

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

NO. 2012-CA-000434-MR

PAUL D. YORK

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE RODNEY BURRESS, JUDGE  
ACTION NO. 08-CR-00145

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: On May 21, 2008, a Bullitt County grand jury returned an indictment charging Paul D. York with Complicity to second-degree Burglary, Complicity to Theft by Unlawful Taking over \$300,<sup>1</sup> and being a Persistent Felony Offender in the First Degree (PFO I). Following a jury trial, York was convicted

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<sup>1</sup> In 2009, the General Assembly raised the threshold for felony Theft by Unlawful Taking from \$300 to \$500. 2009 *Ky. Laws* Ch. 109, § 6 (eff. 6-25-2009). Since the offense took place prior to the change in the statute, York was charged with a felony under the prior law.

on all counts and was sentenced to a total of twenty years' imprisonment. The Kentucky Supreme Court affirmed his conviction on direct appeal. *York v. Commonwealth*, 2010 WL 3377757 (Ky. 2010).

Thereafter, York filed this current motion to alter, amend or vacate his sentence and conviction pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, alleging that he received ineffective assistance from his trial counsel. The trial court appointed counsel to supplement York's *pro se* motion and to represent him at an evidentiary hearing. After conducting an evidentiary hearing, the trial court denied York's motion on January 6, 2012, finding no merit to any of York's claims of ineffective assistance. This appeal followed.

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 of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688–89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance.

*Id.* at 690, 104 S. Ct. at 2066. When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

Although York raised seven grounds of ineffective assistance of counsel before the trial court, he only presents three of them on appeal. First, York asserts that his trial counsel failed to object to the court's failure to provide him with the correct number of peremptory strikes. Second, he contends that his trial counsel was ineffective for failing to request a directed verdict or an instruction on lesser-included offenses to Complicity to Theft by Unlawful Taking over \$300. And third, York argues that his trial counsel was ineffective for failing to object to the introduction of amended and dismissed charges during the penalty phase. We will address each in turn.

At his trial, the court allotted York and his co-defendant a total of eleven peremptory strikes. York points out that, under *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999), co-defendants being tried jointly are entitled to a total of thirteen peremptory challenges. *Id.* at 444. As a result, he argues that his trial counsel was ineffective for failing to object to the allocation of only eleven peremptory strikes.

The Commonwealth points out that the allocation of peremptory strikes was the result of an agreement between the two defense counsel and the

Commonwealth. As a result, the Commonwealth maintains that an express agreement should not be treated as deficient performance. Instead, the Commonwealth argues that counsel's decision should be presumed to be reasonable trial strategy.

Furthermore, in *Young v. Commonwealth*, 212 S.W.3d 117 (Ky. 2006), the Kentucky Supreme Court held that a trial counsel's failure to object on this issue is not automatically grounds for finding ineffective assistance of counsel. Although properly preserved objection to an improper allocation of peremptory challenges may be grounds for an automatic reversal on a direct appeal, the Court held that this *per se* rule does not apply to collateral attacks where the error was unpreserved. *Id.* at 121. Rather, a defendant must show actual prejudice as a result of counsel's failure to object. *Id.* at 121-22.

York contends that he met this burden by identifying one juror who he would have stricken for cause if he had another available strike. In this motion before the trial court, York alleged that Juror 18 had the same last name as another person who was a past adversary of his. However, York offers no evidence, other than mere speculation, that Juror 18 was actually related to the person who he considers an adversary.

York asserts that such evidence is unnecessary considering that peremptory challenges may be exercised for any reason and not just for cause. Nevertheless, the trial court also noted the testimony by York's trial counsel, who stated that York never raised any potential objection about Juror 18 to her. Thus,

even if counsel was deficient for agreeing to the number of peremptory strikes, York has failed to establish that he suffered prejudice as a result.

York next contends that his trial counsel was ineffective for failing to request an instruction on lesser-included offenses to Complicity to Theft by Unlawful Taking over \$300 and in failing to request a directed verdict on that charge. The record clearly refutes these allegations of ineffective assistance. York was caught inside the house and in possession of jewelry, a clock, watches and silverware from the house. The victim initially told the police that the total value of the items was about \$700. At trial, the victim estimated that the watches were worth approximately \$750, and the silverware about \$500.

It is well-established that “the testimony of the owner of stolen property is competent evidence as to the value of the property.” *Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001), *citing Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977). As a result, York’s counsel had no basis for requesting a directed verdict. Furthermore, York does not point to any evidence which would have supported a finding that the items were worth less than \$300. Under these circumstances, we cannot find that counsel performed deficiently by failing to request an instruction on the lesser-included offense of Complicity to Theft by Unlawful Taking under \$300.

Finally, York complains that his trial counsel should have objected to the introduction of an amended charge during the penalty phase. To establish York’s status as a PFO I, the Commonwealth introduced indictments and

judgments from criminal convictions in Owen County and Boone County. The Boone County indictment included a charge of first-degree Robbery. York later pleaded guilty to the charge of second-degree Burglary. The parties attempted to redact the description of the Robbery charge on the indictment with a black marker, but the text remains visible on the exhibit submitted to the jury.

Furthermore, the indictment indicates that the robbery charge involved the use of force with a gun. York contends that his trial counsel was deficient for failing to object to the inadequate redaction of inflammatory and irrelevant information.

The trial court found that the underlying judgments of conviction were properly admitted and consequently York's counsel was not deficient for failing to object. In this respect, the trial court misinterpreted York's argument. York does not challenge the introduction of the judgments, but only the indictment which included details of the amended charge. We agree with York that evidence of dismissed or amended charges is not admissible during the penalty phase. *See Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012), and *Chavies v. Commonwealth*, 354 S.W.3d 103, 115 (Ky. 2011).

But under the unique circumstances of this case, we cannot find that York's counsel was deficient. At trial, York's counsel objected to the introduction of the original charge and requested that it be redacted from the exhibit provided to the jury. The Commonwealth agreed that the information was not admissible. York's counsel actually made the redactions on the Owen County indictment, although it is not entirely clear who made the redactions on the Boone County

indictment. We also note that the stricken text is illegible when the document is laying flat and can only be read when held up to the light.

In any event, it is clear that York's counsel properly raised the objection, obtained a favorable ruling, and attempted to ensure that the inadmissible information was redacted. Although counsel was not entirely successful in making the redaction, counsel made a good faith effort to see that it was done. Furthermore, unlike in *Blane*, the amended charges were not pointed out to the jury by the trial court, the Commonwealth or the Commonwealth's witness. *Blane*, 354 S.W.3d at 153. Given these facts, we conclude that his counsel's actions fell within the wide range of reasonable professional assistance and were constitutionally sufficient.

Accordingly, the order of the Bullitt Circuit Court denying York's RCr 11.42 motion is affirmed.

ALL CONCUR.

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