

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001437-MR

RALPH SCOTT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Ralph Scott (Scott) brings this appeal from a May 4, 2007, order of the McCracken Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. For the reasons below, we affirm.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The underlying facts of this case were summarized by the Supreme Court in its opinion affirming Scott's conviction as follows:

On December 25, 2001, the Paducah Police Department issued a dispatch describing a van that was suspected of being used in a criminal incident in McCracken County. Officer James Davis who was on patrol located a van matching the description parked in the lot of a Shell Mart. He observed a woman in the driver's seat and Appellant, Ralph Scott, in the passenger seat. As Officer Davis approached the van, Scott put his right hand in his pocket. Scott failed to comply when Davis requested that he remove his hand from his pocket. Davis drew his weapon and walked toward the passenger side of the van. As he did so, he observed Scott withdraw his hand and pitch something over his left shoulder into the back seat. Davis directed Scott to exit the van, handcuffed him and conducted a pat-down search. He then flashed a light in the vehicle and saw what was ultimately determined to be about twenty grams of crack cocaine in the floorboard behind the driver's seat. Scott was arrested and during a search incident to arrest, Officer Davis discovered \$1,352.00 in small bills in Scott's pants pockets.

Scott was charged and convicted, upon a jury verdict, of first-degree trafficking in a controlled substance, second offense and of being a persistent felony offender (PFO) in the second degree. He was sentenced to twenty years imprisonment on the trafficking conviction which was enhanced to thirty years by the PFO conviction.²

After his conviction and sentencing, Scott appealed to the Supreme Court of Kentucky arguing that his right to a speedy trial was violated and that he was deprived a fair trial due to prosecutorial misconduct. The Kentucky Supreme Court rendered a unanimous opinion affirming the Scott's conviction and sentence. Scott then filed a *pro se* RCr 11.42 motion seeking to have his sentence set aside,

² Appeal number 2005-SC-00100-MR

vacated, or corrected. The McCracken Circuit Court denied Scott's RCr 11.42 post-conviction challenge without first conducting an evidentiary hearing. Scott now appeals this decision by the circuit court.

Scott next argues that he, in fact, received ineffective assistance of counsel. Scott must satisfy a two prong test to establish an ineffective assistance of counsel claim under RCr 11.42. He must show both that his defense counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, (1984).

In order to satisfy the first prong of the *Strickland* test, appellant must prove that counsel's performance was deficient by showing that it, "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Second, in showing that counsel's deficiency resulted in actual prejudice, the appellant must demonstrate with reasonable probability that the deficiency of counsel likely affected the outcome of his case. *Strickland*, 466 U.S. at 684.

To support his ineffective counsel claim, Scott alleges that deficient performance in the failure to perform appropriate investigation; to properly consult with Scott prior to trial, and to call the driver of the van to testify at trial, but offers speculation regarding the potential testimony of the female who was driving the van. This witness was not called to testify by either the prosecution or defense in Scott's criminal trial. Scott does not specify the content of this proposed witness's

testimony and fails to persuade us that the outcome would have been different had the witness testified at trial. In his appellate brief, Scott argues that had the driver been called to testify, he could have fully asserted the defense that the drugs did not belong to him and that a time period occurred during which the van, where the drugs were discovered, was not in his control.

Scott's argument assumes that the driver would testify to these facts, that the jury would have believed her testimony, and that this new information would have changed the outcome of the case. Scott's argument is purely speculative and fails to account for the possibility that the witness's testimony could have been harmful to his case, by eliminating the potential theory that the drugs belonged to her instead of Scott.

Counsel's decision not to subpoena the driver must be viewed under the highly deferential standard of *Strickland*, 466 U.S. at 689. The court should look at the reasonableness of the counsel's decision not to call this particular witness to testify, while applying heavy deference to counsel's judgment *Strickland*, 466 U.S. at 691. Given all the circumstances of this case, the defense attorney was the best position to make the final determination of whether to subpoena the driver.

Scott also argues that he received ineffective assistance because counsel failed to thoroughly investigate the laboratory analysis of the drug evidence in his case. Scott suggests that defense counsel did not adequately attack the drug evidence in court. Specifically, he argues that counsel should have

challenged the chain of custody for the drug evidence, and that had the drug evidence been properly challenged, the jury would have had “reasonable doubt” about his guilt. However, even if defense counsel actually erred in failing to investigate and question the drug evidence presented in this case, Scott has not convinced the court that the outcome of his criminal trial would have been different.

We thus conclude that Scott has failed to overcome the strong presumption that his counsel was effective. *Strickland*, 466 U.S. at 690. Scott failed to demonstrate that counsel’s representation fell below an objective standard of reasonableness and that actual prejudice resulted from the alleged deficiency. *Strickland*, 466 U.S. at 688. Even if all of the Scott’s allegations of counsel’s deficiencies were true, he has failed to persuade us, either alone or cumulatively, that the errors resulted in actual prejudice to his case.

Finally, Scott argues that the trial court erred in denying his 11.42 motion without first conducting an evidentiary hearing. An evidentiary hearing is only required if “a material issue of fact ... cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); see also *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970) (evidentiary hearing unnecessary if allegations can be resolved by the record or are insufficient to invalidate conviction). Thus, hearings are unnecessary when the issues raised can be determined entirely by an examination of the record. As noted, because all of

Scott's contentions are resolved on the basis of the record alone, the trial court did not err in denying his motion without a hearing.

The McCracken Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph Scott, *Pro Se*

BRIEF FOR APPELLEE:

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