

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001175-MR

JAMES RICKY OWENS

APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 08-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND VANMETER, JUDGES.

LAMBERT JUDGE: James Ricky Owens appeals from the June 18, 2012, order of the Simpson Circuit Court. That order denied Owens' motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. We affirm.

Owens was indicted for assault, first degree; tampering with physical evidence; and being a persistent felony offender, first degree (PFO I). Following a

jury trial, Owens was found guilty of all charges and sentenced to a total of thirty years' incarceration. Owens filed a direct appeal, and his conviction and sentence were affirmed by the Supreme Court of Kentucky. *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011). Thereafter, Owens filed a motion for relief pursuant to RCr 11.42, in which he alleged that his trial counsel provided ineffective assistance. That motion was denied by the trial court, without an evidentiary hearing, in an order entered on June 18, 2012. This appeal followed.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when 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) (citation omitted). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78. When reviewing a claim of ineffective assistance of counsel, we employ the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction . . .

resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. We note that in this particular case, Owens' argument is comprised largely of challenges to the sufficiency and weight of evidence presented at trial. Issues that could or should have been raised on direct appeal cannot be raised in an RCr 11.42 motion. *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009). Indeed, the trial court is vested only with determining whether the trial counsel's performance rendered Owens an unfair trial. *Strickland*, 466 U.S. at 687.

Owens first argues to this Court that the trial court erred in its findings with regard to Owens' RCr 11.42 motion. In particular, Owens' RCr 11.42 motion argued that his trial counsel provided ineffective assistance by failing to present an alternative theory that the crime for which he was convicted was committed by an unknown perpetrator. The trial court's June 18, 2012, order found that Owens' alternative theory included Owens discovering the victim of the assault charge on the floor. Owens maintains, however, that his alternative theory did not involve him finding the victim on the floor, but rather that she was sitting next to him. Owens maintains that the trial court's incorrect recitation of the alternative theory creates reversible error. It is our holding that any misinterpretation of Owens' "alternative theory" is irrelevant and therefore harmless.

The relevant inquiry of the trial court is whether trial counsel's failure to present Owens' alternative theory is an omission sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. In its order

denying Owens' motion, the trial court recounts the substantial evidence against Owens, including Owens' own testimony to officers, which is contrary to the alternative theory presented within his RCr 11.42 motion. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. Moreover, in order to show prejudice, Owens must show a reasonable probability the outcome would have been different. *Bowling v. Commonwealth*, 80 S.W.3d 405, 411 (Ky. 2002). Given the vast amount of evidence contrary to Owens' "alternative theory," Owens has failed to show that it would have altered the outcome of his trial. Thus, his argument is without merit.

Owens next argues that the trial court erred when it failed to hold an evidentiary hearing as to his claims that his trial counsel failed to present hospital records that would refute trial testimony about the injuries sustained by the victim. The testimony was given by Dr. Robert Wesley of the Franklin Emergency Center, who first treated the victim. Although Owens states that these contradictory records are "readily available," he fails to provide any such records and instead simply makes uncorroborated statements as to what information the records allegedly contain. Such an argument is mere conjecture and does not support an allegation of ineffective assistance of trial counsel. "No evidentiary hearing is required if the allegations of the RCr 11.42 motion are insufficient." *Harper v.*

Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998). Resultantly, Owens' argument is without merit.

Owens next argues that the trial court erred when it denied him an evidentiary hearing in general. In support of this argument, Owens makes extensive reference to conflicting trial evidence. This argument appears to be yet another attempt to re-litigate the material facts of his case. As stated previously, the sufficiency of evidence presented at trial is an issue appropriate on direct appeal and not in a motion for RCr 11.42 relief. RCr 11.42; *Leonard*, 279 S.W.3d 151. This argument is therefore without merit.

Owens' next argument to this Court is that the trial court committed reversible error when it incorrectly found, in response to one of Owens' claims of ineffective assistance, that Owens had admitted to drinking on the evening of the assault. We disagree that the trial court made such a finding. In his RCr 11.42 motion, Owens argued that his trial counsel was ineffective by failing to ask for a continuance when the assault charge was amended from one of intentional behavior to one of wanton behavior. When addressing this argument, the trial court stated:

[t]he Commonwealth counters that a dismissal without prejudice demonstrates nothing of evidentiary value nor would it controvert the testimony of Deputy Lawson that the defendant admitted that he had been drinking on the evening of the assault and that at the time of his arrest Owens appeared to be intoxicated.

Contrary to Owens' interpretation of the above language as a factual finding by the trial court, it is actually just a recitation of the Commonwealth's counter-argument. Accordingly, we perceive no error of the trial court.

Finally, we shall address Owens' motion for supplemental citation of additional memorandum and authority, to which no response was filed. Having considered the motion, the Court ORDERS the motion be, and it is hereby, GRANTED. Owens argues that he was entitled to effective assistance of counsel on his RCr 11.42 motion as well as for the present post-conviction appeal. We disagree.

We have considered Owens' citations to the United States Supreme Court's opinions in *Martinez v. Ryan*, 132 S.Ct 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, 133 S.Ct 1911, 185 L.Ed.2d 1044 (2013), and we hold that these cases do not apply in Kentucky. See *Shane v. Commonwealth*, 2012-CA-000914-MR, 2013 WL 6198353 (Ky. App. Nov. 27, 2013) ("The distinction between the circumstances in *Martinez* and those surrounding Shane's appeal, as well as the prevailing weight of authority declining to extend *Martinez* in states like Kentucky, is too significant to ignore. Though a split in authority may exist across federal circuits, and though the recent *Trevino* decision has only added to this uncertainty, our reading of *Martinez* along with authority in the Sixth Circuit and the federal courts within our Commonwealth lead us to conclude that *Martinez* lends no meaningful support to Shane's assertion that his post-conviction claims equated to a direct appeal."); see also *Denny v. Commonwealth*, 2011-CA-001232-MR, 2012

WL 2604599 (Ky. App. July 6, 2012), *reh'g denied* (Sept. 7, 2012) (“Although we find the logic quoted above from the United States Supreme Court's decision in *Martinez* persuasive, the Kentucky Supreme Court has specified that there is no right to the effective assistance of counsel in post-conviction proceedings in Kentucky, and we are bound by that decision. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010); *Bowling*, 981 S.W.2d at 552; *see also Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). Consequently, there was no palpable error affecting Denny's rights because, pursuant to Kentucky law, he had no right to the assistance of post-conviction counsel.”). Furthermore, Owens did not raise this argument below or in his brief, and it is therefore not properly before this Court for review. “[T]his Court is without authority to review that issue since the question was never properly before the lower court.” *Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky. App. 1998), citing *Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

For the foregoing reasons, the June 18, 2012, order of the Simpson Circuit Court is affirmed.

ALL CONCUR.

ENTERED: August 8, 2014

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

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