

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000949-MR

KEVIN L. SIMMS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 08-CR-002149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Kevin L. Simms, *pro se*, appeals from an order of the Jefferson Circuit Court summarily denying his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Simms alleges: (1) he was denied his right to a speedy trial; (2) he received ineffective assistance of counsel because trial counsel did not move the trial court to dismiss the indictment after the

trial court found his right to speedy trial had been violated; (3) trial counsel was ineffective because he did not appeal the trial court's dismissal of his previous indictments on the same charges; and (4) trial counsel was ineffective when he failed to move for a directed verdict and requested an instruction on a lesser included offense. Having reviewed the record and applying the appropriate standard under RCr 11.42, we affirm.

In September 2003, Simms was indicted by the Jefferson County Grand Jury (03-CR-2555) for the murder of Charles Miller, II. He remained out of custody on a \$100,000, ten percent, bond pending trial. After Simms was arrested on the charge of possession of marijuana, his bond was increased by \$25,000, ten percent.

The trial was scheduled to commence on October 5, 2004. On September 20, 2004, the trial court granted the Commonwealth's motion to reassign the trial date in order for testing of a firearm to be completed. On September 27, 2004, Simms filed a speedy trial motion.

A trial was scheduled for January 11, 2005. The Commonwealth again asked for a continuance because of a trial on the same date on an in-custody defendant. The trial date was reassigned and the trial court reduced the bond to the original \$100,000, ten percent.

On February 11, 2005, Simms was indicted on one count of tampering with physical evidence, 05-CR-0474, relating to a firearm seized from his home and suspected to be the weapon used to murder Miller. Over defense counsel's

objection, the Commonwealth's motion to consolidate that case with 03-CR-2555 was granted. Simms moved for a speedy trial on the tampering charge as he had on the murder charge.

At a hearing held in April, 2005, the Commonwealth informed the trial court that it was unable to subpoena two essential witnesses for trial and was granted a continuance. Subsequently, the trial court modified the conditions of Simms's bond to \$50,000 posted property.

In October, 2005, the Commonwealth again made a motion to continue the trial date because it had been unable to serve an essential eyewitness, or alternatively, to dismiss without prejudice. At that time, Simms moved to dismiss with prejudice based on a speedy trial violation. Simms objected to dismissal without prejudice.

After hearing counsel's respective arguments, the trial court orally ruled it was granting the Commonwealth's motion to dismiss without prejudice. The Court advised Simms it would consider a motion to vacate pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 in the event the Commonwealth was unable to locate the material witness within a reasonable period of time following dismissal. However, the trial court's written order recited it was a dismissal without prejudice based on a speedy trial violation.

On February 1, 2006, Simms filed a motion to set aside the order dismissing without prejudice and for an order dismissing with prejudice again based on a

speedy trial violation. The trial court set forth the history leading to the CR 60.02

motion as follows:

Mr. Simms was indicted by the Jefferson County Grand Jury in September, 2003 based upon the death of Charles Miller. The Commonwealth eventually dismissed the charges based upon the fugitive status of a material witness. The dismissal was entered in this Court and was without prejudice. This Court agreed, upon filing of a motion by Mr. Simms, to review the file to determine whether the dismissal should be with prejudice rather than without prejudice at a future date. Said date has arrived and Mr. Simms moves this Court to amend the dismissal.

The trial court denied the motion finding there were no extraordinary circumstances warranting a dismissal with prejudice.

On July 17, 2008, the Jefferson County Grand Jury indicted Simms charging him with (1) count of murder, and (1) count of tampering with physical evidence. On October 1, 2008, trial counsel filed three separate motions: (1) a motion to dismiss for speedy trial violation; (2) a motion to dismiss the tampering charge or, in the alternative, to sever the tampering charge for trial; and (3) a motion for a speedy trial. The trial court denied the motion to dismiss and to sever the murder and tampering charges for trial. A jury trial was commenced on July 14, 2009.

Simms was convicted of second-degree manslaughter and tampering with physical evidence. After the verdict, Simms and the Commonwealth entered into a plea agreement pertaining to sentencing. Entitled "WAIVER OF JURY SENTENCING PROCEEDING," the form agreement provided as follows:

The defendant, Kevin Simms, understands that he/she has a right to a jury determination of sentencing pursuant to RCr 9.26(1) and KRS 532.055 and that by the agreement in this case he/she waives the right to a jury determination of sentencing for the underlying convictions of Manslaughter II (5–10 years) [and] TWPE (1–5 years).

And hereby agrees to the Commonwealth's recommended sentence as set forth below: 10 yrs on Manslaughter II, 5 yrs on TWPE to run concurrent for a total of 10 years, Commonwealth objects to probation; Defendant agrees to waive any and all appeals [in] this case & 03CR2555 & the 05CR0474 indictment as well.

The Commonwealth and defendant further agree that: The defendant hereby waives his right of appeal regarding any issues raised during pretrial hearings or during the trial of this action.

The form was signed by Simms, his defense counsel, and the Commonwealth.

Upon receiving the form, the trial court reiterated to Simms that he was forfeiting his right to appeal. Simms stated that he understood.

Shortly after executing the agreement, on August 14, 2009, Simms filed a motion to withdraw his waiver and offered to accept the maximum sentence in exchange for his right to appeal. The trial court denied the motion and sentenced Simms in accordance with the sentencing agreement. Simms's sentence was ordered to run consecutive with a three-year sentence he was serving on a 2007 indictment.

Simms appealed to this Court arguing he was not adequately informed of his waiver of his right to appeal because “neither the written form nor the trial court explicitly told him that his right to appeal is constitutional.” *Simms v.*

*Commonwealth*, 354 S.W.3d 141, 143 (Ky.App. 2011). This Court affirmed the trial court noting Simms acknowledged in writing and orally in open court that he was forfeiting the right to appeal but did not foreclose other avenues of relief stating that there are a “few limited issues [that] cannot be waived[.]” *Id.* at 144. As noted by the federal court in *U.S. v. Rhodes*, 330 F.3d 949, 952 (7th Cir. 2003), one issue not waived is that the waiver was “made without the effective assistance of counsel.”

After this Court rendered its opinion affirming the judgment of the Jefferson Circuit Court, Simms filed a motion to vacate his sentence pursuant to RCr 11.42. The motion was summarily denied and Simms appealed. Prefatory to discussing each of Simms’s claims, we must determine whether it is in the nature of an ineffective assistance claim or one that was waived by the sentencing agreement.

Simms argues he could not be prosecuted and convicted on the 2008 indictment because the trial court was required to dismiss the prior indictments with prejudice after finding the Commonwealth violated his right to a speedy trial. This alleged error by the trial court also anchors Simms’s alleged ineffective assistance of counsel claims. Therefore, we provide some additional background.

Subject to rare exceptions, a trial court has no authority to dismiss, amend, or file away a criminal charge based on a good indictment without the Commonwealth’s consent. *Commonwealth v. Smith*, 354 S.W.3d 595, 597 (Ky. 2011). However, a denial of a right to speedy trial is one of those exceptions. *Id.*

“[T]he Sixth Amendment to the U.S. Constitution affirmatively bestows upon a criminal defendant the right to a speedy trial.” *Keeling v. Commonwealth*, 381 S.W.3d 248, 257 (Ky. 2012).

In *Keeling*, the Court stated the consequences of a speedy trial violation: “[I]f this right is violated the case must be dismissed and further prosecution is barred.” *Id.* The Court pointed out that this “is an obvious result given that permitting further prosecution would exacerbate the violation.” *Id.* If, as Simms suggests, the trial court granted his motion to dismiss based on speedy trial grounds, dismissal with prejudice would have been the appropriate course of action.

The trial court orally ruled at the hearing’s conclusion that it was granting the Commonwealth’s motion to dismiss without prejudice to secure additional time to locate a crucial witness. However, it added the caveat that it would reconsider its position if the Commonwealth failed to reindict Simms within a reasonable time.

Apparently, through mistake, the trial court signed the order tendered by Simms reciting the speedy trial violation. However, when the trial court reconsidered its order upon the filing of Simms’s CR 60.02 motion, it considered and rejected Simms’s speedy trial argument.

Generally, when there is a conflict between an oral pronouncement and a written order, the written order controls. *Terry v. Commonwealth*, 253 S.W.3d 466, 477 (Ky. 2007). In this case, there is an oral ruling and two written

orders. Any ambiguity in the trial court's initial written order was later clarified in its subsequent written order denying Simms's CR 60.02 motion based on a speedy trial violation. Thus, we reject Simms's factual assertion that the trial court granted his motion to dismiss based on a speedy trial violation.

Even if the record did not clearly refute Simms's factual claim, as a matter of law, Simms cannot raise alleged errors by the trial court because of his waiver of any right to appeal. *Simms*, 354 S.W.3d at 144. Thus, to the extent Simms's claim relies on alleged errors by the trial court, any such errors were waived by his sentencing agreement wherein he expressly waived any right to appeal. *Id.*

Ineffective assistance claim's are collateral attacks on a criminal judgment and governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Quoting *Strickland*, in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002), the Court set forth the two-pronged inquiry in an ineffective assistance of counsel claim:

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.

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. (internal citations omitted).

RCr 11.42(5) states in part that if there is a “material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]” A “trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). However, an evidentiary hearing is not required if the record refutes the claim of error or when the allegations, even if true, would be insufficient to invalidate the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Simms alleges his counsel was ineffective because he did not move the trial court to dismiss the 2008 indictment for violation of his right to a speedy trial. The record clearly refutes his contention. Counsel filed a motion to dismiss for a speedy trial violation less than three months after the indictment was returned.

Simms also alleges his trial counsel was ineffective when his trial counsel did not appeal the dismissal without prejudice of the original indictments. Simms is correct that dismissal of an indictment without prejudice is a final and appealable order. *Commonwealth v. Sowell*, 157 S.W.3d 616, 617 (Ky. 2005). However, the issue is not whether Simms’s trial counsel could have appealed; the question is whether trial counsel’s failure to appeal constitutes ineffective assistance of counsel under the *Strickland* standard.

Even if properly raised as an ineffective assistance of counsel claim, to be entitled to a hearing, Simms was required to allege and the record must not refute that there is a reasonable probability that an appeal of the order denying his motion based on a speedy trial violation would be successful within a reasonable probability. *Bowling*, 80 S.W.3d at 412.

A speedy trial analysis requires that the court examine four factors: “(1) the length of delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant caused by the delay.” *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001). “[D]etermining whether a delay was presumptively prejudicial requires examining two elements: the charges and the length of the delay.” *Id.*

The charges against Simms, murder and tampering with the evidence, are two of the most serious in our penal system. The reason for the delay, the Commonwealth’s inability to locate a crucial witness, is “a valid reason” and not one for which the Commonwealth should be readily penalized. *Id.* at 570. The passage of time between the first indictment and dismissal of the charges was just over two years and not one that this Court believes unconstitutionally prolonged under the circumstances.

Moreover, Simms failed to allege how he was prejudiced by the delay in his trial. During the pendency of the indictment, he was not in custody and he fails to state any other facts to demonstrate prejudice.

In light of the rigorous test for the outright dismissal of criminal charges with prejudice and the glum prospect for a successful appeal on the denial of Simms speedy trial motion, we cannot fault counsel for not accepting partial victory in the dismissal of the indictment rather than further delay the case by appealing. “[W]hat practitioner, successful in having the indictment against his client dismissed without prejudice, would consider appealing that decision to this Court.” *Smith*, 354 S.W.3d at 597. While perhaps in another circumstance diligent counsel might pursue such an appeal where the likelihood of a successful appeal was slim and the likelihood of the Commonwealth being able to locate a crucial witness likewise is slim, it cannot be said that Simms’s trial counsel was ineffective for not appealing the trial court’s order dismissing the indictment.

Simms’s final contention is somewhat incomprehensible. He argues that his trial counsel was ineffective for failing to move “to dismiss the second degree manslaughter charge, or for a directed verdict of acquittal” on the grounds that the Commonwealth failed to prove the shooting of Miller was a wanton act under KRS 507.040. He readily admits that there was evidence that he intentionally shot Miller with the intent to kill him.

The record again refutes Simms’s ineffective assistance of counsel claim in that his trial counsel moved for a directed verdict. The record also refutes that counsel was anything but diligent in requesting a lesser included offense instruction.

This Court is more commonly presented with the argument that trial counsel's *failure* to request a lesser included offense instruction was ineffective assistance rather than the *request* for a lesser included offense instruction was ineffective assistance. While sometimes an all or nothing defense is the only viable strategy, Simms's case presented the classic lesser included offense strategy. As Simms admits, the Commonwealth produced evidence that he shot Miller intending to kill him. However, the requisite element of intent to murder was not established by direct evidence making the lesser included offense instruction a more than reasonable trial strategy.

Based on the forgoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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