

RENDERED: DECEMBER 3, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2009-CA-001715-MR

MICHAEL LYNN WIMBERLY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 05-CR-00196

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS AND DIXON, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant, Michael Lynn Wimberly, appeals *pro se* from an order of the Daviess Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

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<sup>1</sup> Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS 21.580.

On April 4, 2005, a Daviess County Grand Jury indicted Appellant on two charges of first-degree trafficking in a controlled substance (cocaine), subsequent offense, possession of marijuana, possession of drug paraphernalia, and operating a vehicle on a suspended driver's license. The trafficking charges stemmed from two controlled undercover drug buys conducted on December 4, 2004, and February 14, 2005. Appellant was subsequently indicted in January 2006 for being a first-degree persistent felony offender. Following a trial, Appellant was convicted of all charges and was sentenced to twenty years' imprisonment. The convictions and sentence were affirmed by the Kentucky Supreme Court on direct appeal. *Wimberly v. Commonwealth*, 2006-SC-000406 (September 20, 2007).

On April 28, 2009, Appellant filed a *pro se* RCr 11.42 motion raising several claims of ineffective assistance of counsel. Appellant also moved for the appointment of counsel and an evidentiary hearing. By order entered August 10, 2009, the trial court denied all motions. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981

S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*; see also *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Appellant first argues that the trial court erred in not finding that his counsel was *per se* ineffective because he was suspended from the practice of law during the pendency of the case. Essentially, Appellant believes that he was prejudiced by counsel's failure to disclose his criminal activities, his lack of moral character, and the conflict between his interests and those of Appellant. We find these claims to be without merit.

Attorney Stephen Robey was retained in February 2005 to represent Appellant on the instant charges. Robey actively litigated the case including filing a motion to dismiss, a motion to suppress and several discovery motions. In fact, on July 25, 2005, the trial court conducted a lengthy evidentiary hearing during

which Robey appeared and participated. However, at a September 30, 2005, status conference, the trial court was informed that Robey had been temporarily suspended from the practice of law. *Inquiry Com'n v. Robey*, 172 S.W.3d 404 (Ky. 2005).<sup>2</sup> Although the trial court initially appointed a public defender, Appellant retained private counsel who entered an appearance on December 19, 2005, and represented Appellant throughout the remainder of the proceedings.

In rejecting Appellant's claim of *per se* ineffective assistance of counsel, the trial court noted,

In this case, it cannot be said that Mr. Robey's performance fell below the standard articulated in *Strickland* and *Foley*. The Court is mindful that Mr. Robey was suspended from the practice of law in Kentucky on September 22, 2005, but there is no indication that his addiction to intoxicants, at that time, had any adverse effect on his representation of Mr. Wimberly between the time of Wimberly's arrest in February of 2005 and the appointment of Wimberly's new attorney, Hon. Joseph Bennett, in November 2005. Indeed, Mr. Robey filed several motions with the Court on behalf of his client, Mr. Wimberly, before his suspension. It was not until late September 2005, four months before trial, did the Court become aware of Robey's suspension and order that the Department of Public Advocacy represent Mr. Wimberly.

We are also of the opinion that counsel is not *per se* ineffective simply because he was disbarred on unrelated matters. *See Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Nor do we find any merit in Appellant's claim that counsel was ineffective for failing to have the evidence against him suppressed. As previously noted,

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<sup>2</sup> Robey later resigned from the practice of law under terms of permanent disbarment. *Robey v. Kentucky Bar Association*, 266 S.W.3d 234 (Ky. 2008).

Robey appeared and litigated the suppression motion during the evidentiary hearing. At the conclusion, the trial court ruled that the search of the automobile was proper. However, the trial court noted that the search of the house was more problematic because of the conflict in testimony regarding the home owner's consent to the search. As such, the trial court granted both sides additional time to brief the issue. Neither the Commonwealth nor Robey filed any additional information. The trial court subsequently denied the motion to suppress.

We find no support for Appellant's contention that the suppression motion was denied simply because Robey failed to further brief the issue. Rather, it is clear from the trial court's order that its decision regarding the search of the house hinged on the credibility of the witnesses:

Ms. Kelly Board testified that Officer Powell began searching the apartment before anyone ever asked her for consent. She denied ever giving consent to search. However, the weight of the evidence is that Ms. Board did, in fact, consent to the search of her apartment and the Court so finds.

Appellant has failed to demonstrate that counsel's performance was deficient in this respect or that he was prejudiced by such. *Strickland*.

For the reasons set forth herein, the order of the Daviess Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael Lynn Wimberly, *pro se*  
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BRIEF FOR APPELLEE:

Jack Conway  
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