

RENDERED: JUNE 26, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

OPINION OF JUNE 19, 2020, WITHDRAWN

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2019-CA-000213-MR

JAMES R. THOMAS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 13-CR-00123-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

CALDWELL, JUDGE: James R. Thomas appeals the Kenton Circuit Court's denial of his motion to vacate, set aside, or correct his sentence pursuant to RCr<sup>1</sup>

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

11.42. Having reviewed his arguments, the Commonwealth's response, and the trial court's order, we affirm.

### **FACTS**

Thomas was convicted by a jury in 2014 of one count of possession of a controlled substance in the first degree and was sentenced to serve a term of three (3) years' imprisonment. He appealed as a matter of right and his conviction was affirmed on direct appeal in 2016. A panel of this Court laid out the facts of the underlying case as follows:

On November 28, 2012, patrol officers were dispatched to an area in Covington, Kentucky, to watch for individuals who were suspected of looking into cars. Officer Jay Zerhusen of the Covington Police saw the Appellant, James Thomas's, vehicle drive past him. Officer Zerhusen, as a matter of routine, ran its license tag through the National Crime Information Center's database. He learned that Thomas had active warrants against him. Officer Mike Gilliland then initiated a traffic stop.

When the vehicle was pulled over, Thomas was in the driver's seat and his wife, Brenda Thomas, was in the passenger seat. Jeff Ellis was in the backseat. Officer Zerhusen discovered that Brenda had an active warrant. After . . . Officer Zerhusen asked Thomas to exit the vehicle, the officer smelled marijuana from inside the vehicle. Thomas and Brenda were then taken into custody while Ellis was detained. At this point, both officers searched the vehicle at the scene.

The officers stated that they found a white powdery substance inside the vehicle along with marijuana, pills, Ziploc bags, rolling paper, a digital scale, butane hand

torches, glass smoking pipes, a push rod, cut straws and a marijuana grinder. The officers found some of the items in a black HP camera bag in the backseat, some in the center console in the front, and some in a Bob Marley beer bottle insulator alleged to have been between the front seat and the center console. Methamphetamine was found in the bottle insulator.

Both Thomas and Brenda were arrested and indicted on one count of first degree possession of a controlled substance (methamphetamine). The Commonwealth dismissed the charge against Brenda in exchange for her testimony against Thomas.

Thomas was convicted by a jury of first degree possession of a controlled substance and the jury recommended a sentence of three years' imprisonment, which the trial court followed.

*Thomas v. Commonwealth*, No. 2014-CA-001704-MR, 2016 WL 749675, at \*1 (Ky. App. Feb. 26, 2016).

After the unsuccessful direct appeal, Thomas filed an RCr 11.42 motion in the Kenton Circuit Court. The trial court denied his motion without holding an evidentiary hearing, finding that none of the allegations of ineffective assistance of counsel required an evidentiary hearing or merited relief.

### **STANDARD OF REVIEW**

On appeal, allegations of ineffective assistance of counsel are reviewed in a two-part test first articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702

S.W.2d 37 (Ky. 1985). The first prong requires the appellant to show that the performance by counsel was objectively deficient, and the second prong requires a showing that that deficient performance resulted in actual prejudice such that there exists a strong probability that the outcome of the matter would have been more favorable to the appellant without the instance of ineffectiveness. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Keeping that standard in mind, we review this appeal.

### **ANALYSIS**

Thomas alleges that the trial court erred in not holding an evidentiary hearing into his allegations of ineffective assistance of counsel. Not every allegation of ineffective assistance of counsel necessitates the holding of an evidentiary hearing; only those allegations of ineffectiveness which are not resolvable by review of the record or which, if proven true, would require that the conviction be reversed require the holding of an evidentiary hearing. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). All of Thomas's allegations can either be resolved by a review of the trial record or do not require invalidation of his conviction, even if proven to be as he alleges. Therefore, the trial court did not err in refusing to grant Thomas an evidentiary hearing.

**Trial counsel failed to file a motion to suppress regarding evidence obtained from cell phones.**

Thomas alleges, incorrectly, that the police seized his and his wife's cell phones and accessed their contents without obtaining a warrant. However, as the Commonwealth points out, the police did apply for and obtain a search warrant entitling them to search the contents of both of the cell phones seized of Thomas and his wife at the time of their arrests. Thus, as the record from the trial established facts which would not have entitled Thomas to relief from the judgment, it would be impossible for Thomas to prove his counsel was deficient for failing to move to suppress the contents of the phones based on lack of a warrant. Therefore, the trial court did not err. Further, the trial court correctly stated that since Thomas was charged only with possession of controlled substances with evidence aplenty, there was no prejudice to Thomas flowing from the evidence from the cell phones, even if relevant, as there was sufficient other evidence to prove guilt, *i.e.*, the outcome would have been no different even without the cell phone evidence.

**Trial counsel failed to challenge the battery evidence.**

Thomas alleges that counsel was ineffective for failing to point out that the batteries found in the vehicle were not lithium batteries, the type used in the manufacture of methamphetamine. Again, Thomas was not facing a charge of manufacturing methamphetamine, but only simple possession thereof, so it is unclear how he could have been prejudiced by this evidence. Even if counsel had

challenged the evidence or pointed out that the batteries were not the proper sort to be used in manufacturing, there was still more than enough evidence to establish possession, the charge Thomas was facing and of which he was convicted. The trial court correctly determined that this allegation was insufficient for relief.

**Trial counsel failed to challenge “incorrect” parole eligibility testimony and appellate counsel failed to raise the issue.**

Thomas faced a maximum sentence of three years’ imprisonment and a probation and parole officer testified that the parole eligibility would be 15%, pursuant to KRS<sup>2</sup> 439.340(3)(a). The fact that Thomas may have had other sentences which would have to be satisfied was not relevant to the jury’s determination under these facts.

Thomas also alleges that appellate counsel was ineffective for failure to raise this assignment of error on direct appeal.

Respondent must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [defendant] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he would have prevailed on his appeal.

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<sup>2</sup> Kentucky Revised Statutes.

*Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000) (citations omitted).

Thomas had other sentences he was serving which were not relevant to the determination of a proper punishment for the present matter and were also not relevant to jury determination. Therefore, there is no possibility that the failure to raise an unpersuasive argument on appeal could possibly be ineffective assistance of appellate counsel. An issue not relevant to jury determination is inherently frivolous. The trial court did not err in finding this allegation unpersuasive as to both trial and appellate counsel.

**Trial counsel was ineffective for not being adequately prepared.**

This allegation concerns counsel's strategic decisions in how to counter the testimony offered by Mrs. Thomas, who cooperated with the prosecution and testified that the drugs found in the vehicle belonged to her husband. Strategic decisions of counsel can seldom be the basis for a finding of ineffective assistance. "RCr 11.42[] motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court." *Penn v. Commonwealth*, 427 S.W.2d 808, 809 (Ky. 1968). Thomas does not provide any basis for concluding that a more diligent investigation would have uncovered evidence which could have been used to more vigorously go after the lead witness

against him, who happened to be his spouse. The trial court was correct in holding that this bare allegation did not entitle Thomas to relief, and mere speculation is insufficient grounds for relief via RCr 11.42.

### **CONCLUSION**

For the foregoing reasons, we hold that the Kenton Circuit Court did not err in denying Mr. Thomas's motion for relief pursuant to RCr 11.42.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

**BRIEF FOR APPELLANT:**

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**BRIEF FOR APPELLEE:**

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