

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000052-MR

RICHARD COMBS

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 10-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: A Perry County jury convicted Richard Combs of trafficking in a controlled substance (methadone) in the first degree,¹ and trafficking in a controlled substance (hydrocodone) in the second degree.² As a result, he was

¹ Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

² KRS 218A.1413, a Class D felony.

sentenced to fifteen years in prison.³ A panel of this Court affirmed the matter-of-right appeal he filed jointly with his wife. *Combs v. Commonwealth*, 2012 WL 1254775 (Ky. App. 2012, unpublished). Combs now appeals the subsequent denial of a RCr⁴ 11.42 motion in which he claimed counsel was ineffective and the trial court should have convened an evidentiary hearing before issuing its ruling. Having reviewed the record, the briefs and the law, we affirm.

FACTS

While investigating a theft of jewelry and a handgun in early March 2010, Hazard City Police questioned H.M., the victim's seventeen-year-old brother. H.M. admitted committing the theft with others to pay Combs the more than \$300.00 he owed him for OxyContin he had been buying on credit since November 2009. H.M. then accompanied police to the Combs residence where they observed at least three individuals arrive, enter the home, and exit the home one to two minutes later. This activity led officers to believe drugs were being sold in the home.

A "knock and talk" occurred at the Combs home on March 5, 2010.

When the door was answered, permission to search the home was requested and granted by both Combs and Betty. Upon finding part of a 30 mg OxyContin tablet

³ Combs was tried jointly with his wife, Betty. She was convicted of complicity to commit trafficking in a controlled substance (methadone) in the first degree. She was acquitted of trafficking in the second degree (hydrocodone). According to the opinion affirming the direct appeal, Betty received a five-year sentence, probated for five years. (The Commonwealth's brief states Betty was sentenced to two years, probated for five years.) Betty is not a party to this appeal.

⁴ Kentucky Rules of Criminal Procedure.

under the bed in the master bedroom, the search was halted and a search warrant was obtained. Execution of the search warrant revealed eighteen methadone pills, twenty-two hydrocodone pills, and two stacks of cash totaling \$2,119.00.

Thereafter, Combs and Betty were arrested and indicted in June 2010. A jury trial occurred October 11 and 12, 2010, with both being convicted as previously noted.

In October 2012, Combs moved the trial court to vacate the judgment pursuant to RCr 11.42 claiming attorney ineffectiveness. Without convening an evidentiary hearing, on December 6, 2012, the Perry Circuit Court issued a three-page order denying the motion. This appeal followed.

ANALYSIS

We review a trial court's denial of a 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):

[t]he *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. "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000). Additionally, the movant must 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.

Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001) controls whether an evidentiary hearing should have been convened. Combs was entitled to a hearing only if his allegations could not be conclusively resolved from the face of the record. In determining whether 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. We review the arguments raised by Combs with these standards in mind.

Combs complains trial counsel did not vociferously object to or demand sanctions for a perceived discovery violation. He claims the Commonwealth failed to disclose a taped statement H.M. gave to police until a week before trial and his attorney failed to view the tape, object to its admission or seek to have the prosecutor sanctioned for the untimely disclosure. According to the record, the prosecutor provided the tape to the defense upon learning of it—about a week before trial—and defense counsel reviewed the tape that day or shortly thereafter. The trial court concluded no error occurred because defense counsel was aware of the tape for about a week before trial giving him plenty of time to review it, and the Commonwealth never attempted to introduce the tape which

could have been used by the Commonwealth only to rebut a claim of recent fabrication had [H.M.’s] trial testimony been at variance with statements he made during the police interview. This never became an issue.

We agree with the trial court. We discern no discovery violation, no error by defense counsel, no prejudice to the defense, and no abuse of discretion by the trial court. *English*, 993 S.W.2d 941.

Combs also claims trial counsel failed to call Jason Franks as a witness. H.M. testified he was introduced to Combs by Franks. Combs argues

defense counsel should have called Franks as a witness to impeach H.M. because Franks has denied introducing him to H.M. After his conviction, Combs procured a statement from Franks that he did not introduce H.M. to Combs.

How H.M. met Combs was not an integral part of trial.⁵ The main question was whether Combs trafficked in illegal drugs. As argued by the Commonwealth below, “[i]n this case, it would have been strictly a collateral issue, one not central to the issue of guilt, whether Franks actually introduced [H.M.] to Combs. [Combs] was convicted of possession with intent to traffick, not selling to [H.M.] specifically.” The trial court found the Commonwealth’s position to be persuasive, noting “Franks’ testimony would have been impeachment on a collateral matter and thus inadmissible,” citing Lawson, *The Kentucky Evidence Law Handbook* (3rd ed. 1993) § 4.10. Impeachment on collateral facts is prohibited to minimize jury confusion and to avoid a proliferation of side issues. *Rowe v. Commonwealth*, 50 S.W.3d 216, 224 (Ky. App. 2001). We will not fault defense counsel for not doing something prohibited by case law. Again, we discern no error by trial counsel and no abuse of discretion by the trial court.

Combs maintains trial counsel failed to conduct *voir dire* of potential jurors. Our review of the trial shows counsel questioned the panel fully and adequately. The statement in his brief that “Appellant’s attorney failed to ask any questions of the potential jurors” is blatantly wrong and wholly inconsistent with

⁵ Combs’s memo suggests he wanted to argue to the jury he had never met H.M. It is unlikely such a story would have been believed by jurors since H.M. took officers to the Combs’ home where officers observed a pattern of drug activity.

the videotaped trial wherein defense counsel questioned both the panel as a whole and individual jurors at the bench. Without naming anyone Combs believes should have been stricken from the panel or the jury that was seated, Combs merely posits, “there were several witnesses on [Combs’s] jury who had if (sic) been up to [Combs], would have been relieved from jury duty by peremptory challenge.” Without identifying who he believes should have been stricken and why—RCr 11.42(2) requires a movant to state both specific grounds for a challenge and the facts upon which relief is sought—we cannot adequately review the claim and cannot grant relief. Thus, we discern no error.

In his brief to this Court, Combs claims counsel should have prepared him to testify in his own defense. This claim, however, was not argued to the trial court. Combs states it “was mentioned as part of the narrative of counsel’s failure to investigate; prepare and present a defense at trial in [the] RCr 11.42 motion and memorandum.” However, he has not provided a record citation to the argument as required by CR⁶ 76.12(4)(c)(v).

Furthermore, whether counsel should have prepared Combs to testify at trial and put him on the witness stand was not addressed by the Commonwealth in its response to the trial court nor by the trial court in its order. We are a Court of review. Without a ruling on the issue by the trial court—and no request by Combs for a specific finding under CR 52.04—there is nothing for us to review. *Todd v. Commonwealth*, 716 S.W.2d 242, 248 (Ky. 1986). Moreover, were we to

⁶ Kentucky Rules of Civil Procedure.

speculate on the foregoing undeveloped issue, Combs has not convinced us his testimony alone would have secured his acquittal. Plus, it would have subjected him to cross-examination by the Commonwealth which defense counsel may have been trying to avoid. Therefore, we presume the decision not to put Combs on the witness stand was reasonable trial strategy and discern no error. *Strickland*, 466 U.S. at 689.

All claims being resolved on the face of the record, as the trial court found, no evidentiary hearing was required. *Fraser*, 59 S.W.3d 448.

In reviewing the case as a whole, we deem defense counsel to have provided active, adequate and reasonable legal representation. For the foregoing reasons, the order of the Perry Circuit Court denying RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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