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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000901-MR

ROGER L. WHEELER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
NO. 97-CR-002621

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Roger L. Wheeler, was convicted of two murders and was sentenced to death in 2000. This appeal stems from an RCr 11.42 post-conviction collateral attack on his sentence in which he alleges that he received ineffective assistance of counsel during his murder trial and that some improper evidence was introduced during the penalty phase. The circuit court denied the motion and upheld Appellant's sentence. This Court affirms.

I. Background

At trial, evidence was introduced that the bodies of the two victims were found in their apartment by a man named Shannon Calloway on October 2, 1997. Police were called to the crime scene. The male victim had been stabbed nine times, two of which were fatal. According to the testimony of the medical examiner, blood spatters on the floor, walls, furniture, and appliances indicated that the victim and his killer had struggled with each other, moving from the kitchen to the hallway of the apartment. The female victim had been

strangled to death, but the killer had also stabbed her neck with a pair of scissors, which were left in place, and left her body covered by a blanket.

Calloway and a group of people approached Appellant the next morning. Appellant testified that Calloway asked him to remove his shirt. The group saw a fresh wound on Appellant's arm and chased him into his mother-in-law's house. The police then came and took Appellant into custody.

Wheeler denied killing the victims, but his account of the night of the murders changed several times as new evidence was found. He originally denied having set foot in the victims' apartment at all on the night of the murders, but later admitted having been there. However, he then claimed that the male victim had already been stabbed and that he did not see the female victim. He also claimed that the real killer—a man wearing a mask and fatigues—was still in the apartment and attacked him and that they fought, resulting in the wounds to Appellant. Despite claiming that he came upon the crime scene, Appellant never called the police to report the murders or the alleged attack against him.

Evidence against Appellant at trial also included the presence of his blood in the apartment on the female victim's thigh, a sheet, a newspaper and in the Appellant's car (as shown by DNA evidence); testimony from a clerk at a local market who saw Appellant the night of the murders and stated that she saw blood on his head and neck; and cuts on Appellant's hands and arms consistent with knife wounds.

The jury found Appellant guilty of two counts of intentional murder. In the penalty phase, the jury found an aggravator of multiple murders and

recommended a sentence of death, which the trial court then imposed. Appellant's conviction and sentence were affirmed by this Court on direct appeal in Wheeler v. Commonwealth, 121 S.W.3d 173 (Ky. 2003).

Appellant filed his RCr 11.42 motion with the Jefferson Circuit Court in February 2005. In it, he alleged that he received ineffective assistance of counsel during the guilt phase and penalty phase of his trial. The circuit court declined to hold an evidentiary hearing and on October 25, 2006 denied Appellant's RCr 11.42 motion.

Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). He now claims that the circuit court erred in not conducting an evidentiary hearing and in its conclusions about ineffective assistance of counsel.

II. Analysis

A. Legal Standards

Most of Appellant's arguments in his brief include a claim both that he was at least entitled to an evidentiary hearing at the circuit court to resolve the factual allegations in his RCr 11.42 motion and that his trial counsel was ineffective, as demonstrated by his factual allegations. Though these legal issues are present throughout Appellant's claims, only a single recitation of the applicable legal standards is necessary.

1. Evidentiary Hearing

Most parts of Appellant's argument allege that the circuit court improperly refused to hold an evidentiary hearing to resolve the factual disputes raised by his RCr 11.42 motion. However, "[e]ven in a capital case, an

RCr 11.42 movant is not automatically entitled to an evidentiary hearing." Stanford v. Commonwealth, 854 S.W.2d 742, 743 (Ky. 1993). Whether an RCr 11.42 movant is entitled to an evidentiary hearing is determined under a two-part test. First, the movant must show that the "alleged error is such that the movant is entitled to relief under the rule." Hodge v. Commonwealth, 68 S.W.3d 338, 342 (Ky. 2001). The court must assume that factual allegations in the motion are true, then determine whether there "'has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.'" Id. (quoting Lay v. Commonwealth, 506 S.W.2d 507, 508 (Ky. 1974)). "If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises 'an issue of fact that cannot be determined on the face of the record.'" Id. (quoting Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993)). To do this, the court must "examin[e] whether the record refuted the allegations raised," and not "whether the record supported the allegations, which is the incorrect test." Id.

2. Ineffective Assistance of Counsel

The core of most of Appellant's allegations is that his trial lawyers were ineffective. As noted above, for an evidentiary hearing to be required, the RCr 11.42 motion must show entitlement to relief (for example, a constitutional violation) and raise an issue of fact that is not refuted by the record. Ineffective assistance of counsel is such a claim of a constitutional violation. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

Ineffective assistance of counsel is evaluated under the standard established in Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted by this Court in Gall v. Commonwealth, 702 S.W.2d 37 (1985). Strickland first requires that Appellant "must show that counsel's performance was deficient." 468 U.S. at 687. This is done by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," id., or "that counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S.Ct. at 2064. In applying the Strickland test, the Court noted, "Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689. Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. Id.; see also Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001).

Next, Appellant "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." Strickland, 466 U.S. at 687. Or, as noted later in Strickland, "The defendant must show that 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 a probability sufficient to undermine confidence in the outcome."

Id. at 694. A reviewing court must consider the totality of the evidence before the jury and assess the overall performance of counsel throughout the case to determine whether the specifically complained-of acts or omissions are prejudicial and overcome the presumption that counsel rendered reasonable professional assistance. Id. at 695; see also Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

Finally, "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

B. Blood Evidence

As Appellant noted in his RCr 11.42 motion, one of the key pieces of evidence against him was that his blood was found on the female victim's leg. His own testimony included no explanation for this, since he claimed never to have seen her that night, though he did admit he was cut and bled elsewhere in the apartment. He claims that his trial counsel was ineffective for failing to explain how evidence got on the victim's leg.

As an alternate theory, he now claims that the police must have mixed up the blood samples. He supports this claim by noting that it is the most logical explanation, assuming of course that he did not commit the crimes, and by pointing out that all of the many blood samples taken at the crime scene list the same collection time—12:37p.m., when the collection team arrived—which he claims could not have happened (and which he admits his trial counsel pointed out to the jury). Because the exact collection time is unknown, it is

impossible to know if the sample was taken before the body was moved by the medical examiner (which was recorded in a crime scene video). Thus, he argues it is possible that the blood could have been transferred to the thigh and cross-contaminated the other blood during the moving of the body and thus any blood sample taken after that time would have incorrectly implied that he bled on the victim.

The circuit court denied this claim by noting that evidence at trial refuted it. The court cited to the testimony of the medical examiner that the shape of the blood spatter on the victim's thigh indicated it was dropped there, as opposed to a transfer by touch, which would show a different shape. The medical examiner stated that the "drop" pattern was visible as soon as the blanket covering her was removed; photographs taken at that time were also introduced into evidence. Based on this evidence, the court concluded, "While the blood samples obviously were not simultaneously collected and the collection times could have been more precisely stated, there was no credible factual basis for a cross-contamination theory to explain Wheeler's blood on the female victim's thigh."

The circuit court was entirely correct in this regard. The medical examiner's testimony refuted the theory Appellant now proffers, which is couched entirely in speculative terms. Had any transfer blood been present on the victim's thigh, then his argument would make more sense. But his factual assertions about the timing of the blood collection simply do not change the fact that only "drop" blood was present on the victim's thigh. At most they laid the framework for what could be a colorable claim of ineffective assistance if

other facts had also been alleged; however, without the crucial factual allegation that the blood on the thigh was the result of a transfer (as opposed to speculation that it could be), the claim is incomplete. See Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993) (noting that 11.42 requires a specific statement of the facts on which a movant relies in support of a claim).

Appellant further claims that the circuit court's conclusion that there was no factual basis for a cross-contamination theory simply belies the fact that his trial counsel did not sufficiently investigate the issue. This, however, assumes that there was a reasonable cross-contamination theory to investigate. Again, that assumption was contradicted by the evidence at trial.

Appellant's argument as presented in his brief and 11.42 motion is built in part on a logical fallacy, namely that his trial counsel could and should have offered an alternative account of the blood on the victim's thigh because the blood could not have gotten there the way the Commonwealth alleged since he was innocent of the crime. It assumes the conclusion that Appellant is innocent (and that an alternative blood theory exists), rather than looking at the available facts and deriving a conclusion from them. If that were a sufficient basis for a claim of ineffective assistance, then every claim could be successful.

A successful 11.42 movant must allege specific facts that either clearly demonstrate entitlement to relief or call for an evidentiary hearing because they raise factual questions that cannot be resolved from the record. Appellant has done neither here. The standard of Strickland simply has not been met in this situation. Appellant has not shown that his counsel's failure to offer a theory

that was clearly refuted by the evidence at trial was unreasonable, especially since he currently offers no concrete account of his alternate theory. This also means that the circuit court was correct in denying an evidentiary hearing on this issue.

C. Failure to Call Earl Ricketts as a Witness

Appellant also claims that his trial counsel was ineffective for failing to call Earl Ricketts as a witness to contradict the testimony of Denise Mumsford, who claimed Appellant appeared to have had blood "poured" on him the night of the murder. Mumsford testified that Appellant had come into the grocery store where she worked and had so much blood on his head and clothes that it looked like it had been "poured" on him. Ricketts worked in the same grocery as a security guard and stated in an interview with the police that he saw Appellant that night and that he had some blood on him but not a lot. Ricketts was not called to testify at trial to contradict Mumsford's description of the amount of blood on Appellant. Instead, Appellant's counsel tried to impeach Mumsford by showing that she was connected to the victims.

Appellant argues now that Ricketts's statements about a lesser amount were consistent with his claim that he had been attacked and did not commit the murders, since that version of events would have resulted in less blood on him. The circuit court denied this claim by noting that Ricketts's proposed testimony simply would have buttressed Mumsford's testimony about the presence of blood on Appellant and that it would not have been subject to the same impeachment, thus undercutting the impeachment strategy employed by trial counsel.

This issue is easily resolved by reference to the second factor of Strickland. Even assuming that Appellant's trial counsel was deficient in not calling Ricketts (which is not at all certain since it was a product of trial strategy), the failure was not prejudicial. In light of the strong blood evidence tying Appellant to the crime scene and specifically to the female victim, this Court concludes there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Appellant's claim simply does not "undermine confidence in the outcome." Id. With no showing of prejudicial deficiency, no hearing was necessary.

D. Shoe Evidence

When Appellant was arrested, he was wearing a pair of sneakers. During trial, he told his counsel that the shoes in question, which had been included in his personal property at the jail, were the ones he wore the night of the murder when he went to the victims' apartment. Appellant's trial counsel then gave notice to the prosecution and attempted to introduce the shoes into evidence in support of Appellant's theory that someone else committed the murder. The idea was that the shoes did not match bloody shoe prints found at the scene of the crime, meaning those prints showed that someone else was in the apartment. The trial judge excluded the shoes on the grounds of inadequate notice, which came in the middle of trial, and lack of a chain of custody. Appellant testified about the shoes by avowal, however. On direct appeal, this Court held:

> [I]f he could show that the shoes he was wearing while he was in the apartment at the crucial time did not match the shoe prints found at the crime scene, the shoes would have tended to support his theory of the case. But Wheeler did not testify that he was wearing the shoes while he was in the apartment the night the victims were slain. Nor did the defense offer any other evidence to link the shoes to the crime scene. Rather, Wheeler testified on avowal that he was wearing the shoes when he was arrested the next day. The mere fact that Wheeler owned a pair of shoes that may or may not have matched the shoe prints found at the crime scene did not tend to make the defense theory more probable. They were not relevant. The trial judge made the right ruling for the wrong reason.

Wheeler, 121 S.W.3d at 182 (citation omitted).

Appellant now claims that his trial counsel was ineffective for failing to ask if the shoes were the ones he wore when he went to the apartment and for failing to retain an expert witness to testify that the shoes could not have made the shoe prints found at the crime scene. The circuit court found that the shoes would not have changed the outcome of the trial and that Appellant's trial counsel was not deficient in failing to get an expert, having learned of the shoes at such a late time.

Appellant is correct that under this Court's opinion in the direct appeal, his counsel could easily have gotten the shoes admitted at trial. Appellant claims that common sense then would have shown his theory to be correct and that an expert was not even needed, since a layperson could have compared the shoes to the shoeprints. However, there simply is no reasonable probability that the result of the proceeding would have been different. In light of the blood evidence and Appellant's shifting account of the events of the night of the murder, it is unlikely that any reasonable jury would have swallowed his

theory, especially since it was premised solely on his own claim that the shoes were the ones he was wearing on the night of the murder.[1]

The same goes for the lack of a shoe expert. Appellant included with his 11.42 motion an affidavit from a so-called shoe expert (the owner of a local shoe store) who looked at photocopies of the bottoms of the shoes and copies of the shoeprints from the crime scene, and concluded that they were different shoes. This conclusion was based on his finding that Appellant's shoes appeared to be size 11 and the shoeprints appeared to be from size 9½ shoes. As the circuit court noted, however, upon reviewing the actual shoes, which were size 10½, it was clear that at least one of the "expert's" claims was simply incorrect. Thus, it is unlikely that the expert-backed theory would have been any more successful than the lay-person one described above.

This Court also concludes that Appellant's counsel's failure to obtain an expert while in the middle of trying this case simply was not ineffective assistance. Appellant did not notify his attorney about the shoe until the middle of trial. Appellant alone knew about the shoes and he failed to tell his attorneys about them at a reasonable time. Competent counsel is not required to read a client's mind or to radically alter her presentation of the case mid-trial when the Appellant brings up extremely weak evidence out of the blue. Appellant attempts to sidestep this fact by noting that his "feet were always with him," implying that his attorneys should have known from the beginning

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[1] Appellant notes in his brief that the shoe evidence would have been buttressed by evidence that the DNA of two people other than Appellant and the male victim were found under the female victim's nails. This fact, however, was not discussed in the RCr 11.42 motion. Nor, however, would it have been sufficient to create prejudice in light of the presence of Appellant's blood on the victim's thigh.

that his feet could not have left the shoe prints at the scene of the crime. The problem with this is that the RCr 11.42 motion includes no factual allegations about the size of Appellant's feet. While this may seem a small point, an RCr 11.42 movant is required to state specifically the facts in support of his claims in order to be successful. Additionally, as Appellant's 11.42 motion admitted in the argument immediately preceding the one about the expert, "No expert testimony would be required for the jurors to compare the shoes with the shoe prints at the scene. A layperson could determine this fact." This is tantamount to a concession that lack of an expert was not ineffective assistance.

E. Testimony of Kathy Wheeler

Appellant also claims that his trial counsel was deficient for failing to call his cousin Kathy Wheeler as a witness. When Appellant testified at trial, the Commonwealth implied that his current version of events was a recent fabrication, since he had changed his story multiple times. In his RCr 11.42 motion, Appellant claims that his cousin could have rehabilitated him by testifying that his testimony was consistent with what he told her the night of the murders, specifically that he saw her the night of the murders and told her that he had "run into a nightmare of a situation." This, however, is the extent of what Appellant claims he told his cousin, and thus would have been the extent of any rehabilitative testimony she could have given.

The circuit court held that such testimony would have been inadmissible because KRE 801A(a)(2) does not apply to self-serving statements by criminal defendants. It is not clear that this view is correct, since the Rule applies to

"witnesses," a category that a testifying defendant clearly falls under. However, that legal issue need not be resolved now given the limited extent of the testimony that Appellant claims his cousin could have given. The only specific factual claim Appellant's RCr 11.42 motion makes about what she could have testified to is that he told her he came upon "a nightmare situation." The statement is vague and not clearly rehabilitative. Appellant's broader claim that his cousin's testimony would have been rehabilitative, without further explanation, is not specific enough to support his claim. Appellant claims in his brief that this was enough at least to get an evidentiary hearing, but for an RCr 11.42 motion to require such a hearing, it must specifically state sufficient facts that support the legal claim. Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993). The single statement that Appellant came upon a nightmare situation alone, especially when weighed against the multiple different stories he told to police, is simply not enough. It does not create a reasonable probability that the result of the trial would have been different. There simply was no prejudice from trial counsel's failure to call Wheeler as a witness.

F. Shannon Calloway's Death

Shannon Calloway discovered the victims' bodies and was one of the people who confronted Appellant just before his arrest. Appellant claimed at trial that Calloway was actually the killer, making him an alleged alternative perpetrator or "aaltperp." However, at the time of trial, Calloway was dead, and neither Appellant's counsel nor the Commonwealth introduced evidence of this fact at trial, and Calloway, obviously, did not testify. Yet, during closing arguments, in response to the aaltperp theory, the Commonwealth stated, "It's

kind of difficult in the middle of trial to stand up and run out and find people that the defense wants to get up and start pointing fingers at." Defense counsel objected on the grounds that Calloway was dead, and the court told the prosecutor not to dwell on it. During deliberations, the jury submitted a question asking, "So much talk about Shannon Calloway & Adrian Alston. Why have they not appeared as witnesses?"

Appellant now claims that his trial counsel was ineffective for failing to introduce evidence that Calloway was dead. While it is clear that the jury was curious about Calloway and knowledge of his death would have explained his failure to testify, there is no reason to think that such evidence would have had a chance, much less a reasonable probability, of changing the outcome at trial. The problem is that no evidence other than Appellant's own finger-pointing tied Calloway to the murders. Defense counsel's failure to show that Calloway was dead did not prejudice Appellant.

G. Latex Gloves

Appellant claimed that the man he allegedly encountered in the victims' apartment was wearing latex gloves. A small piece of latex was found in the female victim's mouth. That piece of latex was never tested. Appellant now claims that his trial counsel was ineffective for not having the latex tested for DNA or to determine the type of latex for comparison purposes. He also claims that his counsel should have retained an expert to investigate the piece of latex.

Admittedly, "'[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for

possible mitigating evidence.'" Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001) (quoting Porter v. Singletary, 14 F.3d 554, 557 (11th Cir.1994)). However, "[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances." Haight v. Commonwealth, 41 S.W.3d 436, 446 (Ky. 2001) (citations omitted). However, in making such a claim, Appellant "must establish how he was prejudiced by the alleged failure of counsel. In claiming that the defense was deficient, the accused must establish that the performance by the attorney was objectively unreasonable and how the alleged error prejudiced his defense." Hodge v. Commonwealth, 116 S.W.3d 463, 470-71 (Ky. 2003).

Appellant fails to demonstrate how tests on the glove or an expert would have helped him. Instead, he simply says that test could have revealed exculpatory evidence to corroborate his story, either by showing that the latex came from a glove or by showing DNA from a different person. As this Court has noted, however, "[a] claim that certain facts might be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr 11.42 relief." Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky. 2005). Such a claim is purely speculative and is insufficient to warrant RCr 11.42 relief. Id. at 325.

H. Furlough Testimony

During the penalty phase, Appellant's counsel presented testimony concerning Appellant's good behavior during a previous period of incarceration,

including the fact that he had been allowed on two furloughs. Counsel later produced testimony from a former Probation and Parole employee that furloughs were no longer available for murder convictions under 501 KAR 6:020 in an attempt to show that Appellant could not pose a danger outside the prison in the future. On cross-examination, the witness testified that persons convicted of murder had been granted furloughs in the past, that the furlough policy had since been changed, and that the policy could change in the future.

Appellant raises a number of claims related to this testimony.

1. Direct Errors

Appellant argues that the furlough testimony constituted direct error in two ways: (1) that it presented false information to the jury to consider during sentencing; and (2) that the testimony violated Kentucky law because it is not listed in KRS 532.025 and 532.055 as evidence that may be introduced during a capital sentencing phase.

These claims, however, are not appropriate ones for an RCr 11.42 proceeding. If Appellant wanted to challenge the evidence presented at trial, he should have done so in his direct appeal, not by means of an RCr 11.42 motion. "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 . . . ." Thacker v. Commonwealth, 476 S.W.2d 838, 839 (Ky. 1972); see also Mills v. Commonwealth, 170 S.W.3d 310, 326 (Ky. 2005) ("[A]n RCr 11.42 motion is limited to issues that were not and could not be raised on direct appeal." (emphasis added)).

Appellant argues that this Court should nevertheless consider his claims under the palpable error rule, RCr 10.26. The issues that Appellant raises, however, are trial errors, and as such the palpable error rule would only be applicable to the issues now raised if they were presented or discovered in the course of a direct appeal. The palpable rule is not a vehicle for circumventing the standard appellate process in order to bring stale claims in a collateral attack such as this one. Such issues will only be addressed in the course of an RCr 11.42 motion when and to the extent necessary to resolve proper collateral attack claims.

2. Effectiveness of Appellate Counsel

Presumably anticipating the Court's dismissal of the substantive issues he raises, Appellant also claims that appellate counsel on his direct appeal was ineffective for having failed to raise these furlough issues. Appellant acknowledges that this Court has declared that "ineffective assistance of appellate counsel is not a cognizable issue in this jurisdiction," Lewis v. Commonwealth, 42 S.W.3d 605, 614 (Ky. 2001), but also correctly notes that federal courts have recognized a right to effective counsel on the initial appeal that is implicated by appellate counsel's failure to submit a brief on the merits. See Smith v. Robbins, 528 U.S. 259 (2000); Evitts v. Lucy, 469 U.S. 387 (1985).

Unlike in Smith and Evitts, a brief on the merits was filed in this case. The more than two dozen issues raised therein were resolved by this Court in the direct appeal. We have previously rejected such ineffective assistance of counsel claims, distinguishing those situations in which a merits brief is filed from those in which no brief is filed. See Hicks v. Commonwealth, 825 S.W.2d

280, 281 (Ky. 1992) ("We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court."); Harper v. Commonwealth, 978 S.W.2d 311, 318 (Ky. 1998) (applying Hicks). That Appellant's current counsel, with the benefit of hindsight, now perceives different or additional issues that could have been raised does not mean the assistance of counsel that Appellant received on his direct appeal was ineffective.

3. Effectiveness of Trial Counsel in Raising Furlough

Appellant claims this trial counsel was ineffective for raising the furlough issue at all. He claims that there was no reason to bring the issue up at trial. Obviously the furlough evidence was part of trial counsel's strategy: part of an attempt to demonstrate that Appellant had been such a model prisoner during his previous incarceration that he received two furloughs, followed by an attempt to demonstrate no possibility of future dangerousness. That the Commonwealth was able to undercut this strategy to some extent does not make his counsel's performance deficient. It was still a purely strategic choice. Appellant's own RCr 11.42 motion even says, "It was a good plan in theory." As this Court has previously noted, "It is not the function of this Court to usurp or

second guess counsel's trial strategy." Baze v. Commonwealth, 23 S.W.3d 619, 624 (Ky. 2000); see also Hodge v. Commonwealth, 116 S.W.3d 463, 473 (Ky. 2003) ("Trial strategy will not be second guessed in an RCr 11.42 proceeding."). Hindsight as to the effectiveness of a given strategy alone cannot render a strategy unreasonable after the fact. The strategy employed by Appellant's trial counsel was not unreasonable or incompetent, and is not grounds for relief.

4. Failure to Object to Cross-Examination of Probation and Parole Employee

Appellant also claims his trial counsel was ineffective for failing to object to the Commonwealth's cross-examination about the possibility of a future change in furlough policy. This, of course, assumes that the testimony was in error and that such an objection would or should have been successful, which requires to some extent that Appellant's direct claim of error regarding this testimony be addressed.

First, Appellant claims the testimony presented false information to the jury. As a basis for this claim, Appellant states that the testimony was false because furlough would never been available to him given that his crime was murder. Appellant then argues rather creatively that the Commonwealth's implication that he might receive a future furlough amounted to jury nullification since it implied that any sentence of life without parole might be undercut by Corrections. He also argues that any such decision granting him furlough would violate separation of powers because only the General Assembly may classify crimes and set penalties. These arguments, however, ignore the fact that KRS 439.600 grants to Corrections the discretionary power to grant

furloughs, without limiting them to non-murder convicts. The limitations on furloughs are adopted by Corrections via administrative regulations, currently found at 501 KAR 6:020, and would not constitute a separation-of-powers violation. Thus, insofar as the testimony implied that the furlough policy could change in the future, it was not incorrect.

The contention that the testimony violated Kentucky law because it is not listed in KRS 532.025 and 532.055 as evidence that may be introduced during a capital sentencing phase is also incorrect. Appellant's counsel introduced the furlough testimony in mitigation. Any reasonable mitigation evidence is allowed under KRS 532.025, which includes a non-exclusive list of possible mitigating factors. In turn, the prosecutor is allowed to challenge a defendant's mitigation evidence. Woodall v. Commonwealth, 63 S.W.3d 104, 125 (Ky. 2001). The cross-examination of the Probation and Parole employee thus was not improper.

Given that the cross-examination was not erroneous, Appellant's counsel was not ineffective for failing to object to it.

I. Failure to Object to Religious Questions and Peremptory Challenges

Appellant also claims his counsel was ineffective for failing to object to the Commonwealth's voir dire questions about juror's religious views and use of that information in exercising peremptory challenges. The religion questions were approved by this Court on Appellant's direct appeal, see Wheeler, 121 S.W.3d at 179, and thus cannot serve as the basis of an ineffective assistance of counsel claim.

To the extent that Appellant is raising a new issue, namely that counsel should have objected to the use of the information in the prosecution's peremptory challenges as a violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, it is clear that Appellant's allegations fall short of both showing deficient performance and prejudice. Appellant has not made specific enough factual allegations, consisting as they do in this instance only of the claim the numerous jurors were dismissed for their religious beliefs. Yet, as the circuit court noted, those jurors were actually dismissed because of their discomfort with the death penalty. That their discomfort was born out of their religious beliefs does not make the strikes discriminatory as they were based on the jurors' stated views about the death penalty and their ability to consider it as a possible penalty. Absent discrimination, intentional or otherwise, the strikes could not rise to the level of a violation of Batson.[2] With no error, it was also not ineffective assistance to fail to raise such a challenge.

J. Cumulative Error

Finally, Appellant claims that the cumulative effect of the errors alleged in his RCr 11.42 motion merit setting aside his convictions and sentences. There was no cumulative error in this case sufficient to require setting aside Appellant's sentence.

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[2] It is also not even clear that Batson applies to challenges based on religion. See Davis v. Minnesota, 511 U.S. 1115 (1994). Though the Court denied certiorari in that case, Justice Ginsburg filed an opinion concurring in the denial and noting that religious affiliation is not as readily evident as race or gender and inquiry into a juror's religious beliefs is often limited and can be prejudicial. Justice Thomas, joined by Justice Scalia, filed a dissenting opinion arguing that Batson should be extended to religious affiliation.

III. Conclusion

For the foregoing reasons, the Jefferson Circuit Court's Order denying Appellant's RCr 11.42 motion is affirmed.

Minton, C.J.; Cunningham, Noble, Schroder, Scott and Venters, JJ., concur. Abramson, J., not sitting.

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