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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000036-MR

WALTER L. BUCKNER — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 09-CR-00302

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Walter L. Buckner, *pro se*, has appealed from the Daviess Circuit Court's denial of his RCr[1] 11.42 motion for post-conviction relief. He contends the trial court erred in denying the motion without first convening an evidentiary hearing to resolve his allegations of ineffectiveness of his trial counsel

[1] Kentucky Rules of Criminal Procedure.

which he believes were not refuted on the face of the record. After a careful review, we affirm.

Following a jury trial convened on November 16 and 17, 2009, Buckner was convicted of trafficking in a controlled substance in the first degree (subsequent offense),[2] possession of drug paraphernalia,[3] and being a persistent felony offender in the first degree (PFO I).[4] He received an enhanced sentence of fifty years' imprisonment. The Supreme Court of Kentucky affirmed Buckner's conviction and sentence[5] on direct appeal in an unpublished opinion.[6]

On November 28, 2012, Buckner filed a motion for post-conviction relief pursuant to RCr 11.42 raising four allegations of ineffective assistance by his trial counsel and requesting an evidentiary hearing. Apparently, Buckner's original appointed counsel retired from the practice of law a few weeks prior to his scheduled trial date. New counsel was appointed who represented Buckner throughout the remainder of the proceedings. The allegations raised in Buckner's RCr 11.42 motion relate solely to the acts and omissions of the latter counsel, who shall hereinafter be referred to as trial counsel. Buckner contended trial counsel had been ineffective in failing to inform him of the facts and law related to his

[2] Kentucky Revised Statutes (KRS) 218A.1412, a Class B felony.

[3] KRS 218A.500, a Class A misdemeanor.

[4] KRS 532.080(3).

[5] The Supreme Court vacated a portion of the sentence which imposed fines and court costs. However, Buckner's prison term remained unaffected.

[6] *Buckner v. Commonwealth*, 2010-SC-000067-MR (February 23, 2011).

case, failing to adequately perform a pretrial investigation, refusing or failing to file three pretrial motions, and not striking a potential juror from the venire. Numerous sub-arguments were advanced within this larger framework. He alleged that absent these errors, he would have accepted a plea offer from the Commonwealth rather than insisting on going to trial. The Commonwealth filed a response countering each of Buckner's allegations. Without first convening an evidentiary hearing, the trial court denied Buckner's motion in a nineteen-page order entered on December 17, 2012. This appeal followed.

Buckner now contends the trial court erred in denying his motion for relief without the benefit of an evidentiary hearing. He contends the alleged failures of his trial counsel cannot be refuted on the face of the record, thereby requiring a hearing to determine the veracity of his claims. On appeal, he advances the same four chief claims of ineffectiveness of trial counsel he presented to the trial court. We disagree with his assertions.

Prior to considering the arguments presented, we note first we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. "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)).

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's

performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As established in *Bowling v. Commonwealth,* 80 S.W.3d 405 (Ky. 2002):

> The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: 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 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. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). 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. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

*Bowling*, at 411–12. Additionally, we note that the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances, counsel's action "might have been considered sound trial strategy." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2066. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010).

On the issue of whether an evidentiary hearing is necessary, *Fraser v. Commonwealth,* 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, Buckner is only entitled to an evidentiary hearing if there are allegations that cannot be conclusively resolved on the face of the record. In determining whether the allegations in a post-trial motion to vacate, set aside or correct sentence can be resolved on the face of the record, the trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Id.* at 452–53. Where the trial court has denied an RCr 11.42 motion without a hearing, a reviewing court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *See Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We review the arguments of the parties with these standards in mind.

Buckner first contends trial counsel failed to discuss with him the evidence, facts or events leading to his arrest prior to his trial. He admits he "was aware of the evidence against him because his original trial counsel did discuss the case with him." However, Buckner avers that while his original counsel informed him a jury could not convict him of trafficking in cocaine because police had found only residue rather than any "useable quantity" of the drug, trial counsel did not discuss this legal theory with him. He argues that since trial counsel never informed him he could, in fact, "be found guilty of trafficking based off of a (sic) unusable quantity of cocaine residue," her performance fell below reasonable

standards and therefore, his decision to reject the Commonwealth's plea offer of ten years' imprisonment and insist on proceeding to trial could not have been knowingly and voluntarily made. Further, because the record contains no evidence of the content of confidential attorney-client discussions, Buckner argues the trial court was required to convene an evidentiary hearing to explore this allegation. We disagree.

Buckner's assertion that counsel's ineffective assistance changed the outcome of the plea process is simply without merit. A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2064-65; *Commonwealth v. Tamme*, 83 S.W.3d 465, 470 (Ky. 2002); *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998) (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997)). To establish actual prejudice, a movant must show reasonable probability that the outcome of the proceeding

would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Bowling*, 80 S.W.3d at 411-12.

It is undisputed that Buckner was acutely aware of the facts and allegations against him as evidenced by his statements to police during and after his arrest, his testimony at trial, and his admission that his prior counsel had gone over the case with him in detail. Buckner does not contend trial counsel was unaware of the evidence against him, only that she failed to fully discuss it with him before recommending that he accept the plea offer. Although he contends this lack of communication constituted subpar representation, the Sixth Amendment's right to counsel does not "guarantee[] a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983). We cannot say the alleged failure by counsel to discuss the factual background with Buckner constituted ineffective assistance.

It is likewise undisputed trial counsel advised Buckner, based on her professional opinion, that he should accept the Commonwealth's plea offer. Such advice cuts squarely against Buckner's allegation that trial counsel did not inform him of the possibility of conviction. Buckner's chief complaint appears to be that trial counsel failed to refute his previous counsel's belief that drug residue formed an insufficient evidentiary basis to support a trafficking conviction. While Buckner continues to focus on the small quantity of cocaine residue seized by police, he fails to consider the totality of the evidence against him, including his admissions to police that he had been selling cocaine, had removed cocaine from

his residence prior to the officers' arrival, and deposited proceeds from the drug sales into his bank account. Such overwhelming evidence of Buckner's guilt would clearly have colored trial counsel's advice to accept the plea agreement, regardless of the amount of cocaine or residue located by police. As correctly noted by the trial court, Buckner's reliance on prior counsel's advice to the exclusion of trial counsel's recommendation cannot form the basis for relief under RCr 11.42 simply because the latter's predictions come true.

Further, and most importantly, Buckner has failed to show that any alleged defect in trial counsel's performance related to discussion of the cocaine residue changed the outcome of the plea process or prejudiced him in any way. Intensive plea negotiations had been ongoing long before trial counsel's involvement in the matter but had been unsuccessful, even though Buckner was aware of the great weight of evidence against him. Buckner's self-serving assertion that he would have accepted the Commonwealth's plea offer had trial counsel merely informed him of her belief that a jury might convict him is simply unbelievable based on our review of the record. We can discern no prejudice from counsel's actions. Absent a showing of actual prejudice, relief under RCr 11.42 is unavailable. *Strickland*.

Buckner next contends trial counsel failed to perform an adequate pretrial investigation and was therefore ineffective. He contends it is impossible for "any competent attorney" to conduct a sufficient pretrial investigation without first "conducting an in debt (sic) interview with their prospective client." He

asserts a full investigation would have revealed the existence of numerous unnamed witnesses who would have been able to testify at trial as to his character, along with exculpatory evidence regarding ownership of the containers in which the cocaine residue was located and ownership of the trash collected by police officers during their investigation, and evidence of police threats and coercion precipitating his confession. Notably, however, Buckner's allegations are based on speculation and supposition and generally fail to indicate with specificity how any of these actions or inactions adversely affected the outcome of his trial.

Generally, decisions regarding witness selection will not be second-guessed and "merely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal." *Robbins v. Commonwealth*, 719 S.W.2d 742, 743 (Ky. App. 1986). Further, as previously stated, a strong presumption exists that trial counsel's actions were the result of sound trial strategy, *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2066, and the heavy burden is on Buckner to overcome that presumption. Buckner offers nothing more than unsupported beliefs and bald assertions that trial counsel's investigation was insufficient and that further investigation would have revealed exculpatory testimony and evidence. Nevertheless, even had counsel conducted the investigation according to Buckner's standards and obtained all of the information and evidence Buckner claims would have been revealed thereby, he has failed to show that the outcome of the trial would have been different or that his conviction would have been rendered invalid. Having again failed to show

how he was prejudiced by counsel's alleged failures, Buckner has failed to carry his burden under *Strickland* so as to entitle him to relief.

Third, Buckner argues counsel's failure to file three "non-frivolous pre-trial motions" constituted ineffective assistance. He contends counsel should have requested a continuance, moved to suppress the fruits of the search, and moved to suppress his coerced statement to police. These arguments are without merit.

Without support, Buckner contends that trial counsel was unprepared for trial and should have, therefore, moved for a continuance. Even a cursory review of the record reveals trial counsel announced "Ready" at the start of the trial and vigorously and aggressively participated in the examination of witnesses. She showed great familiarity with the facts and law applicable to the case. Counsel had several months to prepare for trial and Buckner has failed to indicate why more time would have been necessary or would have changed trial counsel's strategy. We discern no error in failing to file this unnecessary motion.

Next, Buckner believes counsel should have moved to suppress evidence seized during the police search of his home. He again gives no support for his contention nor does he indicate any evidence or rationale for why the search or resultant seizure was invalid, nor that the underlying search warrant was infirm in any way. We believe any motion to suppress would have been summarily rejected as it would have clearly been baseless. "An attorney cannot be ineffective

for failing to raise a non-meritorious claim." *Williams v. Commonwealth*, 336 S.W.3d 42, 47 (Ky. 2011).

Buckner likewise fails to provide a factual or legal basis supporting his claim that trial counsel should have moved to suppress his allegedly coerced statement to police. Our review of the record bears out the trial court's determination that "no facts support such claim." Buckner alleged his confession was coerced because of overly aggressive interrogation techniques by a federal Drug Enforcement Agency (DEA) representative. However, even assuming his allegations are true, the statements and confession used during trial were secured outside the presence of the DEA agent and after Buckner had been read his *Miranda* warning. The taint of any alleged misconduct by the DEA agent was thereby removed and there would be no basis for a motion to suppress Buckner's confession. *See Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). As before, the failure of trial counsel to raise this non-meritorious claim will not be deemed ineffective. *Williams*.

Next, Buckner argues counsel was ineffective for failing to remove a potential juror from the venire. In support of his allegation, Buckner alleges the juror was "very close friends of the Commonwealth Attorney and his wife" and would therefore be biased against the defense. He admits the decision to strike a potential juror by peremptory strike is a matter of trial strategy left to the discretion of trial counsel but, quoting *Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004),

argues the decision to not question this juror regarding the relationship was "so ill-chosen that it permeates the entire trial with obvious unfairness." We disagree.

A careful review of the record reveals trial counsel was aware the potential juror knew not only the Commonwealth Attorney but also the supervisor of the Office of Public Advocacy. This fact came to light during *voir dire* when the juror approached the bench to inform the court of his familiarity with both supervising attorneys. The trial court questioned the juror regarding whether his relationship with these attorneys would have an impact on his ability to be impartial, to which the juror responded in the negative. Even armed with this information, trial counsel made the strategic choice to not strike this juror from the panel. This strategic decision is entitled to considerable deference, *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, and we are pointed to no valid reason to undermine trial counsel's assessment of this potential juror.

Finally, we note all of the allegations contained in Buckner's motion for relief could be conclusively resolved on the face of the record. Thus, the trial court's decision not to convene an evidentiary hearing was not infirm. *Fraser*.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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