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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001808-MR

MICKEY TOOLEY — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 08-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Mickey Tooley, *pro se*, has appealed from the Monroe Circuit Court's denial of his motion for post-conviction relief pursuant to RCr[1] 11.42 without first convening an evidentiary hearing. We affirm.

[1] Kentucky Rules of Criminal Procedure.

Following a jury trial, Tooley was convicted of trafficking in a controlled substance in the first degree, second offense;[2] trafficking in a controlled substance in the second degree, second offense;[3] possession of drug paraphernalia, second offense;[4] possession of a controlled substance not in its original container;[5] operating a motor vehicle while license is suspended or revoked for driving under the influence, second offense;[6] and fleeing or evading police in the second degree.[7] The trial court granted a directed verdict on another drug-related charge and later dismissed a persistent felony offender charge. The facts of Tooley's underlying convictions were set forth by the Supreme Court of Kentucky on direct appeal as follows:

> On April 11, 2008, Tompkinsville Probation and Parole Officer Jeff Taylor and Detective Eddie Paul Murphy of the Pennyrile Drug Task Force were driving in the Harlan Heights section of Tompkinsville, Kentucky. While on Short Street, Officer Taylor observed Appellant, Mickey Tooley, driving a blue Chevy Lumina. Officer Taylor knew that Appellant did not have a valid driver's license, and Detective Murphy subsequently pulled the vehicle over. Appellant admitted that he did not have a valid driver's license, and when Detective Murphy told him that he was under arrest for driving with a DUI-suspended license, Appellant ran away through a nearby

[2] Kentucky Revised Statutes (KRS) 218A.1412, a Class B felony.

[3] KRS 218A.1413, a Class C felony.

[4] KRS 218A.500(2), a Class D felony.

[5] KRS 218A.210, a Class B misdemeanor.

[6] KRS 189A.090(2)(b), a Class A misdemeanor.

[7] KRS 520.100, a Class A misdemeanor.

> yard. He was quickly apprehended and placed under arrest.
>
> A search incident to arrest conducted by Detective Murphy revealed a crack pipe, a piece of plastic containing crack cocaine, and two pill bottles. The label on one pill bottle was made out to "Jennifer Lundsford" and contained liquid hydrocodone. The label on the other pill bottle was in Appellant's name and contained hydrocodone pills of varying strengths, Xanax, buspirone pills, and another rock of crack cocaine. Detective Murphy also discovered cash in the sum of $1,032 in various denominations in Appellant's pockets. Appellant informed Officer Taylor that his mother had given him the money to buy forks and spoons.
>
> A trial by jury was held on November 18, 2008. Appellant was convicted of first-degree trafficking in a controlled substance, second offense; second-degree trafficking in a controlled substance, second offense; and possession of drug paraphernalia, second offense. For these felony convictions, Appellant received a combined sentence of 35 years. Appellant was also convicted of possession of a controlled substance not in its original container; driving on a DUI-suspended license, second offense; and fleeing and evading police in the second degree. For these misdemeanor convictions, the jury assessed fines in the total amount of $1,250.

Tooley v. Commonwealth, 2009-SC-000044-MR, 2009 WL 4251969 (rendered November 25, 2009, unpublished). Tooley raised two allegations of error in the direct appeal, one concerning what he considered an infirm jury instruction, and the other challenging the imposition of fines on him as he was indigent. The Supreme Court affirmed Tooley's convictions but vacated the portion of the judgment requiring him to pay $1,250.00 in fines.

Tooley subsequently filed his *pro se* motion seeking post-conviction relief pursuant to RCr 11.42 and requesting appointment of counsel and an evidentiary hearing. He alleged six errors of his trial counsel in arguing counsel had been ineffective in representing him. The Commonwealth filed its response to the motion. The trial court entered an order denying the motion on August 23, 2010, finding Tooley had failed to show his counsel's performance had been deficient nor that he was prejudiced as a result of any alleged deficiencies. The trial court concluded all of Tooley's allegations of error could be resolved by examination of the record and thus, no evidentiary hearing was required. This appeal followed.

Tooley now contends the trial court erred in denying his RCr 11.42 motion without first convening an evidentiary hearing. He further contends his trial counsel was ineffective in failing to: 1) subpoena two witnesses; 2) make a pre-trial motion to suppress the drug evidence seized from his person; and 3) object to the proposed jury instructions. Tooley alleges the trial court erred in not granting him the requested relief based on these allegations of deficiencies by his counsel. We have reviewed the record and disagree with Tooley's assertions.

First, 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 on 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 all of Tooley's allegations are clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

Second, Tooley alleges his trial counsel was ineffective for several reasons and that the trial court erred in not so finding. We shall address each of his allegations separately.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must generally prove two prongs: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland,* the standard of attorney performance is reasonable, effective assistance. The defendant bears the burden of proof in showing his counsel's representation fell below an objective standard of reasonableness and must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth,* 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth,* 445 S.W.2d 874 (Ky. 1969).

Tooley alleges his counsel was ineffective in failing to subpoena two witnesses to testify on his behalf. These two witnesses were a pharmacist and a female friend. Tooley contends the pharmacist would have testified that he "had

been prescribed the medication which formed the basis of one of the criminal charges." The female friend, identified as Pat or Patty Hamilton, allegedly would have testified she had left her prescription medications at Tooley's residence and he was in the process of returning them to her when he was stopped and arrested. Tooley states that had the jury been allowed to hear the proposed testimony the result in his case would have been different. Tooley submitted no affidavits or supporting evidence to substantiate the purported testimony of either of these witnesses.

It is well-established that decisions of trial counsel "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) (*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). The testimony elicited at trial undermines Tooley's contention that the outcome would have been different had the jury been presented with testimony from these two individuals. Tooley was found to be in possession of a substantial amount of narcotics and cash and drug paraphernalia. The arresting officer testified Tooley had a crack pipe, crack cocaine and two pill bottles on his person. One of the medicine bottles bore the name of "Jennifer Lundsford" and contained liquid hydrocodone. The other bottle had Tooley's name as the recipient of the prescribed medications. It contained three different types of hydrocodone pills of varying dosages, Xanax, buspirone, and a rock of crack cocaine. Neither bottle

named Pat or Patty Hamilton as the person to whom the medications were prescribed. Tooley presents no explanation for this discrepancy.

Tooley baldly asserts that had the two proffered witnesses been allowed to testify, the jury would have determined the drugs he possessed—except the crack cocaine—were validly prescribed and thus the jury would not have convicted him of trafficking in a controlled substance or possession of a controlled substance in an improper container. Contrary to Tooley's allegation, we cannot find that the outcome of his trial would have been different had the two witnesses testified. The jury was presented with evidence that he possessed multiple prescription drugs—most of which were contained in the same bottle alongside a piece of crack cocaine—and that the drugs he possessed are commonly sold or traded in the illicit drug market. The suggested testimony from the pharmacist and Pat or Patty Hamilton, even if assumed to be true, would be insufficient to undermine confidence in the jury's verdict based on the totality of the evidence. We discern no prejudice from trial counsel's decision not to call the two witnesses as the jury heard sufficient testimony to believe Tooley intended to traffic in the narcotics found on his person.

In his next allegation that his trial counsel was ineffective, Tooley argues he was prejudiced by counsel's failure to file a pre-trial motion to suppress the evidence seized following his arrest. This allegation of ineffectiveness is without merit. Without citation to authority or facts, and without argument or analysis, Tooley asserts such a motion would likely have been successful because

"the proof of a (sic) illegal search & seizure is more than evident when taken as a whole." This argument is likewise without merit.

Testimony was elicited that the officers observed Tooley driving and were aware that his operator's license was suspended. This personal knowledge formed a sufficient basis to perform an investigatory traffic stop. *Boyle v. Commonwealth*, 245 S.W.3d 219, 220 (Ky. App. 2007). Upon being stopped, Tooley confirmed that he did not have a valid driver's license. This, and his subsequent attempt to flee, provided sufficient justification for his arrest. The ensuing search incident to his arrest was clearly permissible. *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009). Therefore, the filing of a motion to suppress the evidence seized would clearly have been futile and counsel cannot be ineffective for failing to perform a futile act. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002).

Finally, Tooley alleges his counsel was ineffective in failing to object to the jury instructions. He posits three objections to the instructions which he believes should have been made. He claims that counsel's failure to raise these three objections resulted in: 1) a wrongful conviction for trafficking despite there being insufficient evidence to support those charges; 2) a double jeopardy violation; and 3) a statutorily unauthorized sentence. These claims are again wholly without merit.

The failure to object to an instruction as an underlying premise to an ineffective assistance claim requires the movant to show the instruction was given

in error. *Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). Tooley contends the trafficking instruction given to the jury was infirm and unsupported by the evidence. However, on direct appeal, the Supreme Court recognized that "ample evidence" was presented to support a trafficking instruction based on the Commonwealth's theory that Tooley possessed the narcotics with the intent to sell them. Thus, Tooley's allegation that his counsel should have objected to the trafficking instruction as unsupported by the evidence must fail.

Tooley further alleges he received ineffective assistance because counsel "failed to object to erroneous jury instructions regarding the double jeopardy clause of trafficking and possessing the same controlled substance (not in the original constainer (sic))." Without citation to authority or the record, he claims the "ineffective assistance in this instance is readily apparent" and counsel's performance fell below the standard of reasonable assistance. We disagree.

In the landmark decision of *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), the Supreme Court held that no double jeopardy violation occurs so long as each offense "requires proof of an additional fact which the other does not." The instructions given in this case clearly indicate that the two offenses Tooley believes are mutually exclusive require proof of different facts. The trafficking instruction required the jury to believe Tooley possessed hydrocodone with an intent to sell, distribute or dispense it to another person. The instruction for possession of a controlled substance not in its original container required proof that Tooley possessed hydrocodone "in a

container other than that in which it had been delivered to him" by the pharmacy. Thus, there was clearly no double jeopardy violation and any objection to the instructions would have failed. As previously stated, counsel cannot be deemed ineffective for failing to perform a futile act. *Bowling*.

In his final challenge, Tooley contends trial counsel was ineffective in failing to object to the sentencing instructions which resulted in an unauthorized sentence of thirty-five years. Tooley claims that under the provisions of KRS 532.110(1)(c),[8] the maximum aggregate sentence which could have been imposed on him is twenty years' imprisonment because he stands convicted of only Class C felonies. However, Tooley fails to note that in addition to his convictions on a Class C and a Class D felony, he actually stands convicted of trafficking in a controlled substance in the first degree, *second offense*, which is a Class B felony. Thus, the statutory cap of twenty years' imprisonment is inapplicable. As there was no unauthorized sentence, counsel's failure to object to a proper sentencing instruction cannot be deemed ineffective.

Therefore, for the foregoing reasons, the judgment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

[8] KRS 532.110(1)(c) states in pertinent part that the "aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences are imposed."

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