

RENDERED: SEPTEMBER 25, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2007-CA-001949-MR

JIMMY BROWNING

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE DOUGLAS C. COMBS, JR., JUDGE  
ACTION NO. 03-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Appellant, Jimmy Browning (Browning), appeals the ruling of the Perry Circuit Court denying Browning's motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

## I. BACKGROUND

Browning was convicted of murder and tampering with physical evidence, and was sentenced to fifty-five years imprisonment. He was indicted on May 15, 2001, and his trial ultimately began on August 5, 2003, following several procedural delays. Following Browning's conviction, he directly appealed to the Kentucky Supreme Court. The Court affirmed his conviction, and summarized the factual and procedural history of the case as follows:

The Appellant, Jimmy Browning, and Ance Neace had been friends for years. Both men dated the victim, Tamara Beverly, at different times. Neace had been living with Tamara and their child until social services removed the child from their custody, placing him with Neace's mother and father. During the custody dispute, Neace and Tamara became hostile towards each other, and in February of 2001, Tamara obtained a domestic violence order against Neace.

On April 5, 2001, Neace and Tamara argued on the phone about the custody of their son. Allegedly, Tamara told Neace that she was going to take full custody of the child and bring charges against the Appellant for molesting her youngest daughter. That night, Neace made a three-way phone call to Ms. Smith and the Appellant. During the conversation, Neace discussed the argument he and Tamara had earlier that day. The Appellant and Neace also then planned to get Tamara to go somewhere with them, do drugs, and have sex. Because Neace did not have a car, the Appellant agreed to pick him up and then they would go get Tamara.

On April 5, 2001, somewhere between the hours of 7:00 p.m., and 9:00 p.m., the Appellant and Neace picked Tamara up at her home. They went to a surface mine strip-job on top of a mountain to "snort" and "eat" some pills and drink some whiskey. Once on top of the mountain, the men took turns having sex with Tamara.

The Appellant claims he had sex with Tamara first and then got out of the truck so Neace could have his turn. Supposedly, after Neace and Tamara had sex, they got out of the car and went to the back of the truck. At that time, the Appellant claims he got back in the truck and fell asleep and remained asleep until he was awakened by Neace. The Appellant claims that Neace was then in a panic and told him that he had “done it” and wanted to “get the hell out of there.” Neace told the Appellant that he and Tamara had gotten into an argument over their son; she claimed he was not the father, and he got so angry he “put her in the pond.” Then they drove back to the Appellant's house. His mother, Joan Morton, and his wife, Christy, were there. Neace told them the story and threatened to say they were accomplices if they told anyone.

Sometime around 1:00 a.m., Neace allegedly called Ms. Smith and told her he “did it” and that the Appellant had helped. During this phone call, Neace told her about the murder and then the Appellant told her not to say anything about it or she would “be laying up there right where [Tamara] is.”

The next couple of days following Tamara's disappearance, the police visited Neace and the Appellant several times. Both denied having seen Tamara. Then, Appellant's mother finally convinced him to tell the police what he knew about the murder. He contacted Detective John Sizemore and gave a complete statement. He then led police to the site. The police recovered the body and placed the Appellant under arrest for Tamara's murder.

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Both the Appellant and Neace were indicted on May 15, 2001, in the Perry Circuit Court on one count of murder, one count of tampering with physical evidence, and one count of rape in the first degree.

Thereafter, the Appellant and the Commonwealth entered into a plea agreement for a recommendation of a twenty year sentence in exchange for a plea of guilty to murder and his truthful testimony in the case against Neace. The rape charge was thereafter dismissed on motion of the Commonwealth in June of 2002. Subsequently, on August 23, 2002, a new Commonwealth's Attorney was appointed to proceed with the case. On December 18, 2002, after several delays, Judge Combs accepted the Appellant's plea and set the matter for final sentencing on January 22, 2003.

However, at the hearing for final sentencing on January 22, 2003, Judge Combs announced his rejection of the recommended sentence and suggested a harsher punishment. The Appellant argued, without avail, that Judge Combs was bound by the plea and that the Appellant detrimentally relied upon the Court's words and actions in allowing his trial to be continued. The trial court then allowed the Appellant to withdraw his guilty plea and the matter was set for trial.

Consequently, on March 7, 2003, the new Commonwealth's Attorney sought and obtained a superseding indictment from the Perry County Grand Jury, charging the Appellant with one count of complicity to murder, and one count of complicity to tampering with physical evidence.

After several continuances, the trial started on August 5, 2003[.]

*Browning v. Com.*, 2006 WL 435423 (Ky. 2006)(No. 2003-SC-1026-MR).

Following his unsuccessful direct appeal, Browning filed a RCr 11.42 motion to vacate his sentence. Browning contended that his trial counsel was ineffective in four ways: first, by failing to ensure him a fast and speedy trial; second, by failing to object to certain pictures which Browning believes did not accurately depict the crime scene; third, by not requesting a directed verdict

dismissal of the tampering with physical evidence charge; and fourth, by failing to procure concurrent sentences on the two charges. The Perry Circuit Court denied the motion without holding an evidentiary hearing. We affirm.

## II. STANDARD OF REVIEW

Because the circuit court denied Browning's RCr 11.42 motion without an evidentiary hearing, our review is “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Com.*, 411 S.W.2d 321, 322 (Ky. 1967).

## III. ANALYSIS

In order to prevail on an ineffective assistance of counsel claim, a movant must affirmatively prove that his “counsel's performance was deficient” and that the deficiency prejudiced the case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing Court should be highly deferential in scrutinizing counsel’s performance and must evaluate the particular facts of the case and determine whether the acts or omissions were “outside the wide range of professionally competent assistance” to the extent that the errors caused the “adversarial testing process” not to work. *Id.* at 690, 104 S. Ct. at 2066. To prove prejudice, a movant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]” meaning in this case that Browning would not have been found guilty. *Id.* at 694, 104 S. Ct. at 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

There is no automatic entitlement to an evidentiary hearing with regard to an RCr 11.42 motion. Rather, a hearing is required only if there is an “issue of fact that cannot be determined on the face of the record[.]” RCr 11.42(5); *Stanford v. Com.*, 854 S.W.2d 742, 743 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Thus, if the official record conclusively contradicts the movant’s claim, no hearing must be held. *Trice v. Com.*, 632 S.W.2d 458 (Ky. App. 1982). When the movant claims ineffective assistance of counsel for failure to present a specific argument, no evidentiary hearing is required if the record totally establishes that the argument would have been meritless. *Freeman v. Com.*, 697 S.W.2d 133 (Ky. 1985). With this standard in mind, we will address the four bases for ineffective assistance of counsel in order. First, we find that the record conclusively refutes Browning’s claim that his counsel was constitutionally deficient for failing to ensure his right to a fast and speedy trial. The record reveals that Browning’s counsel did in fact file a motion for a speedy trial on December 11, 2001, and also filed two separate motions to dismiss based upon the right to a speedy trial. The first of these motions was filed on August 27, 2002. The second was filed on June 2, 2003. Thus, there is no factual basis for his claim of ineffective assistance on this issue, and the record conclusively establishes that the endeavors of the trial counsel in this regard were well within the wide range of professionally competent assistance. Browning’s counsel may not be deemed ineffective merely because the judge denied the motions to dismiss.

Second, we find no basis for Browning's claim that his counsel should have objected at trial to one of the evidence photos, which depicts a steep embankment leading up to the pond where Tamara Beverly's body was found. The record conclusively establishes that the decision not to object to the evidence was neither constitutionally deficient nor prejudicial. With regard to deficiency of counsel, there is no indication that the photo is an inaccurate depiction of the crime scene nor that it misled the jury. In fact, it is entirely consistent with all the other, seemingly non-objectionable photos. It seems incredibly unlikely that any attempt to exclude the photo would have succeeded. As is noted in *Freeman*, 697 S.W.2d 133, an attorney's decision not to present a specific argument cannot be ineffective assistance if that argument would have been meritless. With regard to prejudice, the record establishes the photo was not prejudicial because the exclusion of the photo would not have prevented Browning's conviction. Although the photo was used at trial to indicate that Browning must have helped Ance Neace (Neace) dispose of the body in the pond, there is other, independently sufficient evidence to establish the same fact, specifically the testimony of Neace. We believe there was ample evidence in this case, outside the photo, to convict Browning, and its inclusion does not undermine reasonable confidence in the outcome of the case.

Third, Browning's counsel was not ineffective in failing to request a directed verdict on the tampering with physical evidence charge. There is no factual basis for this claim, much like Browning's first claim, because Browning's counsel did in fact request a directed verdict. Browning's counsel made a motion

for a directed verdict at the close of the evidence, which was denied by the trial judge. The Supreme Court of Kentucky later determined on appeal that there had been sufficient evidence for the tampering charge. *Browning*, 2006 WL 435423. Thus, the record conclusively refutes this claim both factually and legally.

Fourth, we do not find Browning's counsel to have been ineffective for failing to procure concurrent sentences for his client. While Browning's attorney was perhaps obligated to ensure that the sentence complied with all statutory requirements, we find no deficiency in the sentence upon which he could have based an objection. The sentencing entirely complies with the requirements of Kentucky Revised Statutes (KRS) 532.110, and was fully within the wide discretion of the trial judge. *See Jones v. Com.*, 833 S.W.2d 839, 842 (Ky. 1992). Browning's counsel ultimately had little control over the sentence imposed on his client at the discretion of the court, and it's unlikely that any evidence introduced at a hearing could alter this determination.

#### IV. Conclusion

All the grounds raised by Browning to establish ineffective assistance of counsel are conclusively refuted by the record, and he was not entitled to an evidentiary hearing on his motion. For the reasons stated herein, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.



BRIEFS FOR APPELLANT:

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