

RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000086-MR

STEPHON TRAMBER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NOS. 11-CR-001042 & 11-CR-003392

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: JOHNSON, SMALLWOOD, AND THOMPSON, JUDGES.

JOHNSON, JUDGE: Stephon Tramber appeals the denial of his Kentucky Rules of Criminal Procedure (“RCr”) 11.42 motion for post-conviction relief without conducting a hearing. After reviewing the record in conjunction with the applicable legal authority, we affirm the judgment of the Jefferson Circuit Court.

## **BACKGROUND**

Tramber's indictment for first-degree robbery,<sup>1</sup> and subsequent indictment for being a persistent felon in the first degree,<sup>2</sup> stem from the theft of an automobile. The facts underpinning those indictments occurred in August 2010, when the victim was walking to his vehicle parked on a street in Old Louisville. A male, later identified as Tramber, approached him and asked for some spare change. The victim said he did not have any change and, as he was entering the vehicle, Tramber jumped into the passenger seat holding a handgun. In the course of wrestling the victim for the car keys, Tramber hit the victim behind his left ear with the gun. The victim was able to escape and Tramber sped away in the vehicle.

Upon learning that the vehicle was equipped with a GPS system, the police contacted the dealership where it had been purchased. Using the dealership's GPS tracking service, the police were able to locate the vehicle, confirm the VIN number, and tow the vehicle to the auto theft garage where it was processed by the department's fingerprint technician. Not only were Tramber's fingerprints found on a package of cigars located in the vehicle, but a black BB

---

<sup>1</sup> Kentucky Revised Statutes ("KRS") 515.020.

<sup>2</sup> KRS 532.080.

gun was discovered in the trunk. In a subsequent photo line-up, the victim positively identified Tramber as his assailant.

After a three-day trial, the jury convicted Tramber on one count of second-degree robbery and of being a first-degree persistent felon. Tramber waived his right to a pre-sentence hearing or report and requested immediate sentencing, which resulted in a sentence of twelve years' imprisonment.

Tramber's direct appeal from the judgment of conviction was affirmed by this Court in 2013.<sup>3</sup> The Supreme Court of Kentucky denied his motion for discretionary review of this Court's decision. Tramber thereafter filed the underlying RCr 11.42 motion alleging ineffective assistance of counsel. Based on its finding that the record conclusively refuted each of Tramber's allegations, the trial court denied his motion without conducting an evidentiary hearing.

This appeal followed.

### **STANDARD OF REVIEW**

An appellate court "review[s] the trial court's denial of an RCr 11.42 motion for an abuse of discretion." *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014) (citing

---

<sup>3</sup> *Tramber v. Commonwealth*, 2012-CA-000107-MR, 2013 WL 645828 (Ky. App. Feb. 22, 2013).

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). ““It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding . . . .’ This rule has been applied consistently to bar . . . claims from being brought in collateral attacks . . . that could and should have been litigated in the direct appeal . . . .” *Leonard*, 270 S.W.3d at 156 (internal citation omitted). This is a “pure procedural bar that aims to have issues raised only in the proper forum.” *Id.*

## ANALYSIS

Tramber raises two issues to support his contention that the trial court erred in denying his motion for RCr 11.42 relief: 1) that the trial court erred in excluding exculpatory evidence that would have exonerated him; and 2) that because the Commonwealth did not indict him on the charge of being a persistent felony offender until he was already in trial, the trial court erred by permitting the Commonwealth to seek enhancement without prior notice. As he did in the trial court, and as it specifically noted, Tramber attempts to couch his appellate contentions in terms of ineffective assistance of counsel, although the clear tenor of

those arguments is a challenge to the trial court's evidentiary rulings. Like the trial court, we are convinced that each of Tramber's contentions could and should have been presented in his direct appeal. *Leonard, supra*. However, notwithstanding this procedural deficiency, we are persuaded that Tramber's claims of error fail on their substantive merits as well.

Turning first to Tramber's contention that he received insufficient notice as to the PFO indictment, we agree with the trial court that he is factually incorrect. Review of the record clearly demonstrates that Tramber was indicted on the PFO charge prior to the commencement of trial. Both Tramber and his attorney were fully aware of the indictment in advance of and throughout his three-day trial. At the beginning of each day's proceedings, the trial court read the PFO charge as the second indictment. To claim at this juncture that he was "ambushed" by the PFO charge is disingenuous at best. The record conclusively refutes Tramber's contention on this issue. If Tramber believed he had insufficient notice as to the PFO indictment he could and should have presented this issue in his direct appeal. *Id.*

As to the exculpatory evidence issue, Tramber alleges that the trial court did not allow him to introduce exculpatory evidence in questioning a GPS expert. Specifically, he argues that "[t]he GPS Specialist was asked to identify the ping on the history report for the alleged location, date and time, 'August 19, 2010

@ 12:20am -12:30am. 6<sup>th</sup> and W. Oak St., Louisville, Ky 40203”” and that the trial court sustained the Commonwealth’s objection to this testimony. However, our review of the record supports the Commonwealth’s assertion that the GPS Specialist was never asked by either attorney to locate such a notation at any point in her testimony. Nor was any objection made on the record concerning the exclusion of such evidence. In fact, the only objection made by the Commonwealth during the GPS expert’s testimony was to certain hearsay. Because the record does not support Tramber’s allegation that this evidence was excluded from his trial, there was no error. This evidentiary issue could and should have been raised in his direct appeal. *Id.*

Finally, the trial court correctly determined that Tramber was not entitled to an evidentiary hearing on his RCr 11.42 motion alleging ineffective assistance of counsel. In *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), our Supreme Court clarified a trial court’s duty with regard to conducting an evidentiary hearing on a motion filed pursuant to RCr 11.42:

After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.

*Id.* at 452. Because our review of the record confirms the propriety of the trial court's conclusion that a hearing was not warranted, there was no error.

In sum, the Supreme Court of Kentucky has repeatedly held that a direct appeal issue may not be litigated in postconviction proceedings merely by couching it as ineffective assistance of trial counsel claim. *Hodge v.*

*Commonwealth*, 116 S.W.3d 463 (Ky.2003), *overruled on other grounds by Leonard, supra; Haight, supra.* We thus concur in the trial court's conclusion that both issues could and should have been raised in Tramber's direct appeal.

Furthermore, even if Tramber could overcome this procedural bar, our review of the record convinces us that the trial court, having reviewed the record, was not required to grant Tramber an evidentiary hearing because his claims fail on their merits as noted in the record. We are therefore persuaded that the trial court did not abuse its discretion in denying Tramber an evidentiary hearing on his claim for relief pursuant to RCr 11.42.

## **CONCLUSION**

Based upon the foregoing, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephon Tramber, *pro se*  
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Courtney J. Hightower  
Assistant Attorney General  
Frankfort, Kentucky