

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000952-MR

LEROY HAMPTON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 05-CR-00536

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial of appellant, Leroy Hampton's, motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Based upon the following we will affirm the decision of the trial court.

BACKGROUND INFORMATION

Hampton was convicted of multiple drug charges and persistent felony offender I (PFO I) and sentenced to a term of twenty years of imprisonment. After his conviction, Hampton brought a direct appeal asserting that his conviction should be overturned because the police had improperly searched him, seized evidence as a result of the illegal search and that he was entitled to a directed verdict. He also contended that he had been subjected to double jeopardy when he was prosecuted for both possession of a controlled substance and possession of drug paraphernalia. Hampton's appeal was denied in *Hampton v. Commonwealth*, 231 S.W.3d 740 (Ky. 2007). He then filed the RCr 11.42 motion from which his current appeal is taken.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 "motion is limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky. 1998) (*overruled on other grounds*).

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Pursuant to the holding in *Strickland*, 466 U.S. at 694, a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” With this standard in mind, we will examine the trial court’s decision.

DISCUSSION

In his RCr 11.42 motion, Hampton asserted that his counsel was ineffective in the following ways:

1. For not objecting to the charge of first-degree possession of a controlled substance, second offense, because the prior offense was more than five years old;
2. For failing to object to “double enhancement”;
3. For failing to prepare, investigate or interview relevant witnesses;
4. For refusing to allow him to testify on his own behalf;
5. For failing to challenge the constitutionality of Kentucky Revised Statutes (KRS) 532.080;
6. By rendering a deficient performance which failed to subject the Commonwealth’s case to meaningful adversarial testing.

Trial counsel was appointed and filed a supplemental brief asserting that trial counsel erred in not interviewing Quinton Hampton, Kenneth Sweat and Deloris Stacker. However, neither Hampton nor his counsel set forth what an interview with either of these individuals would produce. An evidentiary hearing was then

held before the trial court. The trial court denied Hampton's motion in its entirety. Hampton brought this appeal.

Hampton argues that his trial counsel was ineffective in failing to object to the charge of first-degree possession of a controlled substance, second offense, because the prior offense was more than five years old. The trial court found that trial counsel was not ineffective because there is no statutory provision requiring that a prior possession conviction occur within five years of the new offense for it to qualify as a second offense. KRS 218A.1415 has no such provision, thus, the trial court was correct in denying Hampton's motion on this issue.

Next, Hampton asserts that his trial counsel was ineffective for failing to object to the "double enhancement" with the PFO charge. Specifically, he argues that it was used for the PFO charge as well as possession of a controlled substance, second offense. The trial court set forth that the possession of a controlled substance conviction was in Logan County and completely separate from the charge in this action from which the possession of a controlled substance, second offense, was brought. In *Commonwealth v. Grimes*, 698 S.W.2d 836, 837 (Ky. 1985), the Kentucky Supreme Court held that "a conviction of a second offense of trafficking in a Schedule III controlled substance under KRS 218A.990(2), may be further enhanced by a persistent felony offender second degree charge pursuant to the general PFO statute, KRS 532.080, where the PFO charge is grounded on a prior, unrelated conviction." We agree. Thus, we affirm the trial court's decision on this issue.

Hampton also contends that his trial counsel was ineffective in failing to interview Quinton Hampton, Sweat and Stacker. Hampton asserted that these three witnesses could have corroborated his testimony that the officer at the scene could not have seen him put anything in to his shoe and that he was not belligerent with the officer. However, none of these witnesses were called at the evidentiary hearing. Hampton alone testified as to their possible testimony. Thus, we find the trial court correctly held that there was no evidence Hampton's trial counsel was ineffective in failing to interview them.

Next, Hampton asserts that his trial counsel was ineffective in not letting him testify at his trial. Trial counsel, however, testified that he had advised Hampton not to and that Hampton had agreed. Hampton had prior convictions that his trial counsel did not want to be brought before the jury. As set forth in *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, there must be a showing that the outcome would be different in order to prevail. We do not find that Hampton has shown that his testimony would have changed the outcome. Trial counsel had a reasonable reason for advising Hampton not to testify. The trial court found that the fact that Hampton did not testify at his suppression hearing gave credence to trial counsel's contention on this matter. We agree. We do not find trial court abused its discretion on this issue and will affirm.

Hampton also contends that his trial counsel was ineffective by failing to argue the unconstitutionality of the PFO statute as it applied to him. However, we agree with the trial court that there is no evidence that the PFO statute is

unconstitutional as applied to Hampton and, thus, trial counsel was not ineffective in failing to raise this as an issue.

Finally, Hampton argues that the ineffectiveness of his trial counsel resulted in the denial of due process. Since the trial court found, and we have affirmed, all the issues of ineffectiveness set forth by Hampton, we affirm the trial court's decision that Hampton was not denied due process. Thus, we affirm the trial court's decision to deny Hampton's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leroy Hampton, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky