process of law. *Schooley v. Commonwealth*, 556 S.W.2d 912, 917 (Ky.App. 1977).

Smith next contends that he received ineffective assistance of counsel when his counsel failed to object to the Commonwealth's erroneous assertion that he had been previously convicted of being a PFO. During its closing, the Commonwealth stated that Fayette County had already punished him as a persistent felony offender. However, under the terms of the plea agreement in the Fayette Circuit Court case, Smith pled guilty to escape and the PFO charge was dismissed. Smith contends that this factual misstatement requires a reversal in this case. We disagree.

It is well established that errors which would require reversal on direct appeal do not necessarily justify reversal pursuant to post-conviction relief. *Id.* It was error for the Commonwealth to make this assertion because Smith had not been previously convicted of being a PFO in Fayette Circuit Court. However,

despite this error, the evidence of his guilt on the PFO I charge was sufficient, and there can be no doubt that Smith received a fair trial and effective representation in light of the entire record. *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

For the foregoing reasons, the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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