

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001254-MR

WILLIAM JAMES SMITH, II

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 06-CR-00381

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: William James Smith, II appeals the Hardin Circuit Court's order denying his RCr¹ 11.42 motion to vacate, alter, or amend the judgment convicting him of first-degree possession of a controlled substance (cocaine – subsequent offense); possession of drug paraphernalia (subsequent offense); third-degree possession of a controlled substance (hydrocodone); and being a first-

¹ Kentucky Rule of Criminal Procedure.

degree persistent felony offender (PFO-1st). After a careful review of the record² before us, we affirm because Smith has failed to show that he received the ineffective assistance of counsel.

I. FACTUAL AND PROCEDURAL BACKGROUND

Smith states in his appellate brief that he was indicted on the following charges: (1) first-degree trafficking in a controlled substance; (2) complicity to commit first-degree possession of a controlled substance, second offense; (3) complicity to commit possession of drug paraphernalia, second offense; (4) complicity to commit third-degree possession of a controlled substance; (5) third-degree possession of a controlled substance; (6) carrying a concealed deadly weapon; and (7) PFO-1st.

Following a jury trial, Smith was convicted of: first-degree possession of cocaine (subsequent offense); possession of drug paraphernalia (subsequent offense); third-degree possession of hydrocodone; and PFO-1st. He was sentenced to serve twelve years of imprisonment.

Smith appealed his conviction, and this Court affirmed. *See Smith v. Commonwealth*, No. 2007-CA-001005-MR, 2008 WL 4683025, *1, 8 (Ky. App. Oct. 24, 2008) (unpublished), *disc. rev. denied* (Ky. Apr. 15, 2009).

² We note that only Volume III of the circuit court record was certified by the circuit court for purposes of the appeal. Volume III contains the record from the RCr 11.42 proceedings. Therefore, our references to the charges in the indictment and the original judgment are based on what was stated in the parties' briefs before us, as well as the circuit court's order denying Smith's RCr 11.42 motion.

Smith also appealed the circuit court's order that \$932.00 in cash seized from him at the time of his arrest be forfeited. This Court affirmed the circuit court's order of forfeiture, and the Kentucky Supreme Court denied discretionary review. *See Smith v. Commonwealth*, 339 S.W.3d 485, 488 (Ky. App. 2010), *disc. rev. denied* (Ky. 2011).

Smith then filed his RCr 11.42 motion in the circuit court, asserting various claims involving the ineffective assistance of trial counsel. Smith also requested an evidentiary hearing in the circuit court.

The circuit court denied Smith's RCr 11.42 motion without holding an evidentiary hearing. Smith now appeals, contending that: (a) he received the ineffective assistance of trial counsel when counsel failed to establish a meaningful strategy prior to trial; and (b) he received the ineffective assistance of trial counsel when counsel failed to challenge the prosecutorial misconduct that occurred during the grand jury proceeding.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v.*

Commonwealth, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

Furthermore, pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .” In the present case, because the circuit court determined that Smith’s claims could be resolved by examining the record, the court denied his request for an evidentiary hearing.

On appeal, after “the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks omitted). Upon review, we conclude that Smith’ claims lack merit; thus, his arguments cannot be bases for invalidating his conviction.

III. ANALYSIS

A. COUNSEL’S FAILURE TO ESTABLISH A MEANINGFUL TRIAL STRATEGY

Smith first alleges that he received the ineffective assistance of trial counsel when counsel failed to establish a meaningful strategy prior to trial. Specifically, he contends that his attorney visited him once at the Hardin County Detention Center for about an hour while reviewing taped interviews of two witnesses. Smith asserts, however, that his attorney never visited him when he was held at the

Eastern Kentucky Correctional Complex. Counsel sent Smith a letter there, explaining that it was too far for him to visit Smith, but that they could communicate by telephone and letters. Smith states that letters were exchanged between them, but Smith's telephone calls to counsel were unsuccessful. He alleges that counsel wrote to him and advised Smith to write a letter to counsel with a defense to the charges.

Then, about two weeks before trial began, Smith states that he was moved back to the Hardin County Detention Center, and counsel visited him only twice during that two-week period. Each visit lasted approximately five minutes. Smith asserts that counsel's purpose for visiting him those two times was to convince Smith to accept the Commonwealth's plea offer and that they did not discuss trial strategy or possible defenses during those visits.

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Smith must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Further,

a court's review of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Hence, the defendant must overcome the

presumption that counsel provided a reasonable trial strategy.

Brown v. Commonwealth, 253 S.W.3d 490, 498-99 (Ky. 2008) (internal quotation marks and citations omitted).

In his appellate brief, Smith quotes the following from a November 7, 2006 letter his defense counsel sent him:

Lastly, as I indicated on November 6th, 2006, my ability to visit you at Eastern Correctional Complex is greatly hindered by the distance between this office and the facility. As such, it will be the mutual benefit of us to communicate via letter (giv[en] your desire to proceed to trial on March 12, 2007). Toward that end, please write me a letter detailing as much about these allegations and about the discovery which have been provided as soon as possible.

(Internal quotation marks omitted).

Thus, according to Smith, counsel reviewed two taped interviews of witnesses³ with Smith for about an hour. After Smith was moved to the Eastern Kentucky Correctional Complex, counsel continued to consult with Smith and advise him by letter. Counsel even asked Smith to write him concerning the allegations, any possible defenses, and details regarding the discovery that was provided, so that counsel could prepare for trial. We fail to see how this amounts to deficient performance.

Additionally, although Smith argues that counsel failed to establish a meaningful trial strategy, Smith does not explain what that trial strategy should

³ Smith states in his appellate brief that one of these “witnesses” was his girlfriend, who was later indicted on charges related to this case. The other witness was Smith’s friend, who was not charged, but was present in the apartment when the police arrived and arrested Smith.

have been, and he does not assert any possible defenses to the charges that his attorney could have argued at trial, aside from the defense that counsel did assert.

Regarding this claim, the circuit court reasoned as follows:

Smith was found in the apartment with [Linsey] Brown and another person along with the drug materials. Smith had the \$932 cash on him. The whole point of the defense was to argue that the drugs were not connected with Smith. His counsel tried unsuccessfully to get the Court to give instructions on “mere presence or association.” The definition of possession, which includes the language often summarized as “constructive” possession, was given by the court and argued by counsel. Of course, the constructive possession argument cuts both ways. Just as Smith’s counsel could have focused on Brown having been in constructive possession, the same could be said of Smith by the Commonwealth. While ownership may be exclusive, the same is not necessarily true for possession.

In the circumstances, it is clear that Smith’s counsel argued well the only defense available, *i.e.*[,] the drugs were not Smith’s. . . . The idea that the drugs were possessed by someone else at the scene is included in the argument that they were not owned by Smith or possessed by him. With the evidence presented, Smith has failed to show any prejudice caused by his counsel’s theory of defense and how this was argued at trial.

Therefore, the trial strategy of Smith’s counsel was to argue the defense that the drugs did not belong to Smith. This is a reasonable trial strategy, and Smith’s ineffective assistance of counsel claim challenging defense counsel’s trial strategy lacks merit. *See Brown*, 253 S.W.3d at 498-99.

B. COUNSEL’S FAILURE TO CHALLENGE PROSECUTORIAL MISCONDUCT IN GRAND JURY PROCEEDING

Smith also alleges that he received the ineffective assistance of trial counsel when counsel failed to challenge the prosecutorial misconduct that occurred during the grand jury proceeding. Specifically, Smith contends that the prosecutor permitted “unfound evidence and claims of unfound bad acts of conduct; *i.e.*[,] hearsay, to inflame the Grand Jury to secure an Indictment.” He asserts that his trial counsel was aware, or should have known, that the prosecutor permitted Officer Matt Hodge to testify falsely before the Grand Jury. Smith alleges that Officer Hodge falsely testified that Smith had a prior conviction for trafficking in cocaine, when he never had such a conviction.

This Court has previously noted as follows:

Courts are extremely reluctant to scrutinize grand jury proceedings as there is a strong presumption of regularity that attaches to such proceedings. Ordinarily, courts should not attempt to scrutinize the quality or sufficiency of the evidence presented to the grand jury. An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits.

Commonwealth v. Baker, 11 S.W.3d 585, 588 (Ky. App. 2000) (internal quotation marks and footnotes omitted).

Courts have the authority “to dismiss an indictment based on nonconstitutional irregularities, including prosecutorial misconduct occurring before a grand jury.” *Id.*

Generally, a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment. A court may utilize its supervisory

power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant.

Id. (footnotes omitted).

In the present case, even if we were to assume, for the sake of argument, that the prosecutor's act of permitting the officer to falsely testify was a flagrant abuse of the grand jury process, Smith has failed to show that it resulted in actual prejudice. Smith's only allegation on appeal concerning prejudice is that but for the testimony claiming that he had a prior arrest for trafficking, it would have been impossible for the grand jury to charge him with trafficking. He asserts that but for defense counsel's error in failing to challenge the indictment, he would not have been convicted following the jury trial, as his indictment would have had to have been dismissed on the trafficking charge.

However, although Smith was charged with trafficking, he was not convicted of trafficking. Additionally, Smith has failed to explain or show why the remainder of the charges against him would have had to have been dismissed based upon the alleged lie concerning the prior trafficking charge. Therefore, he has failed to show actual prejudice that resulted from the alleged "flagrant abuse of the jury process," and his claim lacks merit.

Accordingly, the Hardin Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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