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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001318-MR

PAUL BLEVINS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2006-CA-001642-MR

PAUL A. BLEVINS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

NICKELL, JUDGE: Paul Allen Blevins (Blevins), *pro se*, has appealed from an order of the Laurel Circuit Court partially denying his RCr² 11.42 motion for post-conviction relief entered prior to holding an evidentiary hearing on limited issues, and from an order from the same court fully denying his RCr 11.42 motion following the evidentiary hearing.³ Blevins has separately appealed from the Laurel Circuit Court's order in a different indictment denying his RCr 11.42 motion without first conducting a hearing. Blevins argues the circuit court erred by not holding a full and fair evidentiary hearing on all of the issues raised in his first motion and not conducting any evidentiary hearing on his other motion. Having concluded the trial court did not err in denying Blevins' claims of ineffective assistance of counsel, we affirm.

This appeal stems from two convictions following jury trials for two convenience store robberies. Following the first jury trial, Blevins was convicted under Indictment No. 01-CR-000157 of two counts of robbery in the first degree⁴

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

³ The circuit court entered an order on August 30, 2005, denying all but two of Blevins' claims for ineffective assistance of counsel without conducting an evidentiary hearing, but scheduled a hearing on May 22, 2006, to address the two remaining claims. Following the hearing, the circuit court denied the remaining claims.

⁴ KRS 510.020, a Class B felony.

and being a persistent felony offender in the first degree (PFO I).⁵ The trial court imposed the sentenced fixed by the jury. Blevins was sentenced to ten years on each robbery count, each enhanced to twenty years by virtue of the PFO I conviction, to run consecutively for a total sentence of forty years' imprisonment. The Supreme Court of Kentucky unanimously affirmed Blevins' convictions on direct appeal.⁶ The facts underlying these convictions were set forth by the Supreme Court as follows:

An employee of the Tobacco Outlet testified that on May 21, 2001, an individual with a stocking over his face entered the building armed with a knife and robbed the store. She also testified that the robber took money from a customer who was there buying lottery tickets. At trial, the employee unequivocally identified the robber as Blevins. She explained that the stocking he wore did not distort his face because it was a nude color and was not on tight.

Another witness who was working construction near the Tobacco Outlet testified that he encountered an individual at his work site on the night in question. Afterwards, police showed him six black and white photographs and he identified Blevins' picture as the one who looked closest to the individual he saw. Police then showed him a color photo of Blevins and he positively identified him. This witness was unable to identify Blevins at trial, explaining that the incident had occurred a year and a half ago.

An in-store surveillance system made an audio and video recording of the entire robbery. Two individuals that knew Blevins, one an acquaintance and the other a cousin, testified at trial that they viewed the recording

⁵ KRS 532.080.

⁶ *Blevins v. Commonwealth*, 2003-SC-0091-MR (rendered March 18, 2004, unpublished).

and positively identified Blevins. In addition to the surveillance tape, the Commonwealth also introduced an audio taped statement given by Blevins to police in which he admits that he robbed the Tobacco Outlet.

Blevins testified in his own defense and completely denied the charges. He claimed that he was unable to remember anything from the night of his arrest until the time of his preliminary hearing because of a head injury inflicted by police. Blevins denied that the voice on the audio taped confession was his own.

After his convictions were affirmed, Blevins filed a motion for post-conviction relief pursuant to RCr 11.42, alleging numerous claims of ineffective assistance of his trial counsel. Without holding an evidentiary hearing, the trial court entered an eighteen-page order on August 30, 2005, denying all but two of Blevins' claims. The court found the denied claims could be refuted on the face of the record so no hearing was necessary on those issues. However, the remaining two issues could not be so resolved, and thus the trial court appointed Blevins counsel and scheduled an evidentiary hearing. After the hearing, on May 24, 2006, the trial court entered an order denying Blevins' final two allegations of ineffective assistance. Blevins timely appealed to this Court.⁷

⁷ The notice of appeal referenced only the May 24, 2006, order. The Commonwealth has asked us to hold that the issues resolved by the order entered on August 30, 2005, are therefore not properly before us for review. Blevins contends that since he is a *pro se* litigant he should not be held to the strict standards required for licensed attorneys, and that his notice of appeal adequately placed the Commonwealth on notice of the issues to be resolved on appeal. Although Blevins is now proceeding *pro se*, we note his notice of appeal was filed by the same licensed, practicing attorney who represented him during the RCr 11.42 proceedings. Thus, we reject his leniency request. However, we do not believe the August 30, 2005, order was final and appealable, and because the May 24, 2006, order referenced previously decided issues, Blevins has substantially complied with the requirements of Kentucky Rules of Civil Procedure (CR) 73.03. The Commonwealth was placed on sufficient notice of the issues to be decided on appeal, and the argument to the contrary is rejected. Therefore, we shall review all of the issues raised in the RCr 11.42 motion.

Blevins was separately convicted following a jury trial under Indictment No. 01-CR-000159 of one count of robbery in the first degree and being a PFO I. These charges stemmed from the robbery of another Laurel County business known as the “Fillin’ Station.” The jury fixed a sentence of ten years’ imprisonment on the robbery charge, enhanced to twenty years by virtue of Blevins’ PFO I status. The trial court accepted the jury’s decision and sentenced Blevins accordingly. These convictions were unanimously affirmed on direct appeal to the Supreme Court.⁸ The salient background facts were succinctly set forth by the Supreme Court as follows:

On the evening of May 13, 2001, a man wearing a ski mask and brandishing a knife entered the “Fillin’ Station” in London, Kentucky. The store manager, Karen Bellomy, and her husband were both present at the time, as was the store cashier, Donna Eaton. The robber ordered Mr. Bellomy to the floor and held the knife to his throat while demanding Karen Bellomy and Eaton retrieve the money from the store’s safe. After Eaton handed him the cash, the robber fled the premises.

During the course of the investigation, police learned that Appellant, Eaton, Eaton’s husband, and Appellant’s half-brother, Henry Sizemore, had conspired to commit the robbery. In a statement to police, Eaton implicated Appellant and stated that she was paid \$100 for her participation in the crime. After his apprehension, Appellant gave a statement wherein he confessed to his participation in the conspiracy, but claimed that it was not a robbery, rather it was an attempt to cover up Eaton’s desire to steal from her employer.⁹

⁸ *Blevins v. Commonwealth*, 2003-SC-0131-MR (January 20, 2005, unpublished).

⁹ Donna Eaton was subsequently indicted for her criminal participation in the robbery, and was treated as Blevins’ co-defendant. (footnote added).

Following the issuance of the Supreme Court opinion affirming these convictions, Blevins filed a motion pursuant to RCr 11.42. This motion raised nearly identical issues to those raised in his earlier motion in connection with the Tobacco Outlet conviction. On July 18, 2006, the trial court denied the motion without holding an evidentiary hearing. Blevins timely appealed from this denial. The two appeals were consolidated and our opinion today reflects resolution of all of the claims presented.

On appeal, Blevins contends the trial court erred in finding his counsel was effective.¹⁰ In relation to the Tobacco Outlet conviction, he claims trial counsel was ineffective in failing to: (1) object to the introduction of evidence collected on the night of his arrest, (2) seek funding from the trial court for various expert witnesses, (3) object to an in-court identification of him by an eyewitness, (4) interview and call alibi witnesses, and (5) object to his co-defendant's invocation of her Fifth Amendment privilege against self-incrimination. Blevins further contends the cumulative effect of these errors mandates reversal of his conviction. He raises similar arguments in relation to counsel's representation of him on the Fillin' Station charge and conviction. He contends counsel failed to: (1) seek funding from the trial court for various expert witnesses, (2) interview and call alibi witnesses, (3) object to his co-defendant's invocation of her Fifth Amendment privilege against self-incrimination, and (4) object to the

¹⁰ Blevins was represented by the same counsel in both trials.

Commonwealth's improper bolstering or vouching for his co-defendant's testimony during its redirect examination of her. Because Blevins makes claims of a similar nature in the two appeals, we will address those claims concurrently and then address the remaining issues separately.

In addition to challenging the trial court's rejection of his various claims, Blevins contends the court erred in failing to conduct an evidentiary hearing on all of the claims presented in his RCr 11.42 motions. His argument ignores the fact that a movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion; there must be an issue of fact which cannot be determined from the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)). Our review indicates Blevins' allegations, which were ruled upon without the benefit of an evidentiary hearing, were clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing on those issues.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000).

The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 912 (Ky. 1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Sanborn*, 975 S.W.2d at 991 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). To establish actual prejudice, a movant must show reasonable probability the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland, supra*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). Where the movant is convicted at trial, a reasonable probability is one that undermines confidence in

the outcome of the proceeding upon consideration of the totality of the evidence before the jury. *Strickland*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884. Finally, we review a trial court's findings of fact under the clearly erroneous standard of review. CR 52.01.

First, Blevins contends his counsel was ineffective in both cases for failing to seek funding from the trial court for various expert witnesses to assist in his defense. He claims experts were needed to demonstrate that his confession was involuntary, that the voice on the recorded confession was not his, and to discredit any testimony identifying him as the perpetrator of these crimes using video surveillance tapes obtained from the businesses. He further insists trial counsel should have sought funding to employ a clinical neuropsychologist and an expert in coercive police interrogation techniques. In support of these claims, Blevins contends that during an altercation with the arresting officers he sustained a debilitating head injury after being struck by a flashlight and is unable to recall any events that occurred for several days following his arrest. Thus, he claims any confession he may have made could not have been voluntarily and intelligently given. We disagree.

Contrary to his assertion, Blevins is not automatically entitled to funding for an independent psychological expert; trial courts have discretion to deny such funding requests if it is determined such testimony is not reasonably necessary. *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008). Our review of the hospital records from the evening of his arrest indicated Blevins was alert,

oriented, had normal speech, was cooperative, and had no outward signs of decreased intellectual functioning. Blevins' subsequent evaluation at the Kentucky Correctional Psychiatric Center (KCPC) revealed no substantial mental defects or disabilities. The record also reveals Blevins voluntarily executed a written waiver of his constitutional rights after the officers read him the warnings required under *Miranda*.¹¹ The audio-taped confession is coherent, calm, detailed and extremely consistent with the events captured on the video surveillance tapes of the robberies. Apart from Blevins' self-serving and unsupported contentions, nothing in the record indicates his confession was obtained by force or the threat thereof, nor that he lacked the capacity to give a voluntary statement.

We are not persuaded by Blevins' argument that had an expert testified as to this matter, there is a reasonable probability he would have been acquitted. It is possible that expert testimony may have strengthened the case for the Commonwealth, especially in light of the internal inconsistency of his arguments.¹² Furthermore, Blevins had to overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland, supra* 466 U.S. at 689. Blevins has failed to overcome this presumption. Based on the surrounding circumstances, we believe that trial

¹¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¹² On the one hand, Blevins contends his confession could not have been voluntarily given because of his head injury. Inexplicably however, he further contends he did not give a confession and the voice on the audio tape was not his. Blevins does not explain how counsel could, in good faith, request funding for experts to discredit the voluntariness of his confession when he insists he made no statement at all.

counsel's strategy in this matter was not deficient. We also do not believe there was a sufficient probability that such expert assistance would have undermined confidence in the outcome. Hence, we do not believe trial counsel's acts in relation to this matter prejudiced Blevins. Therefore, Blevins has failed to satisfy the elements of *Strickland* in relation to this argument.

Moreover, Blevins offers no argument as to consulting an independent expert to analyze the contents of the audio-taped confession for authenticity nor to review the procedures implemented in obtaining identifications of him as the perpetrator from the surveillance video-tapes. These arguments are made in passing only without reference to specific experts nor to what anticipated testimony they would have given. Thus, we shall not address these issues as they are not properly presented to this Court.

Second, Blevins contends his trial counsel was ineffective in failing to investigate and call alibi witnesses to testify on his behalf. He contends these witnesses would have vouched for his whereabouts at the time of each of the robberies.¹³ Following an evidentiary hearing, the trial court found trial counsel had offered a credible explanation for not calling the witnesses. We agree with the trial court.

During the evidentiary hearing, trial counsel indicated he had, in fact, investigated Ms. Jones, as Blevins had suggested, and after interviewing her

¹³ Blevins indicates only one of the two proposed witnesses, Jennifer Jones, could testify regarding his whereabouts at the time of the robberies. He contends the other proposed witness, Lee Jones, would bolster Jennifer's credibility.

determined the proposed testimony would not assist in Blevins' defense.

Additionally, Ms. Jones would be impeached by her her own legal troubles as she was incarcerated at the Kentucky Correctional Institute for Women when counsel interviewed her. Blevins offered no contradictory testimony to rebut trial counsel's explanation. Although counsel is required to make a reasonable investigation, "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight."

Foley v. Commonwealth, 17 S.W.3d 878, 885 (Ky. 2000) (quoting *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998)).¹⁴ Ms. Jones' testimony was also subject to impeachment because of the surveillance video-tapes of the robberies and the eyewitness identifications of Blevins as the perpetrator. We believe the trial court correctly held counsel's discretionary decision not to call Ms. Jones was the result of sound trial strategy and did not rise to ineffective assistance of counsel.

Third, Blevins contends trial counsel was ineffective in failing to object to co-defendant Donna Eaton's invocation of her Fifth Amendment privilege against self-incrimination at the suppression hearing. He argues Eaton's testimony would have bolstered his statements that police assaulted him on the night of his arrest, which would in turn bolster his that he could not have given a voluntary confession. Thus, he alleges trial counsel's failure to contemporaneously object to Eaton's invocation of her privilege fell below the

¹⁴ *Foley v. Commonwealth* was overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

standard of reasonable representation.¹⁵ Again, we disagree. Initially, we note that although Blevins includes numerous citations to legal precedents in his brief to this Court, they are inapposite to the matter at bar and he cites us to no pertinent legal authority supporting his position. We are convinced none exists. Eaton was an indicted co-conspirator in one of the two robberies for which Blevins stood charged. Blevins gave a taped confession regarding both robberies, and it was this confession which was at the heart of the suppression hearing. At the time of the hearing, Eaton's criminal charges were still pending. Based on the record before us, her assertion of the privilege was reasonable. The record contains no indication that counsel would have had a legal or factual basis upon which to object to Eaton's assertion of her privilege against self-incrimination. Thus, following the evidentiary hearing on this matter, the trial court correctly found counsel had not performed deficiently.

We now turn to Blevins' remaining allegations of ineffectiveness which are specifically applicable to only one of the convictions below. Blevins contends trial counsel was ineffective in failing to object to the Commonwealth's redirect examination of Eaton during her testimony in the "Fillin' Station" trial. He alleges the Commonwealth's comments during this examination improperly bolstered or vouched for Eaton's identification of him as the perpetrator and her co-conspirator. On direct appeal, the Supreme Court specifically addressed the

¹⁵ Although the majority of Blevins' argument on this issue is rambling and largely incoherent, we believe we have accurately framed the claim.

Commonwealth's examination of Eaton, finding the comments did not rise to the level of improper vouching, did not amount to the prosecutor improperly testifying, and were merely an aggressive attempt to impeach her with her prior inconsistent statements. In light of this finding, trial counsel's decision not to object to the line of questioning was proper. Blevins' argument to the contrary is without merit.

Blevins' remaining contentions pertain to trial counsel's alleged ineffectiveness in representing him in regard to the "Tobacco Outlet" charge and resulting conviction. He initially contends counsel was ineffective in failing to object to the admission of evidence seized from his campsite on the night of his arrest. The evidence consisted of a gym bag with the Adidas logo imprinted on it containing dark clothes, a ski mask, a pair of black sweat pants, a knife, and a police radio scanner. Blevins alleges this evidence was "irrelevant and highly inflammatory." However, Blevins has failed to demonstrate how any alleged prejudice caused by the admission of these pieces of evidence outweighed their probative value. He has also failed to articulate any legal basis which would support a motion to suppress these items, or an objection to their entry into evidence, as they were lawfully found and seized following Blevins' arrest. Further, Blevins does not demonstrate how the outcome of his trial would have been different had these items been excluded. Based on the otherwise overwhelming evidence of his guilt—including the surveillance tapes, the taped confession, and three different positive identifications of him as the robber—Blevins has failed to satisfy the prejudice prong under *Strickland*. Thus, the trial

court correctly found trial counsel was not ineffective in failing to object to the introduction of these pieces of evidence.

Next, Blevins argues his trial counsel was ineffective in failing to object to a victim's¹⁶ in-court identification of him as the person who robbed her. He contends the Commonwealth wrongly withheld information that Ms. Mills had been shown photographs of several men on the day of the robbery and four days later was shown photographs of only Blevins but was unable to conclusively identify him as the perpetrator. However, a careful review of the record reveals that counsel did, in fact, object to the testimony and move for a mistrial immediately upon learning of Ms. Mills' previously undisclosed attempts to make an out-of-court identification on the grounds that her in-court identification was tainted. The objection and the motion for a mistrial were both overruled. We agree with the trial court that counsel's actions were reasonable and prudent under the circumstances and clearly evidenced an intent to protect Blevins' best interests. We cannot say counsel's actions fell below the standard of reasonably competent representation.

Finally, Blevins contends the cumulative effect of the foregoing errors requires reversal of his convictions. However, having found all of Blevins' arguments to be without merit, there could be no cumulative error because "[a] combination of non-errors does not suddenly require reversal." *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1988).

¹⁶ This eyewitness was Sherry Mills, the cashier at the Tobacco Outlet at the time of the robbery.

Therefore, for the foregoing reasons, the orders of the Laurel Circuit Court denying Blevins' motions for post-conviction relief are affirmed.

ALL CONCUR.

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