RENDERED: March 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002156-MR

MICHAEL MARTIN — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 97-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: Michael Martin appeals from a Greenup Circuit Court order denying, without a hearing, his Rules of Criminal Procedure (RCr) 11.42 motion seeking vacation of the sentence he is presently serving.

In August 1997, a jury found Martin guilty of two counts of trafficking in a controlled substance within 1000 yards of a school and two counts of being a first-degree

persistent felony offender (PFO). Consistent with the jury's verdict and sentencing recommendation, the circuit court sentenced Martin to five years in prison on each count, enhanced to twenty years for each count by virtue of the PFO I convictions, with the sentences to be served concurrently. In an unpublished opinion rendered on June 17, 1999,[1] the Supreme Court affirmed Martin's convictions on direct appeal. As summarized by the Court, the events giving rise to this case are as follows:

> Detective Haynes of the Flatwoods Police Department received information from a confidential informant that [Martin] was a drug dealer. A "buy" was arranged with [Martin] at his apartment, which was within 1000 yards of an elementary school. The informant, Wellman, was wired in order to record the transaction with [Martin], and a microcassette recorder was also used. Wellman purchased 30 tablets of Adipex, or speeders, from [Martin] for $100.00. On another occasion, a similar monitored "buy" occurred at which Wellman purchased approximately a quarter of a gram of cocaine from [Martin] for $25.00.

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[1] 97-SC-730-MR.

On direct appeal, Martin's first claim of error was that the circuit court allowed improper impeachment evidence to be admitted during his trial.[2] In addressing this claim, the Court engaged in the following analysis:

> Whereas the jury should have been informed only that [Martin] was a convicted felon, the jury received the additional information that [Martin] had been convicted of more than one felony and that his prior criminal activities extended beyond the limited locale of this Commonwealth. Such a superfluity of 'credibility' evidence is excessive and potentially prejudicial.
>
> Despite our view that the trial court should have sustained the objection during summation as to any argument concerning multiple felony convictions, we

[2] During the prosecutor's cross-examination of Martin, he inquired as to whether Martin had been convicted of a felony. Martin answered affirmatively, at which point the prosecutor asked, "Both in Ohio and Kentucky?" Martin again answered affirmatively. There was no contemporaneous objection by defense counsel. During the prosecutor's summation, he referred to Martin's two previous felony convictions. At that time, defense counsel objected to both the cross-examination during which the evidence had originally been elicited and the subsequent restatement of the evidence by the prosecutor during his closing argument. The circuit court overruled the objection but admonished the jury that Martin's felony convictions were to be used only in assessing his credibility. Following this favorable ruling, the prosecutor again mentioned the two prior convictions to the jury.

> must also acknowledge that the evidence against [Martin] was highly persuasive. In such circumstances, we are required to consider whether the evidence is harmless and if so, disregard it. RCr 9.24. Even if the court had ruled correctly, the Commonwealth would have been allowed to argue [Martin's] lack of credibility based on his conviction of a felony. Where the evidence is highly persuasive, as here, we conclude that argument of a second felony conviction does not add sufficiently to the prejudicial effect so as to require reversal.

Martin's second claim of error was that he received ineffective assistance of counsel due, among other reasons, to his counsel's failure to object to the aforementioned improper cross-examination, the sole basis for this claim that was preserved for review.[3] Because admission of the additional prior felony conviction as credibility evidence did not unduly prejudice Martin, the Court concluded that defense counsel's failure to object to this evidence did not prejudice his defense as required to support such a claim. With respect to Martin's

[3] Defense counsel moved for a mistrial during the prosecutor's closing argument, citing his failure to object to that part of the prosecutor's cross-examination revealing the existence of Martin's prior felony convictions in two states. The court denied the motion.

unpreserved arguments in this vein, one of which was counsel's failure to object when the prosecutor allegedly defined reasonable doubt during voir dire, the Court emphasized that an ineffective assistance of counsel claim is not properly the subject of a direct appeal, "but this does not preclude its consideration in a proper collateral attack proceeding."[4] Martin's final claim of error was that his due process rights were violated by numerous instances of misconduct by the prosecutor, including the improper cross-examination and definition of reasonable doubt. Since there were no contemporaneous objections to these alleged acts of malfeasance, this claim was not preserved for review and, therefore, was not addressed by the Court.

On June 28, 2001, Martin filed a motion pursuant to RCr 11.42 alleging that he had received ineffective assistance of counsel. His motion was denied by the circuit court without a hearing. In an order entered on November 26, 2001, this Court granted Martin's motion for a belated appeal, specifying that the "time for designation and certification of the record on appeal [was to] run from the date of entry of this order by the

[4] As to counsel's alleged failure to move for a directed verdict, the Court observed that the record, as supplemented by the Commonwealth, contained "numerous documents indicating that defense counsel did move for directed verdicts of acquittal," thereby dispensing with this argument in support of his ineffective assistance of counsel claim.

Clerk of this Court." At the same time, we denied Martin's motion for sanctions and his motion to strike the Commonwealth's response.

Martin subsequently filed a pro se motion for court records, again seeking additional time in which to file a brief. The former request was denied and Martin was advised that his request should be directed to the Greenup Circuit Court Clerk[5] while the latter was granted with a warning that failure to file a brief within sixty days could result in dismissal of the appeal.

Upon receipt of Martin's brief, his appeal should have been ripe for decision. At that time, however, we were unable to locate either his RCr 11.42 motion or an order denying the motion, although the record did contain an order entered on August 28, 2001, in which the circuit court ordered the Department of Corrections to evaluate Martin's eligibility for pre-release probation in response to a letter written by Martin inquiring as to its availability in his case.

Of particular relevance was the following excerpt from the order addressing Martin's letters inquiring as to the status

[5] Attached to Martin's supplemental brief is a copy of a motion "requesting this court to release court records, including trial transcripts imperative to filing a proper appeal," as well as a redacted copy of the legal mail log record indicating that said motion was mailed on February 18, 2002. According to Martin, the circuit court clerk never responded.

of his RCr 11.42 motion: "The Court overruled his RCr 11.42 motion on July 11, 2001, finding upon review of the record, that the motion was without merit. The Court will however, consider the Defendant's letter of June 13, 2001, as a Motion for Pre-release Probation . . . ." Also included in the record was the court's calendar which contains the following language suggesting denial of Martin's motion: "Overruled because [court] can tell from the record that defendant's allegations have no merit." Neither of the documents referenced above constitutes an actual ruling. Accordingly, in an order entered on October 4, 2002, we directed the circuit court to enter an order ruling on Martin's RCr 11.42 motion in compliance with Kentucky Rules of Civil Procedure (CR) 58(1) setting forth the basis for its decision. Upon entry of an order by the circuit court, the Greenup Circuit Court Clerk was directed to forward both the order and Martin's RCr 11.42 motion to the Clerk of this Court.

In an eight page order entered on October 16, 2002, the circuit court addressed each of Martin's claims, ultimately denying his motion. Finding that the "allegations made by the Defendant are clearly refuted by the record," the court concluded that no hearing was required.[6] Although the Clerk of

[6] Citing an additional basis for its decision not to hold a hearing, the court also found that Martin "could have argued his

this Court received the circuit court's order on October 21, 2002, the circuit court clerk failed to include a copy of the motion at issue, again delaying the disposition of this appeal. After contacting the clerk of Greenup Circuit Court, we finally received the circuit court's order denying Martin's RCr 11.42 motion, the motion itself and the memorandum filed in support thereof. Upon receipt of the aforementioned documents, the matter would have normally been submitted for decision. However, in the interest of fairness, a further delay was warranted.

In his original brief on appeal, the Attorney General relied solely on the following argument: "The record is silent as to appellant's arguments in his brief and a silent record is assumed to support the decision of the trial court." Given that we subsequently obtained a more complete record, we believed the

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objections in prior RCr 11.42 motions, however, he failed to do so." In so doing, the court observed as follows: "By the Defendant's own admission and in his RCr 11.42 motion, this is his third RCr 11.42 motion." Upon reviewing the record on appeal, however, we uncovered no prior motions of this nature. Presumably, the court is referring to a motion styled as such which the public advocate apparently filed following the trial without the knowledge or signature of Martin rendering it "a nullity so far as invoking jurisdiction under RCr 11.42" and a subsequent motion filed by Martin which was "procedurally dismissed without prejudice because, according to the order dismissing, the records were not available to the court." These descriptions are derived from Martin's RCr 11.42 motion. Contrary to the court's assertion, then, Martin has filed only one RCr 11.42 motion, the one which is presently before this Court for review.

Attorney General should be afforded the opportunity to address this appeal on the merits. To that end, we directed the Commonwealth to submit a brief focusing on the two arguments with potential merit raised by Martin in an order entered on December 23, 2002, with Martin having fifteen days thereafter in which to respond and the matter standing submitted for decision upon receipt of the parties' briefs. As set forth in that order, the two issues are: (1) Was Martin's counsel ineffective for failing to object when the prosecutor defined reasonable doubt during voir dire as follows:

> The law does not allow the Judge, or me, as the prosecutor, or Mr. Hardy, to define for you what reasonable doubt means. It is something that the law says is within your province as a juror. It's something that you must decide. I certainly would suggest to you that there is doubt in everything you do.
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> * * *
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> There's always some possible – there's always a possibility that something might happen. It's possible that an alien spaceship will hover over this courthouse and beam me up in the next fifteen seconds. But, that's not a reasonable likelihood. It's not a reasonable possibility. But, I guess it's possible,

> since all things are possible. The Commonwealth does not have the burden to prove Mr. Martin guilty beyond every possible conceivable doubt, no matter how unlikely. And, when you are deciding this case as a juror, you must do that yourself, beyond a reasonable doubt — a doubt based on reason, that he is guilty. And, if, at the end of the case, you have a reasonable doubt that he is guilty, then you must and shall find him not guilty. Do you understand that? Do you agree with that sir?

If counsel was ineffective for this reason, did Martin suffer prejudice as a result? (2) Was Martin's counsel ineffective in failing to request that the court appoint an expert in voice spectrographic analysis to determine whether it is Martin's voice on the tape recording of the drug transaction in question given the informant's testimony identifying Martin's voice, Martin's testimony denying same, his questionable credibility due to his status as a convicted felon and the dispositive nature of this inquiry? And, if counsel was ineffective in failing to request such an expert, was Martin prejudiced by this failure?

Martin subsequently filed a motion to reconsider this order. No responses were filed. Observing that Martin could

"address the issues raised in his motion in his reply brief," we denied the motion. As we are now in possession of both parties' briefs, the matter is ripe for decision.

In order to prevail on a claim of ineffective assistance of counsel, a movant must show both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding.[7] The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's actions might be considered "trial strategy."[8] "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of victory."[9] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[10]

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[7] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878 (2000).

[8] Id., 466 U.S. at 689, 80 L. Ed. 2d at 694; Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998).

[9] Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001)(citation omitted).

[10] Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[11] To establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different absent counsel's error.[12] A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.[13]

When reviewing a motion pursuant to RCr 11.42, the court "shall examine the motion to see if it is properly signed and verified and whether is specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed."[14] After the answer has been filed, the court "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."[15] If there is a material issue of fact that cannot be conclusively resolved by an

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[11] Strickland, supra, n. 6, 466 U.S. at 668-669, 80 L. Ed. 2d at 699.

[12] Id., 466 U.S. at 694, 80 L. Ed. 2d at 697.

[13] Id., 466 U.S. at 694-695, 80 L. Ed. 2d at 697-698.

[14] Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001)(citation omitted).

[15] Id.

examination of the record, however, a hearing is required.[16] Because the movant must establish both deficient performance by counsel and actual prejudice as a result, a court is permitted to examine the question of prejudice before determining whether there have been errors in counsel's performance and should dispose of the claim upon concluding that there is a lack of prejudice to the movant.[17]

Guided by the foregoing, we now address the two issues presented on the merits, beginning with the reasonable doubt inquiry. In Commonwealth v. Callahan,[18] the Kentucky Supreme Court observed that the "removal of the definition of reasonable doubt from [jury] instructions in the Commonwealth is well founded in case and textbook law." In support of this position, the Court cited a treatise on the subject by Professor Wigmore:

> We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the

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16 Id.

17 Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986).

18 Ky. App., 675 S.W.2d 3391, 393 (1984).

> guilt of the accused, honestly entertained, is a reasonable doubt.[19]

Conclusively resolving any question as to the implication of this reasoning for attorneys, the Court engaged in the following analysis:

> Having prohibited the court from the definition of the term "reasonable doubt" in the instructions, by RCr 9.56(2), we can hardly condone a client-serving definition by defense counsel or prosecutor in either voir dire, opening statement or closing argument. . . . We do not contend by this holding that counsel cannot point out to the jury which evidence, or lack thereof, creates reasonable doubt, but all counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt."[20]

Here, the prosecutor's elaboration upon the concept of reasonable doubt during voir dire constituted an improper attempt to further explain or define the term as expressly forbidden by the Supreme Court. It stands to reason, therefore, that Martin's counsel should have objected when the prosecutor

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[19] Id., citing 9 Wigmore, Evidence, Sec. 2497 (Chadbourn rev. 1981).

[20] Id.

engaged in such behavior. Given our resolution of this legal question, the relevant inquiry becomes whether Martin suffered actual prejudice as a result of this deficiency.

As characterized by the Supreme Court, the evidence against Martin is "highly persuasive." This assessment is both binding and reflective of our own. That being the case, we are required to determine whether the error was harmless[21] in light of the evidence as a whole. Having considered this error in context, we are not convinced that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's error in this regard, a conclusion which is consistent with the Supreme Court's decision as to the effect of the improper and prejudicial impeachment evidence. Since Martin suffered no actual prejudice as a result of counsel's failure to object when the prosecutor defined reasonable doubt during voir dire, his argument that counsel was ineffective for this reason must fail. Further, because this

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[21] Ky. R. Crim. P. (RCr) 9.24 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

basis for relief presented no genuine issue of material fact that could not be conclusively resolved from an examination of the record, an evidentiary hearing was not warranted.

Martin's remaining argument is that his counsel was ineffective in failing to request an expert in voice spectrographic analysis[22] to determine whether it is Martin's voice on the tape recording of the drug transaction in question so as to refute the testimony of the informant identifying Martin's voice given Martin's impeached credibility and the crucial nature of this evidence. Citing an unpublished opinion of the United States Court of Appeals for the Sixth Circuit,[23] the circuit court determined that the "jury could hear the tape and decide for themselves if the voice on the tape belonged to

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[22] The sound spectrograph, a machine that was invented in 1941, produces, by an electrical process, a pictorial representation of sounds, called a sound spectrogram. A sound spectrogram representing a person's voice is known as a voice spectrogram, or "voiceprint." Voice spectrographic analysis is a scientific process by which a voice spectrogram of a known speaker is compared with a voice spectrogram of an unknown speaker in order to determine if the two speakers are the same person. The fundamental premise of voice spectrographic analysis is that each person's voice is different. Accordingly, the voice spectrographic analysis' validity, as a means of personal identification, rests on the proposition that the sound patterns produced in speech are unique to the individual and that the spectrogram accurately and efficiently displays this uniqueness. 95 A.L.R. 5th 471, Voice Spectrographic Analysis Sec. 2 (2002)(internal citations omitted).

[23] Pursuant to CR 76.28(4)(c), unpublished opinions "shall not be cited or used as authority in any other case in any court of this state."

[Martin]." In its estimation, permitting a "voice analysis" expert to offer an opinion on this matter "would invade the province of the jury," and such testimony would have been inadmissible "because its probative value was substantially outweighed by the danger of undue prejudice, confusion of the issues, and would mislead the jury."

Although neither party has provided any authority as guidance nor has our research revealed any published Kentucky or Sixth Circuit decisions addressing this subject, our sister jurisdictions have confronted the issue of whether such evidence is admissible at both the state and federal level with varying results.[24] In United States v. Drones,[25] the Fifth Circuit held that expert testimony concerning voice spectrographic analysis is admissible in cases where the proponent of the testimony has established a

[24] United States v. Drones, 218 F.3d 496 (5th Cir. 2000), cert denied, 531 U.S. 1151, 121 S. Ct. 1095, 148 L. Ed. 2d 968 (2001); Tyson v. Keane, 159 F.3d 732 (2nd Cir. 1998), cert denied, 526 U.S.1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999); Ricketts v. City of Hartford, 74 F.3d 1397 (2nd Cir. 1996), cert denied, 519 U.S. 815, 117 S. Ct. 65, 136 L. Ed. 2d 26 (1996); United States v. Kupau,781 F.2d 740 (9th Cir. 1986), cert denied, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 45 (1986); United States v. Schmidt, 711 F.2d 595 (5th Cir. 1983), rehearing denied, 716 F.2d 901 (5th Cir. 1983), cert denied, 464 U.S. 1041, 104 S. Ct. 705, 79 L. Ed. 2d 1691 (1984); State v. Coon, 974 P.2d 386 (Alaska 1999); People v. Jeter, 80 N.Y.2d 818, 600 N.E.2d 214 (N.Y. 1992); People v. Ashford, 121 Ill. 2d 55, 520 N.E.2d 332 (Ill. 1988); Windmere, Inc. v. International Insurance Co., 105 N.J. 373, 522 A.2d 405 (N.J. 1987).

[25] Id. at 503.

proper foundation, joining several other circuits in finding such evidence admissible under the "general acceptance" standard for admitting scientific evidence established in Frye v. United States.[26] As observed by the Court, however, all of those cases were decided prior to Daubert v. Merrell Dow Pharmaceuticals, Inc.,[27] in which the United States Supreme Court determined that Federal Rule of Evidence (FRE) 702 superceded the Frye test and delineated five non-exclusive factors[28] to assist the trial judge in assessing the reliability and relevancy of proffered expert testimony.[29]

At the time, no federal case decided post-Daubert had considered the admissibility of expert voice identification

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[26] 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

[27] 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[28] Under Daubert, when faced with a proffer of expert testimony, a trial judge "must determine at the outset pursuant to [FRE] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Further, the following considerations identified in Daubert guide this inquiry: (1) whether the proffered scientific theory or technique can be and has been empirically tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential error rate of the theory or technique is acceptable; (4) whether the existence or maintenance of standards controls the technique's operation; and (5) whether the theory or technique has acquired general acceptance within the relevant scientific community. Id., 509 U.S. at 593, 125 L. Ed. 2d at 482-483.

[29] Drones, supra, n. 23, at 503.

testimony, but the one state court[30] to address the issue post-Daubert had determined that spectrographic analysis was admissible.[31] The Drones Court did not reach the question of whether expert voice identification testimony is admissible under Daubert. Given the "uncertainty of the current state of the law regarding the reliability and admissibility of expert voice identification evidence, the vulnerability of such expert testimony at trial," and the existence of other circumstantial evidence against Drones, the Court determined that Drones could not demonstrate that his counsel's failure to investigate and present voice identification testimony prejudiced his defense.[32]

Relevant for present purposes is the common thread of uncertainty that surrounds voice spectrographic evidence as revealed by a review of the relevant cases. Suffice it to say that the courts have gone in both directions with many courts determining that voice spectrographic evidence is not admissible under Frye, some admitting the evidence under standards other than Frye such as Daubert and still others allowing its admission while purporting to apply Frye. In short, "it is inconclusive whether there is a judicial consensus that voice

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30 Coon, supra, n. 23.

31 Drones, supra, n. 23, at 503.

32 Id. at 504.

spectrographic evidence is generally accepted within the relevant scientific community."[33]

Martin concedes that "defense counsel's strategy to refute the 'Adipex' testimony and tape was to have the defendant take the stand and attempt to convince the jury he was not at the apartment when the transaction occurred," but argues that this strategy was unreasonable. However, our function is to determine whether there is a reasonable probability that the outcome of Martin's trial would have been different absent his counsel's alleged error, i.e., failure to request an expert in voice spectrographic analysis, considering the totality of the evidence, not to question the wisdom of defense counsel's strategy with the benefit of hindsight as implicitly suggested by Martin. While testimony refuting that of the confidential informant as corroborated by the detective would have been especially helpful since credibility was of paramount significance here, any argument in that vein is mere speculation based on the assumption that such evidence would have been not only admissible but favorable, a proposition which is questionable at best.[34]

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[33] Coon, supra, n. 23, at 402.

[34] In proclaiming retrospectively that it "would not have permitted an 'expert' to express an opinion as to whose voice was on the tape . . . .," the circuit court erred. Before

Given the lack of uniformity regarding the validity and reliability of voice spectrographic analysis and our deference to counsel's judgment, we cannot say as a matter of law that counsel's strategy was objectively unreasonable. "[D]espite our reservations as to whether [defense counsel] actually knew enough about the law surrounding the admissibility of spectrographic evidence to have made a reasoned legal decision based upon it, we find that [his] failure to investigate can be constitutionally deficient only if it resulted in the exclusion of competent evidence."[35] Considering the ambiguous nature of the law concerning expert voice identification and lingering questions as to its level of acceptance within the relevant scientific community as we must, finding counsel ineffective for this omission would not only be unreasonable, it would be inconsistent with binding precedent. Even assuming that defense counsel had requested an expert in this field, his request had been granted and the testimony would have satisfied the Daubert standard, a rigorous cross-examination would more than likely have ensued. Also, the Commonwealth could have countered with expert testimony that

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making such a determination, the court would be required to conduct a Daubert hearing.

[35] Drones, supra, n. 23, at 502.

spectrographic analysis is, "at best, a dwindling science"[36] and, further, could have impeached any expert testimony with the substantial circumstantial evidence of Martin's offense. In short, the uncertainty surrounding this area of the law coupled with the vulnerability of the proposed testimony serves to defeat Martin's argument that he suffered prejudice due to counsel's failure to request an expert in voice spectrographic analysis to testify on his behalf. Accordingly, Martin cannot prevail under Strickland.

Because Martin has failed to establish that he suffered actual prejudice as the result of either of counsel's alleged errors, his claim for ineffective assistance of counsel must also fail. The order denying his RCr 11.42 motion is affirmed.

ALL CONCUR.

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[36] Id. at 504.