

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

NO. 2016-CA-000245-MR

LORENZO BARNES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 11-CR-00711-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON,  
JUDGES.

CLAYTON, JUDGE: Lorenzo Barnes appeals from an order of the Fayette Circuit Court that denied his Motion to Vacate, Correct Sentence or Set Aside filed pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. For the reasons set forth below, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In mid-April 2011, Kentucky State Police (KSP) narcotics officers arrested Derrick Moore trying to sell a prescription pill. In exchange for not being charged with an offense, Moore agreed to cooperate with the KSP. He confessed to two investigating officers that he had been selling pills—thirty milligram Percocets primarily—supplied by a person he knew as Lorenzo, a black male who sometimes drove a burgundy Chevy Tahoe with large chrome rims. Lorenzo would provide him with a quantity of pills, between thirty and one hundred usually, and Moore would sell them to consumers. When he had sold the batch he would return the proceeds to Lorenzo, less a percentage Moore kept as his share, and Lorenzo would provide him a new supply of pills. At the time of his arrest, Moore was due to make such an exchange with Lorenzo, and he agreed to set up a meeting with Lorenzo.

On April 21, 2011, in a phone call, Moore and Lorenzo arranged to meet later that day at the Waffle House in Lexington. Moore drove to the Waffle House with the officers following in unmarked vehicles, but shortly after they had taken up positions there, Lorenzo called Moore and changed the meeting place to the Rite Aid nearby on Winchester Road. A few minutes after Moore and the officers had taken up positions at the Rite Aid, a burgundy Tahoe with large chrome rims driven by a black male pulled into the Rite Aid lot and parked in front of the store. Moore, who was on the phone with one of the officers, said, “That’s him.” Almost immediately, as one of the officers pulled up behind and beside the

Tahoe in a marked police vehicle, a female, later identified as Desiree Robinson, Barnes's girlfriend, exited the vehicle's passenger's side and walked rapidly toward the entrance to the Rite Aid. At about the same time, Barnes exited the driver's side of the Tahoe. An officer stopped him and frisked him. The officer found no weapons, but in the course of the frisk, he immediately recognized by feel a bulge in Barnes's pocket that he suspected was a large wad of currency. He seized the currency—what proved to be more than \$6,700, including more than 180 twenty-dollar bills—and asked Barnes to sit on the curb to await the investigating officers. During a subsequent search of Robinson, the police found a plastic bag containing what proved to be forty-three pills containing oxycodone (thirty-milligram Percocet) and nine pills containing hydrocodone.

During a search of the Tahoe, police recovered four cell phones. When the officers used their phone to call the number Moore, the informant, had called earlier that day to set up the meeting with Lorenzo, one of the phones in the Tahoe rang and displayed as the incoming call the phone number of the phone the officer was using. A forensic analyst later examined the phones and on one of the phones someone had stored contact information for "Derrick," Moore's first name, under which had been stored Moore's phone number, and on two of the phones were records of calls and text messages to and from Moore's phone number from the times on April 21 when Moore and the officers had contacted Lorenzo. While being detained in the back seat of a police cruiser, police officers found Barnes with what looked like particles and crumbs of a crushed pill or pills on his lips and

around his mouth. Upon questioning, he admitted that he had crushed and eaten a Lortab pill.

Barnes was arrested and later indicted on one count of trafficking in a controlled substance in the first degree, first offense (Kentucky Revised Statute (KRS) 218A.1412), one count of tampering with physical evidence (KRS 524.100), and being a persistent felony offender in the second degree (PFO II) (KRS 532.080(2)). Robinson was also indicted for trafficking in a controlled substance in the first degree, first offense, promoting contraband (KRS 520.050), and being a PFO II. Following a two-day jury trial, Barnes was found guilty of first-degree trafficking in a controlled substance, tampering with physical evidence, and being a PFO II. The jury recommended that Barnes be sentenced to fifteen years on trafficking in a controlled substance in the first degree, first offense and five years on tampering with physical evidence, enhanced for being a PFO II, to be served consecutively for a total maximum sentence of twenty years in prison. On August 29, 2012, the circuit court sentenced Barnes to serve twenty years in prison consistent with the jury's recommendation.

On June 23, 2014, Barnes filed a post-conviction motion to vacate and set aside the judgment pursuant to RCr 11.42 raising several issues of ineffective assistance of counsel.<sup>1</sup> After appointment of counsel, Barnes filed a *pro se* supplement to his RCr 11.42 motion raising several additional claims of ineffective

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<sup>1</sup> Barnes filed a direct appeal with the Kentucky Supreme Court, which affirmed the judgment of conviction. *See Barnes v. Commonwealth*, No. 2012-SC-000595-MR, 2014 WL 1514632 (Ky. April 17, 2014).

assistance of counsel. The circuit court denied the motion after rejecting Barnes's arguments in three separate orders and conducting a hearing on one of his claims. This appeal followed.

#### STANDARD OF REVIEW

In an RCr 11.42 motion, the movant has the burden "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). The motion "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." RCr 11.42(2). If the requirements of RCr 11.42 are satisfied, the movant must then establish a claim for ineffective assistance of counsel by proving: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky.1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). See also *Commonwealth v. McKee*, 86 S.W.3d 861 (Ky. 2016). Under the *Strickland* framework, a "deficient performance" contains errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2052. In assessing whether counsel's performance was deficient, the court must consider whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on

an objective standard of reasonableness. *Id.*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. Second, in order to establish that counsel's deficient performance prejudiced his defense at trial, an appellant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* An appellant must satisfy both elements of the *Strickland* test in order to merit relief. *Id.*; *McKee*, 86 S.W.3d at 867.

When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (citing *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001)), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *McKee*, 86 S.W.3d at 867. The ultimate determination of whether counsel's performance was deficient and the defendant suffered actual prejudice because of counsel's errors is reviewed *de novo*. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)).

## ANALYSIS

In this case, Barnes raises two issues of ineffective assistance of counsel in his brief. First, he contends that counsel was ineffective for failing to tender proposed jury instructions to the court and failing to object to the jury

instructions that were given. In denying the motion with respect to this issue, the circuit court noted that the record showed that, at a bench conference, “alternate versions of the jury instructions were tendered to the Court by both parties.”

Defense counsel also did present oral argument requesting lesser-included instructions on both charges at several points during the trial. Under RCr 9.54(2), a party may preserve the issue involving a challenge to the jury instructions if he “fairly and adequately presented his position by an offered instruction or by motion,” or by making an “objection before the court instructs the jury . . . .” *See also McMahan v. Commonwealth*, No. 2010-SC-000162-MR, 2012 WL 601216, at \*1 (Ky. Feb. 23, 2012) (“By tendering even incorrect instructions, McMahan fairly and adequately presented his position to the trial judge as required by Kentucky Rules of Criminal Procedure (RCr) 9.54(2).”). In fact, the circuit court instructed the jury on first-degree trafficking in a controlled substance (ten or more dosage units of oxycodone); first-degree trafficking in a controlled substance (lesser quantity); possession of a controlled substance; criminal facilitation: trafficking in a controlled substance; and tampering with physical evidence. Barnes has not presented any grounds for an objection to the jury instructions given by the court. Counsel is not required to make useless objections or ask for needless instructions. *See Relford v. Commonwealth*, 558 S.W.2d 175, 178 (Ky. App. 1977) (“There is no requirement that any counsel make useless objections or ask for instructions needlessly.”). As a result, the record refutes Barnes’s claim of ineffective assistance of counsel related to the jury instructions because he has not shown

either deficient performance by counsel or actual prejudice due to counsel's performance.

Barnes also argues that defense counsel was ineffective for failing to investigate and interview Desiree Robinson and Derrick Moore prior to the trial. *See, e.g., Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). He asserts that had counsel interviewed these witnesses, “he would have been better equipped for the cross-examination and would have been able to make both potential witnesses admit that the appellant was not involved in any way, in a drug trafficking scheme.” RCr 11.42 requires the 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.” RCr 11.42(2). “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)); *Williams v. Commonwealth*, 336 S.W.3d 42, 50 (Ky. 2011) (stating the subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal).

Barnes’s claim of ineffective counsel on this issue is conclusory, self-serving, and lacks any specific factual support. Defense counsel conducted thorough cross-examinations of both witnesses. Barnes fails to identify any



relevant facts or issues that counsel did not explore during the cross-examinations or that counsel would have discovered in pretrial interviews. Counsel had the prior pretrial statements of these witnesses given to the police and utilized those statements in the cross-examinations, so it was not unreasonable for him not to conduct additional interviews. “[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. In addition, counsel’s ability to interview Robinson would have been problematic because she was a co-defendant with separate legal representation. *See Chapman v. Commonwealth*, 265 S.W.3d 156, 173 (Ky. 2007) (stating that an attorney must not communicate directly about a pending case with a party the attorney knows is represented by counsel). The mere fact that “other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky.2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). Barnes has failed to overcome the presumption that counsel’s actions were not deficient or show that defense counsel’s decision not to interview the two witnesses was outside the wide range of prevailing professional norms. Furthermore, Barnes has not shown that he was prejudiced in that counsel’s failure to interview these witnesses affected or was sufficient enough to undermine confidence in the outcome of the trial.

For the foregoing reasons, we affirm the order of the Fayette Circuit

Court.

ALL CONCUR.

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