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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000067-MR
AND
NO. 2011-CA-001344-MR

THOMAS O. GOINS — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE[1]
ACTION NO. 08-CR-00146

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Thomas O. Goins appeals from two Muhlenburg Circuit Court orders denying him relief from his conviction on multiple drug offenses by a

[1] Hon. David Jernigan presided over the trial that spawned the post-conviction motions at the heart of these appeals. Hon. Brian Wiggins denied the motions to modify and vacate the sentence.

jury.[2] One order denied him RCr[3] 11.42 relief; the other denied him CR[4] 60.02 relief. We ordered these appeals to be heard together. Having reviewed the record, the briefs and the law, we affirm both appeals.

FACTS

At about 11:00 p.m. on April 18, 2008, Officers Tommy Fauntleroy and Mike Robinson of the Greenville (Kentucky) Police Department were patrolling Russell Street in a cruiser when they saw a man staggering in the street. As the officers drew closer to the man they recognized him as Goins and were concerned that something might be wrong because of his unusual gait, described by Officer Robinson as a "bow-legged stagger." When Officer Fauntleroy asked Goins to stop and speak with him, Goins gave an unintelligible reply as he continued walking and as he passed the back of the cruiser, tossed something white to the side of the street. At that point, Officer Fauntleroy told Officer Robinson that Goins had thrown something and directed Officer Robinson to stop Goins. As Officer Robinson stopped Goins, Officer Fauntleroy looked for the item Goins had discarded and returned with a metal crack pipe he had found atop a white tissue.

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[2] Goins was convicted of possession of a controlled substance (cocaine) in the first degree, second or subsequent offense, Kentucky Revised Statutes (KRS) 218A.1415, a Class C felony; tampering with physical evidence, KRS 524.100, a Class B felony; and possession of drug paraphernalia, KRS 218A.500, a misdemeanor. Having qualified as a persistent felony offender in the first degree, his sentence was enhanced to twenty years.

[3] Kentucky Rules of Criminal Procedure.

[4] Kentucky Rules of Civil Procedure.

Upon making the stop, Officer Robinson noticed Goins smelled of alcohol and appeared to be under its influence. Having decided to charge Goins with alcohol intoxication, and then with possession of drug paraphernalia and tampering with evidence based upon the metal crack pipe that had been discarded, Officer Robinson placed him in handcuffs and patted him down for weapons. During the pat down, Goins was very protective of his right side and pushed against the cruiser when Officer Robinson tried to search that side of his body. Having found no weapons, but still believing Goins was concealing something, Officer Robinson searched the rear seat of the cruiser and then placed Goins in the car. With Officer Fauntleroy at the wheel, Officer Robinson sat in the front passenger seat and shined his flashlight on Goins during the short drive to the Muhlenberg County Detention Center to observe whether Goins tried to hide something inside the cruiser.

At the detention center, while Officers Fauntleroy and Robinson completed paperwork, they transferred responsibility for Goins to Deputy Jailers Brian Jones and Johnny Owens. Officer Robinson advised the deputy jailers that Goins had been unsteady on his feet and had favored his right front pocket causing them to suspect he was hiding something. Goins was taken to a dressing room where he changed out of the shirt, denim shorts, socks and shoes he was wearing into an orange jail jumpsuit. He then carefully and neatly placed his clothing in a green bag provided by the detention center. Goins was known to detention center personnel as a frequent prisoner. Normally, he was not particular about his

clothing, but on this night, he folded the denim shorts inward and gently placed them in the bag.

Goins' clothing was then taken to the break room where Officers Fauntleroy and Robinson, as well as Deputy Jailer Owens, searched them more thoroughly. Inside the right front watch pocket, Officer Fauntleroy found two rocks of crack cocaine, a partial pill and residue.[5] The items were embedded in the pocket seam and were not discovered during the prior pat down for weapons at the scene, nor in a search at the detention center.

Hon. Charles Ehlschide agreed to represent Goins *pro bono.* A one-day

jury trial was held on August 19, 2008. Trial counsel timely objected to the jury pool as not being representative of the community because it contained only one African-American and he/she was not ultimately selected as a member of the panel. Ehlschide's objection to the jury panel was overruled and eventually became the only issue argued on direct appeal wherein the Supreme Court of Kentucky affirmed the conviction on the merits holding there had been no *prima facie* showing of a violation of Goins' Sixth Amendment rights. *Goins v. Commonwealth,* No. 2008-SC-000718-MR, 2009 WL 3165539 (unpublished).

[5] According to the forensic lab report, the yellowish "rocks" tested positive for cocaine and the partial white round tablet contained carisoprodol, a Schedule IV controlled substance. No criminal charge resulted from the pill. The report was introduced during Officer Fauntleroy's testimony without objection. Before trial, defense counsel had stipulated to the report's accuracy eliminating the need for live testimony.

Goins' took the witness stand in his own defense to deny the crack cocaine and the metal pipe were his and to explain that his girlfriend had acquired the shorts he was wearing at the time of his arrest from a Bowling Green friend whose son had outgrown the clothes. Goins testified the night of his arrest was the first time he had worn the shorts and he had not checked the pockets before dressing. He stated that he had been visiting a friend in the projects and had one drink before walking to Russell Street to wait for a woman to pick him up; she was late, so he started walking. As he walked, he saw a car approaching in the darkness and eventually recognized it as a police cruiser driven by Officer Fauntleroy. When Officer Fauntleroy yelled at Goins to stop, he responded that he didn't have time to talk and continued walking. He admitted hearing Officer Fauntleroy say he had thrown something, but denied the tissue and metal pipe were his or that they had ever been in his possession. He described the area in which he was walking as "drug infested" and suggested anyone could have discarded the pipe and tissue. Goins denied favoring his right side during the pat down and demonstrated a familiarity with several police officers, mentioning some by name and describing another as "the red-headed one."

On cross-examination, Goins admitted being a convicted felon and the court admonished the jury to use that fact only to weigh Goins' credibility. Goins then testified that he always folds his clothes and denied being previously convicted of possession of cocaine. When the court allowed the Commonwealth to refresh Goins' memory with a certified copy of a prior felony conviction for

possession of cocaine, Goins said it had slipped his mind because it had happened so long ago—1996. Again, the court admonished jurors the conviction could be used only to weigh Goins' credibility. On redirect, Goins confirmed he had not tried to deliberately deceive the jury by denying the 1996 possession conviction.

Gina Sweeny also testified for the defense. She stated she walks the path between the projects and Russell Street daily. She described it as being full of trash including wadded up aluminum foil, glass, ink pens, spray paint cans, beer cans and beer bottles. She explained that aluminum foil is used to smoke methamphetamine.

During closing argument, Ehlschide emphasized the differences in the testimony given by Officers Fauntleroy and Robinson about lighting in the area of the arrest—one said it was well-lit by the moon, nearby houses, street lamps and car lights; the other said it was dark and the only light came from the cruiser's headlights. Ehlschide then emphasized variations in the testimony of the officers and the deputy jailers about whether Goins was intoxicated—Officer Fauntleroy said Goins had a strong odor of alcohol about him and was "manifestly under the influence of alcohol;" Officer Robinson described Goins as being under the influence and severely aggravated; Deputy Jailer Jones testified he had not been trained to determine whether a person is intoxicated and described Goins as exuding a "small" odor of alcohol; Deputy Jailer Owens also testified that he smelled a "small" odor of alcohol on Goins. Ultimately, Ehlschide asked the jury to find Goins not guilty due to insufficient proof.

The Commonwealth also emphasized the differences in the testimony during its summation, contrasting what was said by the two trained police officers and the two deputy jailers with the words of Goins, whom he described as a convicted felon with a memory problem. During summation, the prosecutor showed Goins's denim shorts to the jury and mentioned cocaine "crumbs" remained in the watch pocket. While the rocks of cocaine were submitted to the lab for testing, the shorts themselves and any residue were not tested, but they were admitted into evidence.

The jury began its deliberations about 2:30 p.m. At 4:44 p.m., they asked for and received a replay of testimony from Officer Robinson and Deputy Jailer Owens. At 6:16 p.m., the jury sent the judge a written request to ask Officer Fauntleroy how long he had searched before finding the crack pipe. Both attorneys agreed to depart from RCr 9.74's requirement that all contact with the jury, once deliberations are underway, must occur in the courtroom. They agreed in chambers that the trial court would send a written response to the jury stating,

> By law, I cannot answer your question. You have heard all the evidence and it is impermissible to add or introduce additional evidence.

The jury returned with a guilty verdict on all three counts at 6:43 p.m.

The separate sentencing phase was brief. Via a deputy circuit court clerk, the Commonwealth introduced proof of five prior felony convictions, including ones for tampering with physical evidence and possession of cocaine in the first degree. A probation and parole officer then explained the range of

punishments available and the possibility of parole. Ehlschide offered no proof for the defense and moved for a directed verdict due to insufficient proof. The motion was denied. After the jury returned with its sentence, motions for judgment notwithstanding the verdict (JNOV) and for a new trial were also made and denied.

On October 4, 2010, Goins filed a motion to vacate with a lengthy supporting memorandum alleging numerous instances of trial counsel ineffectiveness and accusing appellate counsel of not mounting a better direct appeal. He also requested an evidentiary hearing and appointment of counsel. On December 9, 2010, without convening a hearing or appointing counsel, the trial court entered a ten-page opinion and order denying the motion to vacate.

On June 15, 2011, Goins filed a motion to modify his sentence arguing the recent amendment of KRS 218A.1415, eliminating enhancement for second or subsequent possession offenses, should be retroactively applied to his 2008 sentence. He also requested an evidentiary hearing and appointment of counsel. On June 22, 2011, without convening a hearing or appointing counsel, the trial court entered an order denying retroactive relief. Thereafter, Goins filed a motion under CR 52.02 and CR 52.04 seeking specific findings for the denial of CR 60.02 relief. The trial court entered an order on July 6, 2011, denying the motion and stating it had made sufficient findings and conclusions in its original order. These two appeals followed. We affirm both.

LEGAL ANALYSIS

CR 60.02

Goins sought relief pursuant to CR 60.02 (e) and (f) which authorize relief from a judgment when:

> (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

A circuit court's denial of CR 60.02 relief is reviewed for abuse of discretion. *Campbell v. Commonwealth,* 316 S.W.3d 315, 318 (Ky. App. 2009); *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004). A trial court need not hold a hearing or appoint counsel on a CR 60.02 motion "when the record in the case refutes the movant's allegations." *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985).

We quickly dispense with Goins' argument that he should have received the benefit of retroactive application of the amendment of KRS 218A.1415[6] and therefore, his underlying sentence for cocaine possession in the first degree, second or subsequent offense, should have been reduced. Goins was sentenced nearly three years *before* the amendment became effective. In no way did he consent to the future change, nor did he give the court notice that he

[6] At the time of Goins' conviction for possession of a controlled substance in the first degree, a first offense was a Class D felony, but a second or subsequent offense was a Class C felony. As a result of the enactment of House Bill 463, which became effective June 8, 2011, there is no longer an increased penalty for a second or subsequent offense. When Goins' crime was committed in 2008, KRS 218A.1415 allowed a sentence of five to ten years as punishment for a second or subsequent offense. Since 2011, however, the maximum sentence for possession in the first degree is now just three years' imprisonment, with the possibility of deferred prosecution and probation.

intended to claim the benefit of some unknown change that might someday reduce the maximum penalty for his crime.

There is no doubt that if sentenced today, Goins would receive a shorter sentence. But he is not being sentenced today; he committed the offense, was charged, tried, convicted and sentenced in 2008. Commensurate with *Lawson v. Commonwealth,* 53 S.W.3d 534, 550 (Ky. 2001), he was sentenced "in accordance with the law which existed at the time of the commission of the offense . . . ." *See also* KRS 446.110. Goins has not directed us to, and we have not found, any provision in House Bill 463 stating the change was to be applied retroactively, nor is there any language from which we could construe such a legislative intent.

Goins's comparison of House Bill 463 to a statutory change discussed in *Commonwealth ex rel. Conway v. Thompson,* 300 S.W.3d 152, 166-67 (Ky. 2010), is unpersuasive. Since KRS 446.080(3) specifies that "[n]o statute shall be construed to be retroactive, unless expressly so declared[,]" the trial court did not abuse its discretion in denying Goins' CR 60.02 motion. Moreover, our Supreme Court recently reiterated,

> there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result.

Thompson, 300 S.W.2d at 167 (quoting *Commonwealth Dept. of Agriculture v. Vinson,* 30 S.W.3d 162, 168 (Ky. 2000)). There being no retroactivity language in

House Bill 463 and no absolute certainty that the legislature intended such a result, we affirm the denial of CR 60.02 relief.

RCr 11.42

"RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for 'a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge.' It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). To prevail on an RCr 11.42 motion, the movant must convincingly establish he was deprived of some substantial right justifying the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

Goins alleges he was denied effective assistance of both trial and appellate counsel. His claims are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which sets forth our standard of review. *Strickland* requires Goins to show a reasonable probability that, but for counsel's unprofessional errors, the result of trial would have been different. *Id*., 466 U.S. at 694, 104 S.Ct. at 2068. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. *Id*.

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. *Id*. 466 U.S. at 689, 104 S.Ct. at 2065. The defendant must overcome the presumption that, under the totality of the circumstances, the challenged action might be considered sound trial strategy. *Id*. In evaluating counsel's failure to object, we are mindful that counsel is not required to make useless objections and failure to do so is not ineffective assistance of counsel. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). Guided by *Strickland* and its progeny, we review Goins' claims that his trial counsel and the attorney appointed to represent him on direct appeal were ineffective.

TRIAL COUNSEL

Goins alleges trial counsel made nine mistakes, beginning with a general claim that trial counsel did not investigate the case and thoroughly prepare for trial. Within this argument he discusses several points. First, he maintains that he told Ehlschide several police officers (other than Officers Fauntleroy and Robinson) had responded to the scene on the night of his arrest and searched for the crack pipe that was ultimately found by Officer Fauntleroy. He believes Ehlschide should have explored whether any other officers were involved in the stop and subsequent search. He does not identify any of these phantom officers by name and no personnel, other than Fauntleroy, Robinson and the two deputy jailers, are named in the record. Without proof that counsel actually missed something, we will not reverse a conviction solely on unsupported speculation.

Second, Goins alleges Ehlschide did not interview and call three women as witnesses during the guilt phase of trial to corroborate his story.[7] As proof of the value of these witnesses, he submitted typed statements from them—all prepared on the same typewriter/computer, only two of which are signed, and none of which are dated or notarized. He says his girlfriend could have explained how he came to be wearing the shorts in which the crack cocaine was found. Unfortunately, how Goins acquired the shorts was not disputed and his girlfriend's statement did not say the shorts contained crack cocaine when she received them from a friend in Bowling Green—in fact, she wrote, "I did not check any of the clothing's pockets." Testimony on how Goins acquired the shorts would have been collateral and inadmissible. *See Commonwealth v. Preece,* 844 S.W.2d 385, 387 (Ky. 1992).

Goins says his girlfriend could have also testified that the area of the arrest was "extremely dim and not well maintained." However, Officer Robinson had already testified the area was dark and the only light came from the cruiser's headlights; Gina Sweeny, called by the defense, testified that the area in which Goins was arrested was full of litter. Thus, Goins's girlfriend's proposed testimony on these points would not have assured acquittal and would have been cumulative of other testimony. Likewise, the two other witnesses proposed by Goins speak of the neighborhood as being dark and strewn with litter. Pursuant to

[7] Goins repeats this allegation in Argument VI in which he claims Ehlschide failed to offer mitigating proof from these same women during the penalty phase of trial. We combine our review of the two claims.

KRE[8] 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." *Childers v. Commonwealth*, 332 S.W.3d 64, 79 (Ky. 2010). The two other witnesses also refer to the area being cleaned and improved *after* Goins' arrest, none of which would have ensured acquittal.

Goins also suggests these three women could have testified about his character in the event of conviction, but the statements attributed to them do not speak to his character. Furthermore, once jurors learned of Goins' extensive criminal history including five felonies, some for the same crimes of which he had just been convicted, it is highly unlikely Goins would have been acquitted or received a lighter sentence on the strength of testimony from these three women.

Goins claims Ehlschide offered no proof to corroborate his story. However, Goins ignores the fact that some corroboration came from the Commonwealth's own witnesses who disagreed about the lighting conditions at the scene of the arrest and about Goins' physical condition. Importantly, Goins admits in his brief to this Court that he "cannot prove that had his attorney interviewed and called witnesses for the defense and presented a mitigating case, that the jury would have acquitted him." To prevail under *Strickland*, that is precisely what is required for us to reverse his conviction.

[8] Kentucky Rules of Evidence.

Goins faults Ehlschide for not filing a discovery motion and learning in advance how the Commonwealth procured the crack pipe and the rocks of crack cocaine. The trial court concluded the decision to forego filing a discovery motion was a strategic decision and we have no grounds to disagree. Even Goins admits a discovery motion would have been unnecessary if the Commonwealth had provided discovery as a courtesy. From the record provided to us, we cannot determine how or when discovery was shared in this simple and straightforward case. We do know, however, that the bulk of the Commonwealth's case was laid out in the uniform citations generated on the night of the arrest. For the charge of tampering with physical evidence, the citation read:

> Observed abov (sic) subject on Russell St. Observed above subject throw white paper to side of road. White paper contained pipe commonly used to ingest controlled substances.

For the charges of possession of drug paraphernalia, first offense, and alcohol intoxication, first offense, the citation recited:

> Observed above on Russell St. walking. Above walked away when spoken to. Observed above throw white paper to side of road. White paper contained pipe with residue. Subject smelled of intoxicating beverages.

For possession of controlled substances, first degree, cocaine, and promoting contraband, first degree, the citation stated:

> Above subject arrested on below related citations. Subject searched and dressed out by deputy jailers. Search of subject's jean shorts by this officer, Officer Robinson and Deputy Jailer Owens revealed 2 rocks of

> suspected "crack" cocaine and 1 white pill in right change pocket.

These are the same explanations Officer Fauntleroy testified to and Officer Robinson corroborated at trial. There was no surprise. Furthermore, the indictment was sufficiently detailed, especially when read in tandem with the uniform citations, to apprise Goins and Ehlschide of the precise charges alleged. The charges were further supported by the forensic drug tests, completed on June 13, 2008, which showed "yellowish 'rocks' weighing approximately 159 milligram(s)" tested positive for cocaine and "one half (1/2) of a white round tablet" tested positive for carisoprodol, a Schedule IV controlled substance. The record does not specify when the Commonwealth made these documents available to Ehlschide, but the citations were filed in the court record on April 21, 2008, just three days after Goins' arrest.

The record does not reveal that there were any other documents or statements created by police officers that would have been discoverable. Thus, Goins' statement that he provided an "incident report generated by Deputy Jailer Jones related to the finding of the contraband" and allegedly appended it to his RCr 11.42 motion as Exhibit DD is unsupported by the record. There is no Exhibit DD in the record. We see no ineffectiveness of counsel as it relates to the alleged lack of discovery.

Goins' second argument is that Ehlschide failed to adequately object and preserve for appeal the absence of a fair representation of African Americans in the

jury pool. We disagree. Before the first question was asked on *voir dire*, Ehlschide objected because no African Americans were in the jury pool. The trial court noted there was at least one African American in the pool and while a greater number would be necessary to accurately reflect the county's African American population, which was reported at 17 to 18 percent at one time, he was unaware of any means by which a greater number could be guaranteed. The trial court then overruled the objection and trial proceeded. At the end of trial, Ehlschide reiterated his objection to the lack of African Americans on the jury in a new trial motion that was also denied because the "systematic exclusion of African Americans" had not been demonstrated. *Goins,* at *1.

Under RCr 9.22 and 10.12, the lodging of an objection stating specific grounds is sufficient to preserve an allegation of error for appellate review. Nothing more was required of Ehlschide. Goins suggests Ehlschide should have done more, but fails to specify anything he failed to do. We will not deem counsel to have rendered ineffective assistance of counsel without an explanation of what he failed to do and how that inaction prejudiced the defense.

Under this same claim, Goins complains that Ehlschide did not move to strike a member of the venire who said his wife's cousin had killed three people, and then when asked whether he could listen to all the proof and make a fair decision based solely upon the proof responded, "I'd like to think so, yes." While part of the juror's response is muffled by someone coughing, we do not believe sufficient cause existed to strike the potential juror from the panel due to unfairness

or lack of impartiality. *Sherroan v. Commonwealth,* 142 S.W.3d 7, 16 (Ky. 2004); RCr 9.36. Furthermore, since the potential juror did not state his name or badge number, we do not know whether he ultimately sat on the panel that decided Goins' fate. Thus, no prejudice has been demonstrated.

Goins' third complaint pertains to a written request by the jury, during guilt phase deliberations, to ask Officer Fauntleroy how long he searched before finding the crack pipe, a fact that was not established during the Commonwealth's case-in-chief. He argues first that Ehlschide should not have agreed to the trial court answering the question in writing without bringing the jury into the courtroom, and second that the trial court wrongly told jurors he was legally prohibited from answering their question because the evidence was closed. We deem no error and no ineffectiveness of counsel.

While RCr 9.74 requires all communication with the jury to occur in open court in the defendant's presence once deliberations have begun, Ehlschide and the prosecutor agreed to waive this requirement and have the trial court answer the inquiry in writing. This action saved time and we perceive no prejudice that could have transformed the jury's guilty verdict into an acquittal.

As for whether the trial court's response was accurate, "[t]here is no iron-bound, copper-fastened, double-riveted rule against the admission of evidence after both parties have rested upon their proof and even after the jury has entered upon it deliberations. Considerable latitude in discretion is vested in the trial judge in this respect." *Henry v. United States*, 204 F.2d 817, 820 (6th Cir. 1953). RCr 9.42(e)

gives Kentucky courts discretion to allow evidence-in-chief to be admitted after a party has closed its case "in furtherance of justice," but *Stokes v. Commonwealth*, 275 S.W.3d 185, 190 (Ky. 2008), highlights the dangers of a trial court giving new information to a jury during penalty phase deliberations. As in this case, *Stokes* began with a written jury request for proof of a fact the Commonwealth chose not to introduce during its penalty phase case-in-chief. After researching the matter and discussing it with counsel, the trial court provided new evidence to the jury, but there had been no motion by the Commonwealth to reopen its proof; the defendant was not given an opportunity to counter or correct the new evidence; and, the jury may have given the new fact more weight because they heard it directly from the trial court. *Id.* While the trial court in this case, in the exercise of its discretion, could have responded differently, we have no quarrel with the response provided.

Goins' fourth argument is that Ehlschide failed to object to the admission of testimony from various police officers and detention center personnel that they knew Goins. Officer Fauntleroy testified he recognized Goins "from being a police officer." Without more, this fact standing alone was not prejudicial; a person may be acquainted with a police officer for any number of reasons.

During direct examination, the prosecutor asked Deputy Jailer Jones whether he considered Goins' handling of his clothing while being booked that night—folding his jeans inward and carefully placing them inside a detention center bag—to be unusual. When Jones said he did, Ehlschide objected arguing Jones was

unqualified to say whether a particular action regarding clothing was unusual. The trial court overruled the objection saying Ehlschide could explore the matter on cross-examination. The prosecutor then chose to ask Jones why he deemed Goins' handling of his clothing to be unusual and Jones responded that Goins had come into the detention center previously. Ehlschide objected again. This time the court stated Jones's response was a hazard of asking why a particular action was unusual. Thereafter, the trial court sustained Ehlschide's objection and admonished the jury to use that information only to explain Jones's familiarity with Goins. Kentucky courts have long accepted the proposition that "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003); *see also Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009). Goins suggests the trial court held Ehlschide responsible for asking the question, but clearly it was the prosecutor, not Ehlschide, who pursued the topic. Ehlschide protected his client by immediately objecting and requesting an admonition. Nothing more was required.

Goins' fifth argument is that Ehlschide failed to object to the introduction of prejudicial and bolstered proof—namely testimony from Officers Fauntleroy and Robinson that cocaine residue still remained in the watch pocket seam. Goins admits this argument was "irrelevant to [his] defense," but claims Ehlschide should have objected because the shorts and the residue were never submitted for testing. We perceive no error, and certainly none of such magnitude as to require reversal.

Goins was not convicted on the basis of the alleged residue; he was convicted for possessing two rocks of crack cocaine and a metal crack pipe. The shorts were admitted into evidence so jurors could have examined the pocket for themselves. Furthermore, as the trial court noted in its order denying the motion to vacate, Goins' defense was that nothing in the pockets of the denim shorts he was wearing belonged to him. Thus, arguing over whether there was cocaine residue in the shorts would have been a futile act and failing to perform a "futile act" is not ineffective assistance of counsel. *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002).

Goins' next argument is that Ehlschide should have moved for dismissal of the cocaine possession charge so the Commonwealth would try him for promoting contraband[9] instead and should have moved for a directed verdict when the Commonwealth closed its case. Goins appears to base this argument on the fact that he was initially cited by police officers for possession of cocaine and promoting contraband, both in the first degree. However, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604, 611 (1978); *see also Commonwealth v. McKinney*, 594 S.W.2d 884, 888 (Ky. App.

[9] KRS 520.050 (1)(a), "knowingly introduc[ing] contraband into a detention facility or penitentiary[,]" a Class D felony.

1979). Goins does not put forth a theory under which counsel should have sought dismissal of the cocaine possession charge.

Goins was not indicted for promoting contraband, he was indicted for possession of cocaine in connection with the two rocks of cocaine discovered in his pocket. Having sufficient proof to support and secure a conviction for possession of cocaine in the first degree, it is highly unlikely the prosecutor would have dismissed that charge, especially when Goins qualified as a persistent felon. Goins admits in his brief that he "can not (sic) say for sure if the court would have granted" a motion to dismiss the cocaine possession charge. Thus, he cannot prove he was denied a fair trial and a reasonable result under *Strickland.*

We are unpersuaded by Goins' complaint that Ehlschide should have stated other grounds in support of the motions he made for a directed verdict due to overall insufficient evidence at the close of the Commonwealth's case and renewed at the close of all the proof. Goins' reliance upon *Potts v. Commonwealth,* 172 S.W.3d 345, 348 (Ky. 2005), is misplaced. Under *Potts*, asking for a directed verdict without stating *any* grounds will not preserve the issue for appeal. Ehlschide stated specific grounds as required by CR 50.01.

Goins' next argument is that Ehlschide should have objected to prosecutorial misconduct during the Commonwealth's closing argument. Goins believes Ehlschide should have objected when the prosecutor displayed to the jury the denim shorts Goins was wearing at the time of his arrest and said that cocaine "crumbs" remained in the seam of the right watch pocket. As noted in the trial

court's order denying the motion to vacate, the shorts had been introduced into evidence so the prosecutor's comment upon them was appropriate. Officers Fauntleroy and Robinson had testified on direct that they found cocaine residue in the watch pocket along with the two rocks of crack cocaine and the partial pill. It has been long recognized that "a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt" during summation. *Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998).

Moreover, as soon as the jury was seated and sworn, the trial court explained how the trial would develop and apprised the jury that it would begin with opening statement and end with summation, neither of which was evidence—because evidence comes from witnesses. We conclude the prosecutor's comments did not exceed the bounds of wide latitude allowed during summation. *Bixler v. Commonwealth*, 204 S.W.3d 616, 632 (Ky. 2006). Therefore, there was no basis for Ehlschide to object.

Goins' next argument is that the combination of the foregoing alleged errors requires reversal. We disagree. Discerning no error, we, therefore, see no cumulative error. *McQueen v. Commonwealth,* 721 S.W.2d 694, 701 (Ky. 1986).

The heading of Goins' last argument is that Ehlschide[10] "failed to adequately present his direct appeal." We have already determined Ehlschide sufficiently

[10] Following sentencing, Ehlschide was allowed to withdraw from representing Goins. The Department of Public Advocacy was appointed to represent Goins on appeal and Hon. Erin Hoffman Yang was assigned the case.

preserved the jury pool question for direct appeal, but Goins also faults Ehlschide for not lodging more objections at trial and thereby preserving more issues for appellate counsel to raise on direct appeal. Throughout the body of this Opinion we have concluded Ehlschide effectively represented Goins at trial. Therefore, there were no additional objections that should have been voiced to lay the groundwork for a successful direct appeal.

APPELLATE COUNSEL

The text of Goins' final argument also faults appellate counsel for raising only the non-representational jury question on appeal, and doing so poorly. *Hollon v. Commonwealth,* 334 S.W.3d 431 (Ky. 2010) confirms that ineffective assistance of appellate counsel may be reviewed under RCr 11.42. *Hollon* also recognizes a strong presumption that counsel's choice of appellate issues represents a reasonable exercise of appellate strategy. *Id.,* at 436-37.

Hoffman Yang adequately presented the jury pool question on appeal. She could not supplement the record with new factual support, as Goins suggests she should have, because CR 76.12(4)(b)(vii) states in part:

> Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.

Additionally, items not entered into the trial court record prior to entry of judgment are not reviewable on appeal. CR 75.08; *Triplett v. Commonwealth*, 439 S.W.2d 944, 945 (Ky. 1969). As an appellate court, our review is restricted to the material

considered by the trial court. As for Goins' vague and conclusory claim that Hoffman Yang should have raised more issues on direct appeal, without specifics we cannot grant relief.

For the foregoing reasons, the orders of the Muhlenberg Circuit Court denying RCr 11.42 and CR 60.02 relief, are AFFIRMED.

ALL CONCUR.

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