

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000371-MR

GREGORY JERMAIN LANGLEY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 06-CR-00192

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Gregory J. Langley, *pro se*, appeals from the Henderson Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel. After careful consideration, we affirm.

Langley is currently serving a thirty-year sentence based on a 2006 conviction for first-degree trafficking in a controlled substance (2nd offense) and being a persistent felony offender (PFO). The sentence emanated from an August 2006 indictment for drug-trafficking activities. The drug-trafficking incident was captured on a videotape, obtained in October 2005, when Langley sold methamphetamines to a confidential informant who was wearing a hidden video recorder and surreptitiously recorded the incident.

Langley appealed his conviction to the Kentucky Supreme Court in 2008. It was affirmed in March 2008. Langley's petition for certiorari filed with the United States Supreme Court was denied.

Langley, through counsel, then filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion, as well as RCr 10.02 and RCr 10.06 motions, for a new trial. After the trial court denied the motions, he appealed the decision to our Court, which on January 13, 2010, affirmed the trial court's decision. Next, on January 19, 2011, Langley, *pro se*, filed a RCr 11.42 motion, supporting memorandum, and motions for appointment of counsel and a hearing alleging that the performance of his counsel was deficient on several counts. On January 11, 2012, the trial court denied these motions. He now appeals this order.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth*

v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Further, an RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-909 (Ky. 1998) (overruled on other grounds).

To prevail on an ineffective assistance of counsel claim, a movant must show both that counsel's performance was deficient and, also, 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). Thus, besides establishing that counsel's performance was deficient, 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." *Id.* at 694, 104 S.Ct. at 2068. Courts 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).

On appeal, Langley maintains that his trial counsel's performance was deficient because counsel failed to object to sentencing instructions, which resulted in an unauthorized sentence; failed to make a reasonable pretrial investigation; failed to preserve evidence that the informant was bullied into implicating Langley; and, failed to make a motion to suppress audio and video evidence based on Kentucky eavesdropping laws. Finally, Langley maintains that the trial court erred in denying the motion for an evidentiary hearing.

Langley's first issue is that his counsel failed to object to sentencing instructions, which resulted in an unauthorized sentence. In the motion to vacate, the only argument proffered by Langley to support this position was the following statement:

Counsel was Ineffective for Failing to Raise Objections to the court's Sentencing Instructions which resulted in an unauthorized Sentence and Failed to be preserved for Appellant Review.

Now, in his appellate brief, he offers a detailed, albeit confusing, explanation for this claim.

In the order denying his motion, the trial court made note of the bare-bones presentation of this argument and observed "Langley does not specify what those errors are . . . Without knowing why the jury instructions were allegedly in error, the Court cannot have the basis to grant relief."

The Kentucky Supreme Court has held that RCr 11.42 requires substantial compliance with its provisions in order to confer jurisdiction upon the trial court. *Cleaver v. Commonwealth*, 569 S.W.2d 166, 169 (Ky. 1978). Here, with regard to this specific issue, Langley's motion only provides a conclusory and non-specific allegation that counsel provided ineffective assistance by failure to object to sentencing instructions. This lack of specificity violates RCr 11.42(2), which states, "[t]he motion . . . shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of

such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.”

Thus, a movant under RCr 11.42 must assert facts with sufficient specificity to demonstrate a legal basis for relief. *Lucas v. Commonwealth*, 465 S.W.2d 267 (Ky. 1971). Indeed, RCr 11.42 exists “to provide a forum for known grievances, not to provide an opportunity to research for grievances.” *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983). Langley, by failing to allege specific grounds for this argument, did not comply with the provisions of RCr 11.42(2). And, thus, based on RCr 11.42(2), the trial court did not err by summarily dismissing this particular argument.

As a reviewing Court, we are not charged with ascertaining whether a claim is legitimate but rather are charged with reviewing the actions of the trial court. Langley’s claim regarding counsel’s failure to object to sentencing instructions was a general assertion unsupported by sufficient detail to enable the trial court to address it. Our review is of the lower court’s actions and, therefore, we are only able to review claims presented to it. Here, we conclude that the trial court committed no error in dismissing this claim. As oft-quoted, an appellant is not allowed “to feed one can of worms to the trial judge and another to the appellate court.” *Carrier v. Commonwealth*, 142 S.W.3d 670, 679 (Ky. 2004)(citations omitted).

Langley’s second assertion of error is based on counsel’s purported failure to make a reasonable pretrial investigation. The components of this

argument are that his counsel was deficient when he failed to ensure that the confidential informant appeared at trial to testify on Langley's behalf; failed to adequately investigate and prepare defenses; and, failed to file a motion to suppress audio and video evidence based on Kentucky's eavesdropping laws.

We begin our analysis with Langley's contention that his trial counsel failed to ensure that the confidential informant appear at trial. As noted by the trial judge, it was not necessary for defense counsel to subpoena the informant since the prosecution had already secured a transport order for the informant to appear at trial. Further, regarding Langley's allegation that trial counsel failed to pursue Langley's claim that the confidential informant would verify that Langley had not sold drugs, in fact, when the confidential informant appeared at trial, he adamantly refused to testify. Given the witness's refusal to testify and willingness to accept a 180-day contempt sentence, trial counsel had no other option in dealing with an uncooperative witness. Further, Langley does not provide any such option.

Next, regarding Langley's assertions that his trial counsel did not investigate the case or prepare adequate defenses, a review of the record establishes that defense counsel actively and vigorously investigated the case in order to defend Langley. Langley's trial counsel proffered discovery motions, motions in limine, a motion for grand jury transcript, post-trial motions, a motion to suppress, and provided motions and a memorandum supporting Langley's direct appeal. Moreover, other than contending that his trial counsel's actions were deficient, Langley does not demonstrate specific actions that counsel should have

done or information he should have discovered, or, for that matter, show any prejudice resulting from a lack of assiduousness by counsel.

As explained in *Strickland*, in a case alleging an ineffectiveness claim based on counsel's performance, the inquiry must be whether counsel's assistance was reasonable under the circumstances to ensure that the criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. at 688-89, 104 S.Ct. at 2065. Here, we are confident that counsel adequately investigated the case and properly defended Langley.

Finally, Langley declares that his trial counsel should have filed a motion to suppress audio and video evidence of the drug deal based on Kentucky's eavesdropping law. Kentucky Revised Statutes (KRS) 526.010 *et seq.* He claims because of ineffective assistance of his counsel, both the audio of a three-way conversation among a Henderson police detective, the confidential informant, and Langley, plus the videotape of the drug deal, were illegally admitted.

Beginning with the audio, we note that while trial counsel made no objection vis-à-vis the eavesdropping statute, trial counsel, during the trial, objected to the admission of the phone conversation on the audiotape as hearsay. Ultimately, the trial court sustained this objection. Thus, since the conversation on the audiotape was suppressed, a motion to suppress based on the eavesdropping statutes, even if successful, would have made no difference in the outcome of the trial.

Regarding the videotape and the eavesdropping statutes, in a pretrial motion trial counsel contested its admission. Defense counsel argued that since the confidential informant had refused to testify at trial, the Commonwealth could not prove that the informant consented to the creation of the video. Before ruling on the motion, the trial judge queried the detective as to the informant's willingness to wear the recording device. After hearing that testimony, the trial court ruled that, based on the detective's testimony and the trial court's own viewing of the videotape, the informant had consented to the making of the videotape and its admission did not violate KRS 526.010.

On the appeal of this case, the Kentucky Supreme Court stated:

KRS 526.020 classifies eavesdropping as a Class D felony. KRS 526.010 states that “ ‘eavesdrop’ means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device.” Although this Court has not had the occasion to rule on whether an informant's consent can be shown through the testimony of law enforcement officers, the Kentucky Court of Appeals held in *Carrier v. Commonwealth*, 607 S.W.2d 115, 118 (Ky. App. 1980), that “the testimony of the informant himself is not necessary in order to establish his consent.” In *Carrier*, the informant had initiated incriminating phone conversations with the defendant that were electronically recorded by the police. *Id.* at 116-117. Although the informant refused to testify at trial, “three law enforcement officers testified that [the informant] gave his permission for the electronic recording of the conversation, that it was done freely and voluntarily, without any sign of duress.” *Id.* at 118. We find the holding in *Carrier* persuasive. Therefore, since Detective Adams testified that the confidential informant voluntarily wore the recording device and since the

videotape itself indicated that the informant consented to the recording system, we affirm the trial court's ruling that the informant consented to the creation of the videotape and that no unlawful eavesdropping occurred.

Langley v. Commonwealth, 2008 WL 746462, 11 (Ky. 2008). The facts herein are analogous.

Therefore, since trial counsel was unsuccessful at the pretrial level in having the videotape excluded, a motion to suppress would likely have been unsuccessful. Furthermore, both the audio- and videotape clearly show the informant participating (and consenting) with law enforcement to obtain this evidence. But most significant in terms of Langley's allegation of ineffective assistance is that trial counsel's actions related to the tapes were not unreasonable or unprofessional. Accordingly, Langley did not establish any prejudice to his case based on counsel's representation on this issue.

Langley's last major argument is that the trial court erred in denying his request for an evidentiary hearing. When an RCr 11.42 motion for an evidentiary hearing is made, a trial court's decision about whether it is necessary rests on whether a material issue of fact exists that cannot be determined on the face of the record. *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998). Kentucky courts have consistently held a hearing is not necessary when a trial court can resolve issues on the basis of the record or when "it determine[s] that the allegations, even if true, would not be sufficient to invalidate [the] convictions."

Id. Here, the issues raised by Langley could conclusively be resolved by an examination of the record and, hence, no evidentiary hearing was warranted.

Consequently, the Henderson Circuit Court did not abuse its discretion in denying Langley's RCr 11.42 motion since he was unable to prove that he was prejudiced by any errors of trial counsel. In addition, the trial court did not err in denying Langley's motion for an evidentiary hearing because the issues articulated by him were able to be resolved through a review of the record.

The decision of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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