

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001562-MR

TIMOTHY W. MAXWELL

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 02-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Timothy Wayne Maxwell appeals *pro se* from an order entered by the Logan Circuit Court denying his motion seeking RCr<sup>1</sup> 11.42 relief.

We affirm.

A jury convicted Maxwell of two counts of first-degree unlawful transaction with a minor and one count of custodial interference. He was

---

<sup>1</sup> Kentucky Rules of Criminal Procedure.

sentenced to twenty years' imprisonment, and the Kentucky Supreme Court affirmed his conviction on appeal.<sup>2</sup> Maxwell then sought RCr 11.42 relief on the ground that he was afforded ineffective assistance of counsel during his trial proceedings. The circuit court denied the *pro se* motion after an evidentiary hearing. This appeal followed.

As stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a two-pronged standard applies to claims of ineffective assistance of counsel:

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.

466 U.S. at 687, 104 S.Ct. at 2064. *See also Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

On appeal, Maxwell first asserts that he was afforded ineffective assistance when trial counsel failed to request a competency hearing for him. More specifically, Maxwell alleges that his competency should have been examined because he was severely depressed at the time of the criminal events, and because "this court must find [him] totally insane if it believes" he would provide his car keys to someone to whom he also provided alcohol and drugs.

---

<sup>2</sup> *Maxwell v. Commonwealth*, 2003-SC-0655-MR (rendered April 21, 2005).

However, Maxwell's allegations below turned on his claims that (1) by virtue of their youth the teenage witnesses were incompetent to testify against him, and (2) his own competency should have been examined in light of his ongoing use of alcohol and drugs. As the specific grounds raised on appeal were not raised in the motion for RCr 11.42 relief, they were waived and may not be addressed for the first time on appeal. *Brock v. Commonwealth*, 479 S.W.2d 644, 646 (Ky. 1972).

Next, Maxwell raises several claims in support of his contention that he was afforded ineffective assistance because counsel failed to adequately prepare for trial. However, his assertions that counsel failed to properly object to KRE<sup>3</sup> 404(b) evidence, or to contact witnesses in support of his defense, were waived by his failure to specifically raise those assertions in the RCr 11.42 motion below. *Brock*, 479 S.W.2d at 646.

Similarly, we must reject Maxwell's claim that trial counsel erred by failing to obtain a written recantation from an alleged juvenile victim, S.G., who subsequently asserted that he had falsely recanted his original accusations against Maxwell, and by failing to introduce evidence of S.G.'s prior bad behavior. Despite some similarities to the claims raised below, the claims now before us were not preserved by Maxwell's assertions below that counsel provided ineffective assistance by failing to either pursue charges against S.G., or attack S.G.'s veracity for truthfulness. In any event, even if the claims raised on appeal

---

<sup>3</sup> Kentucky Rules of Evidence.

were orally raised and preserved during the evidentiary hearing, counsel's actions were justifiable decisions relating to trial strategy.

Maxwell next claims that counsel erred by failing to review certain medical evidence prior to trial. Even if we assume without deciding that counsel's failure constituted deficient performance, Maxwell has not shown that his defense thereby was prejudiced. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. As the Supreme Court noted on direct appeal, witnesses testified below that two minors consumed controlled substances provided by Maxwell, and the medical toxicology reports confirmed their ingestion of such substances. Maxwell has not demonstrated that counsel's timely review of the medical evidence would have changed his defense in any way, and he is not entitled to relief on this ground. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Maxwell next asserts that he was afforded ineffective assistance when counsel failed to permit him to testify at trial. However, the record shows and the trial court found that Maxwell admitted during the evidentiary hearing that he knew he had a right to testify but followed counsel's advice, and that counsel did not coerce or threaten him in any way to keep him from testifying. Although counsel stated during closing argument that he had not allowed Maxwell to testify, the record supports the court's finding after the evidentiary hearing that counsel

made this statement to the jury in an effort to take pressure off of [Maxwell], in the eyes of the jury, for not testifying. This was not an admission that he prohibited [Maxwell] from exercising his constitutional right to

testify; rather, it was an exaggeration to explain to the jury why Mr. Maxwell did not testify.

Given the record, we cannot say that the court erred by finding that Maxwell waived his right to testify at trial.

Finally, Maxwell contends that he was afforded ineffective assistance when counsel failed to request a directed verdict based on allegations that the witnesses against him had committed perjury. A court should grant a directed verdict only if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). However, issues regarding the weight and credibility of evidence fall within the exclusive province of the trier of fact. *See, e.g., Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999); *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky.App. 2003). As allegations of perjury go to the weight and credibility of evidence, no basis existed for seeking a directed verdict based on such allegations.

The Logan Circuit Court's order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Timothy W. Maxwell, *Pro se*  
Franklin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Henry Flores  
Assistant Attorney General  
Frankfort, Kentucky