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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001306-MR

PHILLIP LEROY WINES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 05-CR-001921

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Phillip Leroy Wines, *pro se*, has appealed an order entered July 2, 2012, by the Jefferson Circuit Court denying a motion to vacate, set aside or correct sentence pursuant to RCr[1] 11.42. Having reviewed the record, the briefs and the law, we affirm.

FACTS

[1] Kentucky Rules of Criminal Procedure.

Wines and James Hamilton were illegal drug dealers. Wines allowed Hamilton to store drugs in his home in return for using some of Hamilton's inventory. Both men were romantically involved with a woman named Angela Nelson. Hamilton's relationship with Nelson was tumultuous, but while Nelson was committed to remaining with him, she would turn to Wines for refuge. Jealousy over Nelson erupted between the two men and in June 2005, Wines stabbed Hamilton to death with a pocket knife. Nelson was the Commonwealth's prime witness at trial where a jury convicted Wines of murder, second-degree assault,[2] tampering with physical evidence and being a second-degree persistent felony offender (PFO II). Wines was sentenced to a total of forty-five years.

Wines filed a direct appeal alleging the murder charge should have been severed from the April 2005 assault on Micah Brashear; the instruction on extreme emotional disturbance (EED) was flawed; Wines should have benefitted from amendments to the self-defense statute; a prior consistent statement should have been excluded; and the medical examiner should not have been allowed to testify about blood spatter and cast off. The Supreme Court of Kentucky affirmed the conviction. *Wines v. Commonwealth,* No. 2007-SC-000081-MR, 2009 WL 1830805 (Ky. 2009, unpublished).

In December 2009, Wines filed a *pro se* motion to vacate the conviction alleging seventeen instances of attorney ineffectiveness and requested an evidentiary hearing. In an abundance of caution, post-conviction counsel was

[2] The victim of the assault was Micah Brashear, not Hamilton.

appointed but chose not to supplement the motion and memorandum. Thereafter, the trial court entered an eight-page order denying the RCr 11.42 motion. Finding no merit in any of the claims, the trial court concluded "[t]he allegations are adequately refuted by the record, or improperly raised in this forum, such that no evidentiary hearing is needed." This appeal followed.

ANALYSIS

We review a trial court's denial of an RCr 11.42 motion for an abuse of discretion. *Teague v. Commonwealth,* 428 S.W.3d 630, 633 (Ky. App. 2014) (*modified on denial of rehearing*). The test for abuse of discretion is whether the trial judge's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (*citing* 5 Am.Jur.2d Appellate Review § 695 (1995)).

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, 909 (Ky. 1998) (*overruled on other grounds*). To succeed on a claim of ineffective assistance of counsel, Wines must show counsel's performance was deficient and absent that deficiency, the outcome of his jury trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Importantly, Wines will not prevail if he simply describes something counsel did or failed to do, and does not demonstrate how that action or inaction was deficient under the law, and how that deficiency caused his conviction and forty-five-year sentence. In reviewing Wines's allegations, we examine

counsel's actions in light of prevailing professional norms based on a standard of reasonableness. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Additionally, Wines bears the burden of overcoming the strong presumption counsel's assistance was constitutionally sufficient or under the circumstances, "might have been considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

While *pro se* pleadings are held to lesser standards than those applied to pleadings drafted by lawyers, even *pro se* pleadings must give us "fair notice of the claim for relief to be sufficient." *Beecham v. Commonwealth,* 657 S.W.2d 234 (Ky. 1983) (internal citations omitted). Wines's brief does not comply with CR[3] 76.12. To name a few critical flaws, it is not divided into arguments with references to the record and legal citations, and there is no statement of preservation for any contention. Instead, there are twenty-one numbered paragraphs stating his version of the events, random case citations and occasional references to the appendix to his brief. While we can excuse *some* unfamiliarity with court rules by a *pro se* litigant, we will not practice the case for Wines and we will not go on a fishing expedition to find support for his woefully underdeveloped arguments. It is against this backdrop that we review the appeal.

We begin by reciting the numerous ways in which Wines maintains trial counsel provided less than reasonable legal representation. He claims trial counsel: should have requested a competency hearing for him because he is

[3] Kentucky Rules of Civil Procedure.

"bipolar II" and had neither slept nor taken his medication during the twelve days preceding the stabbing so he could remain alert and protect himself and Nelson from an attack by Hamilton; should have stressed Wines had "no duty to retreat"; should have introduced police reports documenting an assault and burglary committed by Hamilton on May 23, 2005; failed to reveal Hamilton had threatened Wines before the stabbing; failed to introduce Hamilton's March 2005 conviction for intimidating a participant in the legal process; failed to seek a directed verdict on the charge of tampering with physical evidence—a charge based on Wines's washing of the knife he used to fatally stab Hamilton—Wines claimed he washed the knife not to destroy evidence but because he believed Hamilton's blood was tainted with HIV; failed to investigate two men who were opening a nearby pool at the time of the stabbing and may have heard threats hurled by Hamilton; and should have revealed Wines had resumed seeing Aisha Ashby, a woman he "was on-and-off dating" to deflate the Commonwealth's theory that Wines was jealous of Nelson's[4] continuing relationship with Hamilton. These "bullet points" do not satisfy *Strickland's* two-prong formula for succeeding on a motion to vacate due to ineffective assistance of counsel. Many of the claims are easily explained as trial strategy, which we strongly presume to be the case. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Having shown neither deficient performance nor resulting

[4] In Nelson's "partial taped statement" which was played for the jury, she stated, "I guess [Wines] thought that I was gonna leave [Hamilton] and be with him. But the whole time, I kept tellin' [Wines], 'I'm not your girlfriend. I'm not your girlfriend.'" Thus, it is highly unlikely emphasizing Ashby would have jeopardized the strength of the Commonwealth's case.

prejudice as required by *Strickland*, the trial court did not abuse its discretion in denying RCr 11.42 relief.

Next, Wines has asserted several claims that will not be reviewed under RCr 11.42 because they could have been and, therefore, should have been raised on direct appeal. First, Wines alleges the trial court made several mistakes in ruling on evidentiary matters, to wit: erroneously excluded documents containing hearsay because the defense did not share them with the Commonwealth during discovery; allowed jurors to hear Wines thought witness Brian Langdon was a "narc," and allowed witness Mark Houghton to testify about Wines's prior drug deals; prohibited Nelson's impeachment with an outstanding bench warrant, and then gave Nelson preferential treatment by having the bench warrant set aside, denying a requested admonition, and denying a motion to recuse; allowed only a portion of Nelson's audiotaped statement to be played for jurors—eliminating the part in which she made contradictory statements, denied a requested mistrial and then tried to cure the error by telling jurors the omitted part was only "biographical" evidence; denied a motion to suppress statements Wines had made to police without being read his *Miranda*[5] rights; admitted a letter Wines had written to Hamilton while Wines was jailed after the assault on Brashear; allowed the medical examiner to testify about blood spatter evidence over defense objection in violation of RCr 7.24 and failed to convene a *Daubert*[6] hearing; and

[5] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 1694 (1966).

[6] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

failed to grant a directed verdict on the charge of second-degree assault of Micah Brashear[7] because it was unsupported by the evidence.

Additionally, Wines claims he was never arraigned on the charge of PFO II and, therefore, it was invalid. Alternatively, he argues that even if the PFO II charge was valid, it was prohibited on grounds of double jeopardy. He also claims the trial court erroneously denied challenges for cause to potential jurors, causing defense counsel to waste peremptory strikes. And, he claims the prosecutor argued a theory of the stabbing during closing argument that was unsupported by the evidence, and the Commonwealth failed to disclose the remaining portion of Nelson's police interview which he claims was exculpatory, but fails to explain how it would have insured his acquittal.

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[7] On direct appeal, Wines argued only that the assault charge should have been severed from the murder. The Supreme Court disagreed because in both instances,

> there was evidence tending to show that Wines planned to use self-defense as a pretext for a premeditated attack. Brashear testified that Wines, angry at Brashear for having allegedly brought a "narc" to Wines's home earlier that day, taunted him and tried to induce him to come onto Wines's property, where a self-defense claim might appear more credible. In the days leading up to Hamilton's death, furthermore, and also following the first honking incident just two or three hours prior to the killing, Wines called the police to report Hamilton's disturbances. Nelson testified that Wines told her he was lodging the police complaints to make Hamilton look like the aggressor, so that when he finally did kill Hamilton he would get off. Both crimes, therefore, reflected a common scheme and each provided evidence that the other crime had been similarly planned to appear as an act of justified self-defense. Thus evidence of each alleged act of self-defense would have been admissible under KRE 404(b) in a separate trial of the other. Given this mutual admissibility, the trial court did not abuse its discretion by denying Wines's motion to sever.

Wines, at *4.

Each of these claims could have been and, thus, should have been raised on direct appeal. *Gross v. Commonwealth,* 648 S.W.2d 853, 857 (Ky. 1983) (direct appeal must state "every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken"). Wines does not couch any of these claims in terms of error by trial counsel in an attempt to bring them within the purview of RCr 11.42. Allowing him to retry issues that could and should have been raised on direct appeal would defeat the purpose of an RCr 11.42 motion, and that we will not do. *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972). Hence, the trial court correctly denied the requested relief.

Wines also claims post-conviction counsel was ineffective in that she did not supplement his *pro se* motion, and in a letter to Wines indicated she had discussed the case with Wines's wife without his express permission to do so.

> In *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991), the United States Supreme Court held that "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." (citations omitted); *see also Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989).

Bowling v. Commonwealth, 981 S.W.2d 545, 552 (Ky. 1998). Apart from not raising the issue in the trial court—and, thus, not preserving it for our review—as explained above, *Strickland* has not been extended to apply to legal representation provided by post-conviction counsel. Hence, the claim is without merit.

Next, Wines claims the cumulative effect of all the errors requires reversal. However, discerning no error, we can discern no cumulative error.

Finally, Wines was entitled to a hearing only if his allegations could not be conclusively resolved on the face of the record. *Fraser*, 59 S.W.3d at 452-53. In light of the allegations advanced, and the state of the record, we are convinced no hearing was required.

WHEREFORE, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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