

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000919-MR

DONALD MARTIN, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 07-CR-00941

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Donald Martin, Jr., appeals an order entered May 9, 2012, by the Fayette Circuit Court denying Martin's motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. Martin argues that trial counsel was ineffective for failing to

reasonably investigate and call witnesses to testify at a suppression hearing. We affirm.

In affirming Martin's direct appeal of his conviction, another panel of this Court in Appeal No. 2008-CA-000496-MR set forth the underlying facts in its opinion as follows:

On May 18, 2007, Lieutenant Lawrence Weathers was on plain-clothes patrol in Lexington when he noticed men in front of 406 East Seventh Street trying to flag him down. Weathers called Detective Byron Smoot and other members of the narcotics enforcement unit who were in the area to investigate. He suspected the men flagging him down might have been trying to sell him narcotics.

Upon arriving, Smoot observed approximately seven people in the yard. Smoot focused on Martin when he noticed Martin shove something into his pocket. Martin then got up from where he was sitting and began to walk toward the house. Smoot asked Martin to stop, but Martin ran into the house and out the back door. Smoot caught Martin by the hood of his jacket and saw Martin throw objects from his pocket into the brush. Martin was handcuffed and arrested for fleeing and evading and given his Miranda rights.

Martin was searched pursuant to his arrest. Smoot found a slip of paper he believed to be a drug-debt list and \$5321.00 in cash in Martin's pants pocket. In the area where Martin had thrown objects, Smoot retrieved three grams of crack cocaine, 9.6 grams of powder cocaine, and a set of digital scales. Martin gave Smoot his consent to search his vehicle. The search resulted in the discovery of a black shaving kit containing \$18,000.00 in cash.

Martin admitted to Smoot that the money was drug money and that he had been trafficking for some time. He named his supplier and offered to testify against him in exchange for leniency. Martin further admitted that

the discarded items recovered from the area were from a recent drug sale.

Martin moved to suppress any fruits of what he claimed to be an illegal search and seizure, including any statements made to Smoot. Following a hearing, the trial court denied Martin's motion concluding that Smoot had a reasonable, articulable suspicion to effect an investigatory stop of Martin.

Martin was convicted of fleeing and evading in the second degree as well as first-degree trafficking in a controlled substance, tampering with physical evidence and being a first-degree persistent felony offender. . . .

Subsequently, Martin filed a motion for post-conviction relief pursuant to RCr 11.42. Following an evidentiary hearing, the trial court denied the motion in an order entered on May 9, 2012. This appeal followed.

Martin argues that trial counsel was ineffective for failing to reasonably investigate and call witnesses at the suppression hearing. We disagree.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate:

[T]hat counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To show prejudice, the defendant must show 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 the

probability sufficient to undermine the confidence in the outcome.

Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002) (citations omitted).

“[A] trial counsel's choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel.” *Saylor v. Commonwealth*, 357 S.W.3d 567, 571 (Ky. App. 2012) (citations omitted).

At the evidentiary hearing, trial counsel testified that he generally did not call witnesses at suppression hearings in order to prevent the Commonwealth from having an early opportunity at cross-examination and a preview of trial testimony. Specifically, counsel stated that Martin failed to provide him with the names of potential witnesses until two weeks after the suppression hearing. Counsel provided Martin the option of testifying at the suppression hearing, but Martin declined. Counsel also stated that he did not believe the testimony of Wayne Marshall, who testified for the Commonwealth at trial, would have been beneficial. Based upon this evidence, we conclude that Martin failed to demonstrate that counsel's performance was deficient. Further, to the extent Martin reargues the merits of the suppression issue, the law of the case doctrine precludes the relitigation of this issue because this Court determined that the search of Martin was proper on direct appeal. *Hogan v. Long*, 922 S.W.2d 368, 370 (Ky. 1995).

Accordingly, for the reasons stated, the May 9, 2012, order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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