

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

NO. 2014-CA-001618-MR

LARRY R. ORDWAY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE ANDREW C. SELF, JUDGE  
ACTION NO. 07-CR-00713

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Larry R. Ordway appeals from an order of the Christian Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to set aside his conviction due to ineffective assistance of counsel. Finding no error, we affirm.

After Lillian Quarles (Lillian) provided a tip to police that Ordway might have been involved in a robbery, Detective Clayton Sumner prepared an affidavit for a search warrant for the residence of Dawn Turnley, Ordway's girlfriend. A search of Turnley's apartment revealed a revolver, Ordway's wallet, articles of dark-colored clothing, ammunition, bolt cutters, a sledgehammer, and two keys to ATVs. The police also seized a stolen truck.

Subsequently, police arrested Turnley. She confessed, implicating Ordway in three robberies and several burglaries. Ordway was then indicted on three counts of first-degree robbery, possession of a handgun by a convicted felon, ten counts of third-degree burglary, first-degree wanton endangerment, knowingly receiving stolen property over \$300, seven counts of theft by unlawful taking over \$300, and nine counts of third-degree criminal mischief.

Ordway filed two motions to suppress the results of the search warrant, over which the court held separate hearings. In the first motion to suppress, filed by counsel, Ordway asserted the affidavit for the search warrant did not establish probable cause. In the second, he asserted the affidavit for the search warrant contained false statements. Though the second motion was filed *pro se*, Ordway's attorney assisted during the hearing. The court denied both motions.

A jury acquitted Ordway of possession of a handgun by a convicted felon, and a subsequent trial on the remaining charges followed. At this trial, Lillian, Lillian's husband Joshua Quarles (Joshua), and Turnley provided key testimony about the factual circumstances of the remaining felonies.

The jury found Ordway guilty of three counts of first-degree robbery, ten counts of third-degree burglary, six counts of theft by unlawful taking over \$300, and receiving stolen property over \$300. The jury acquitted Ordway of wanton endangerment and one count of theft by unlawful taking.

During the penalty phase, the jury found Ordway to be a first-degree persistent felony offender. He was sentenced to twenty years' imprisonment for each robbery and ten years for each of the remaining charges. The trial court ordered the robbery convictions and one receiving stolen property conviction to run consecutively and the remaining burglary and theft convictions to run concurrently for a total of seventy years' imprisonment.

On direct appeal, the Kentucky Supreme Court reversed Ordway's nine burglary convictions and vacated one of his convictions for theft by unlawful taking over \$300. *Ordway v. Commonwealth*, 352 S.W.3d 584, 594 (Ky. 2011). His remaining convictions were affirmed. *Id.*

Ordway filed a motion under Kentucky Rules of Civil Procedure (CR) 60.02 in which he alleged, *inter alia*, prosecutorial misconduct and perjury by Detective Sumner and Joshua. The circuit court denied the motion, finding that Ordway should have presented the issues on direct appeal and that he did not set forth any extraordinary reason to justify relief. Ordway failed to appeal the denial of that motion.<sup>1</sup>

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<sup>1</sup> Although two notices of appeal are included in the record for the denial of that motion, neither of them were filed.

Ordway then filed the instant *pro se* RCr 11.42 motion to vacate his conviction in the Christian Circuit Court, raising a litany of issues. The court denied Ordway's motion, finding that the issues Ordway raised should have been presented in an earlier proceeding, that the motion did not raise any issue of material fact that could not be resolved on the face of the record, and that there was no indication that defense counsel's performance was ineffective.

On appeal, Ordway argues (1) his counsel conceded he was ineffective by apologizing for his representation after a suppression hearing; (2) his counsel was ineffective because he did not call the judge who issued the search warrant to testify during a suppression hearing; (3) his counsel was ineffective because he failed to re-call witnesses at the conclusion of his trial; (4) his counsel was ineffective because he did not expose perjury committed by Detective Sumner and Joshua during a suppression hearing; (5) his counsel was ineffective for failing to seek assistance from an investigator or co-counsel; (6) his counsel was ineffective because he discouraged Ordway from filing *pro se* motions; (7) his counsel was ineffective for failing to establish that Turnley, Lillian, and Joshua committed perjury during trial; (8) his counsel was ineffective for failing to file criminal charges relating to perjury; and (9) his counsel was ineffective for failing to raise the issue of perjury on direct appeal. He further appeals the denial of his request for an evidentiary hearing.

Additionally, Ordway has made several allegations of error that may be resolved summarily. Ordway argues (1) the trial court denied him a jury of his

peers by excusing the only African-American juror;<sup>2</sup> (2) the Commonwealth engaged in prosecutorial misconduct by knowingly relying on false information in securing the search warrant; (3) the Commonwealth engaged in prosecutorial misconduct when it knowingly elicited perjured testimony at trial; (4) the Commonwealth's "identification tactics" were unduly suggestive because one witness identified Ordway by only his eyes; and (5) the Commonwealth informed Ordway that it could not produce a witness, then produced that witness later without explanation. These arguments either could have been or were raised in Ordway's direct appeal or his CR 60.02 motion. "The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Therefore, we decline to address these arguments.

To successfully claim ineffective assistance of counsel, a movant must establish that counsel's performance was deficient and that prejudice resulted from that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37, 40-41 (Ky. 1985). The movant must first identify specific acts or omissions

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<sup>2</sup> Ordway argues his attorney failed to preserve this argument for direct appeal. However, he did not present any ineffective assistance of counsel claim regarding this issue below. Where an appellant fails to raise an issue in the circuit court, it may not be presented for the first time on appeal. *Jones v. Commonwealth*, 239 S.W.3d 575, 577-78 (Ky. App. 2007). Though there is an exception to this rule found under RCr 10.26, Ordway has not requested palpable error review. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008).

made by counsel that were outside the wide range of prevailing professional norms. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2064-65. He must then demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. at 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* There is a strong presumption that counsel performed competently; consequently, it is the movant’s burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L.Ed. 2d 305 (1986). Review of counsel’s performance under *Strickland* is *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016).

Ordway first claims counsel conceded he was ineffective by apologizing to Ordway for his representation after a suppression hearing.<sup>3</sup> However, a review of the record demonstrates that defense counsel merely apologized for failing to speak to Ordway for a period prior to the suppression hearing due to his caseload and the holidays. Defense counsel did not apologize for the quality of his representation. Therefore, this claim is without merit.

Second, Ordway asserts counsel was ineffective for failing to call the judge who issued the search warrant as a witness in his suppression hearing. He

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<sup>3</sup> This argument concerns the hearing over Ordway’s motion to suppress because the affidavit for the search warrant did not establish probable cause. Ordway’s remaining arguments refer to the hearing concerning Ordway’s motion to suppress due to the alleged false statements in the affidavit.

alleges the judge could have testified about the perjury surrounding the warrant and the “improper manner in which the search warrant was secured.” Ordway’s attorney stated on the record that he had researched the issue and spoken with the judge. Thereafter, he decided not to call the judge as a witness. “[A] trial counsel’s choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel.” *Saylor v. Commonwealth*, 357 S.W.3d 567, 571 (Ky. App. 2012). This strategy was reasonable under the circumstances because it is not clear what additional insight into the matter the judge could have provided. Because Ordway has failed to overcome the presumption that defense counsel’s decision not to call the warrant-issuing judge was sound trial strategy, he is not entitled to relief on this issue.

Ordway next claims counsel was ineffective when he did not re-call Turnley, Lillian, and Joshua during trial to expose their perjured statements. During an in-chambers meeting, counsel stated that Ordway wished to re-call those witnesses. Even though counsel admitted that re-calling the witnesses might uncover some additional untruths, he further stated he did not wish to do so because it would provide them with an additional opportunity to incriminate Ordway. “It is not the function of [an appellate court] to usurp or second guess counsel’s trial strategy.” *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky.

2009). Because counsel's decision not to re-call the witnesses was reasonable trial strategy under the circumstances, this claim must fail.

Ordway next argues counsel was ineffective when he failed to cross-examine Detective Sumner and Joshua concerning certain perjured statements. Ordway filed a suppression motion alleging that the affidavit for a search warrant contained false information. Specifically, Ordway asserted Detective Sumner falsely stated that Ordway lived in Turnley's apartment and that Ordway and Turnley were married. The trial court held a hearing on the motion, during which Detective Sumner and Ordway testified.

Ordway now asserts several arguments pertaining to that hearing. He argues that Detective Sumner and Joshua committed perjury therein and that Detective Sumner's affidavit contained other false information. First, he claims Detective Sumner testified he relied on only one confidential informant, even though his affidavit states he relied on two. Though Detective Sumner stated on cross-examination that both informants mentioned in his affidavit are the same person, upon further questioning he testified that the informants were two separate people. Ordway also claims Detective Sumner committed perjury because he testified at the hearing that he was not present when the search warrant was executed. Ordway posits that this testimony is inconsistent with Detective Sumner's statement in his affidavit, in which he stated he was present. However, our review of the record demonstrates that Ordway's assertion is not correct, because Detective Sumner testified that he was present during the search.



Additionally, although Ordway also claims that Joshua committed perjury during that hearing, Joshua did not testify. Because these allegations are refuted by the record, they do not merit relief.

Next, Ordway argues counsel was ineffective for failing to seek assistance from an investigator or co-counsel. This argument is conclusory. RCr 11.42(2) requires a movant to “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” The failure to comply warrants summary dismissal. *Id.* Ordway has not stated which aspects of his case should have been investigated. He has also not stated what co-counsel or an investigator would have discovered, nor how it could have changed the result. “Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule’s specificity standard and so ‘warrant a summary dismissal of the motion.’” *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (quoting RCr 11.42(2)). Because Ordway has failed to make this claim with specificity, this argument is without merit.

Ordway also alleges counsel was ineffective because he discouraged him from filing *pro se* motions. However, Ordway actually did file *pro se* motions. Therefore, he has failed to demonstrate he suffered any prejudice. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Next, Ordway argues counsel was ineffective for failing to cross-examine Turnley, Lillian, and Joshua concerning their “perjury.” Specifically, Ordway

claims that these witnesses previously provided false statements and that his counsel failed to adequately cross-examine them about these statements at trial. Under Kentucky Revised Statute (KRS) 523.020(1), a witness commits perjury when “he makes a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law[.]” Joshua was under oath when he wrote his affidavit, but the record is unclear as to whether Lillian was. Regardless, Ordway has not asserted that any of these witnesses actually made false statements *during trial* and has therefore failed to demonstrate any resulting prejudice from their perjury. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. For the remainder of this discussion we will consider counsel’s alleged failure to cross-examine these witnesses. None of these arguments merit relief under *Strickland*. *Id.*

Ordway asserts counsel failed to cross-examine Turnley concerning her statement that Ordway was involved in the theft of Troy-Bilt tillers from West Brooke Farm Division “but admitted to lying about this theft during trial.” Our review of Turnley’s trial testimony reveals she did not admit to lying about this theft. Because this claim is refuted by the record, counsel was not ineffective for failing to cross-examine Turnley concerning this incident.

Ordway also asserts counsel failed to cross-examine Lillian after she provided a “statement that she and Dawn knew nothing about the robberies, but changed this in her court testimony to indicate all the robberies were planned.” However, counsel cross-examined Lillian thoroughly concerning her prior

inconsistent statements to police, and the jury was able to consider them in assessing her testimony. Therefore, Ordway suffered no prejudice as a result of counsel's failure to cross-examine Lillian on this matter. Ordway also claims counsel failed to adequately cross-examine Joshua concerning his prior inconsistent statements. Prior to trial, Joshua signed an affidavit stating that he had had no contact with Ordway "concerning certain burglaries." At trial, however, Joshua testified that Ordway had actually written the affidavit and that he had only signed it because he was afraid of Ordway. He further stated his testimony at trial – that he and Ordway had committed the crimes – was the truth. Again, the jury was able to hear Joshua's testimony and give it due weight. Because Ordway has failed to allege a basis for relief regarding perjury, he has not suffered any resulting prejudice.

Ordway also alleges his attorney was ineffective for failing to pursue criminal charges relating to perjury. However, Ordway has failed to demonstrate how pursuing charges prejudiced his defense. Therefore, his counsel was not ineffective.

Additionally, Ordway argues that his appellate counsel was ineffective for failing to raise the issue of perjury relating to the testimonies of Turnley, Lillian, Joshua, and Detective Sumner. Because we have determined that Ordway's claims relating to perjury were meritless, appellate counsel was not ineffective for failing to brief this issue.

Finally, we hold Ordway is not entitled to an evidentiary hearing because his motion did not raise any material issues of fact that cannot be determined on the face of the record. RCr 11.42(5).

For the reasons stated herein, the Christian Circuit Court's order denying Ordway RCr 11.42 relief is affirmed.

ALL CONCUR.

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