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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001337-MR

JAMES RAAKE COLLIER

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 86-CR-00658

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: James Collier appeals from an order of the Warren Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Collier was convicted of two counts of murder, two counts of first-degree robbery and one count of possession of a schedule II controlled substance. He was sentenced to life without the possibility of parole for twenty-five years. Although Collier denied participation in the actual murders, he did admit being present at the time the crimes were committed

and alleged that a paroled felon, Billy Smith, was the shooter. The Commonwealth presented evidence of Smith's alibi for the afternoon of the murders and the jury convicted Collier. Finding that neither his own counsel's complained-of conduct, nor that of the Commonwealth Attorney, prejudiced the outcome of his trial, we affirm.

On October 24, 1986, the Kentucky State Police found a vehicle containing two bodies on McFarland Lane in Warren County, Kentucky. There was no identification on the bodies or in the vehicle and the police believed the victims had been killed by gunshot wounds to the head from shots fired at the passenger side of the car. The victims' identities were later revealed as Pam and David Lamastus and police learned that they had been seen on the night of their murders with April Bull, Billy Smith, Stanley Bluet and Collier at John Embry's home. After interviewing Embry and Bull, Detective Stan Harlow took Collier in for questioning.

Collier initially denied knowing the victims, but later admitted purchasing \$150.00 worth of crack cocaine from David Lamastus and smoking the crack with Bull, Embry and the Lamastuses. After the cocaine was gone, Collier asked David Lamastus to give him more cocaine on credit; however, Lamastus refused stating that the cocaine was not his. Collier stated that the Lamastuses then followed him and Smith out to McFarland

Lane to sell them more cocaine. Smith told David Lamastus to give the cocaine to Collier and, after Pam handed the cocaine to Collier, Smith fired two shots into their car, grabbed her purse and drove off with Collier. As they were driving toward the bridge at the bottom of Barren River Road, Smith threw the shotgun out of the car window. Collier claimed that, while he intended to cooperate in robbing the Lamastuses, he had no idea that Smith intended to shoot them.

Police searched the area where Smith was alleged to have thrown the gun, but found nothing. Smith was subsequently interviewed about the murders and denied being present at the scene. Although he had been at Embry's house several times on the day of the murders, Smith stated that, when the murders occurred, he, Brenda Matthews and Larry Gann were selling items stolen during the burglary of a home in order to buy more cocaine. Matthews and Gann corroborated Smith's story.

At trial, Collier's defense was that Smith had been present and was the shooter. His previous statement to police was played for the jury. Smith again denied being present at the scene; however, three defense witnesses testified that Smith had told them he was in fact present, but was not the shooter. Matthews testified that she was certain the burglary by Smith and the murders of Pam and Davis Lamastus had occurred on the same Friday because she recalled taking her son to school that

morning. There was no physical evidence linking any suspect to the crime; however, the Commonwealth introduced a shotgun recovered from a search of Collier's home even though laboratory tests demonstrated that the gun was inoperable.

Collier was convicted and received sentences of life without the possibility of parole for twenty-five years for the murders, twenty years for the robberies and five years for drug possession. His sentence was affirmed by the Kentucky Supreme Court on direct appeal. Collier subsequently filed a motion to vacate his sentence, pursuant to RCr 11.42, wherein he alleged several instances of prosecutorial misconduct and ineffective assistance of both trial and appellate counsel. After several evidentiary hearings, the trial court denied the motion and this appeal followed.

Collier raises four separate issues involving alleged prosecutorial misconduct. First, Collier alleges that the Commonwealth improperly suggested that witnesses placing Smith at the scene of the murders had recently fabricated their testimony. At trial, Wilma McPherson and Debra Tinsley both testified that Smith had admitted to them that he was present when the Lamastuses were murdered. The Commonwealth impeached these witnesses by questioning the fact that they failed to inform police of their knowledge of Smith's alleged involvement in the crime. Collier presented evidence in support of his RCr

11.42 motion that Detective Harlow had in fact been informed of the existence of these women and the substance of their testimony by a man named Tim Coleman who was a first cousin to one of the murder victims. Harlow denied that the conversation with Coleman had revealed the existence of these witnesses before the trial, and the Commonwealth further denied any knowledge of them prior to trial. Moreover, the record reveals that Coleman, who watched the trial on his television, did not contact defense counsel to inform them of his alleged prior conversation with Harlow until after the trial.

The next two allegations of prosecutorial misconduct involve the Commonwealth's witness, April Bull. Collier claims that the prosecution knew, or should have known, that Bull was purchasing and using cocaine during the Lamastus murder trial. This information was obtained during a state police surveillance of Hilltopper Billiards for the purpose of investigating drug trafficking activities. Bull was observed repeatedly entering the billiard hall, but none of the tape recordings reveal her purchasing drugs. Further, she admitted during her trial testimony that she was a cocaine user, although she denied using drugs at the time of the trial. Consequently, the jury possessed enough information about Bull's drug use to evaluate her credibility. Collier further claims that the Commonwealth improperly failed to reveal a tape recording of Bull stating

that she thought Smith, Gann and Matthews were lying about Smith's alibi for the time the murders occurred. This omission on the part of the Commonwealth cannot be considered error because Bull's opinion as to Smith's truthfulness would not have been admissible at trial. Moss v. Commonwealth, Ky., 949 S.W.2d 579 (1997).

Collier next argues that the Commonwealth acted improperly by concealing deals that it made with Smith, Gann and Matthews in exchange for their testimony against him. These three witnesses' testimony placed Collier alone at the scene of the Lamastuses' murders. In a pre-trial discovery request, Collier's trial counsel asked for information pertaining to any deals between the witnesses and the Commonwealth regarding the disposition of a burglary charge against each of them in exchange for their testimony against Collier. The Commonwealth denied that any deals in exchange for testimony from these three witnesses actually existed. Although disposition of their pending charges was postponed until after their testimony in the Lamastus murder trial, the witnesses testified during the RCr 11.42 hearings that no promises were made in exchange for their testimony.

The Kentucky Supreme Court, on Collier's direct appeal, found no evidence of a deal between the Commonwealth and Smith. Issues considered by a court on direct appeal are not

cognizable for review in an RCr 11.42 proceeding. Stanford v. Commonwealth, Ky., 854 S.W.2d 500 (1990). The trial court found that there was no direct evidence to sustain Collier's contention that the Commonwealth made deals with these witnesses. Our standard on review requires us to defer to the trial judge's fact-finding authority. Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001). Moreover, Collier's trial counsel was permitted to question Smith, Gann, and Matthews about the existence and status of their burglary charges, thus raising the possibility of their bias in the minds of the jury members.

In addition to allegations of prosecutorial misconduct, Collier alleges three instances of ineffectiveness of counsel. First, Collier claims that his counsel on appeal was ineffective for abandoning the issue of whether photographs depicting the bodies of David and Pam Lamastus should have been excluded from evidence. Collier further argues that the trial court incorrectly applied the "farce and mockery of justice" test, found in Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642, 645 (1978), in determining that counsel's failure to appeal the admissibility of the photographs was not ineffective. Such error, if any at all, is harmless because photographs depicting murder victims do not become inadmissible simply because they are gruesome. Gall v. Commonwealth, Ky., 607 S.W.2d 97, cert. den. 450 U.S.989, 1010 S.Ct. 1529, 67 L.Ed.2d 824 (1981).

Collier next argues that his trial counsel was ineffective for failing to investigate and obtain information to impeach Brenda Matthews' testimony. Matthews' testimony corroborated Smith's alibi for where he was at the time of the murders. She stated that she knew the burglary in which she had participated with Smith occurred on the same Friday as the murders because she recalled taking her son to school that morning. An investigation of the school calendar for Warren County indicated that school was not in session on October 24, 1986, the day David and Pam Lamastus were killed. Had Collier's trial counsel possessed this information, he could have used it to impeach Matthews' testimony and cast doubt on Smith's alibi.

In order to meet the test for ineffectiveness of counsel under Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Collier must demonstrate not only that his trial counsel committed unprofessional errors, but also that it is likely the results of the proceeding would have been different in the absence of counsel's unprofessional errors. In this case, Smith testified that he was burglarizing the home of Danny Sublett on the afternoon of the murders. Police recovered property stolen from Sublett's home from several people who had purchased it from Smith. These people testified at the Lamastus murder trial and corroborated Smith's story about the date of the burglary. Thus, we are unable to say that trial counsel's

failure to impeach Matthews' recollection that she dropped her son off at school the day of the burglary and murders constituted ineffective representation.

We turn finally to Collier's contention that his trial attorney was ineffective for failure to object to the admission of a shotgun recovered from his home. The autopsy of the Lamastuses determined that their deaths were caused by shotgun wounds to the head and face. In addition #6 size shotgun pellets and shell wadding for a twelve gauge Remington power piston were found between the driver's seat and the console. Police found a shotgun in Collier's home and the Commonwealth introduced it into evidence. It was visible to the jury throughout the trial, and was used by the prosecutor as a prop during his closing argument. The Commonwealth's own ballistics expert reported that the gun was inoperable. Moreover, Collier's trial counsel introduced expert testimony that the firing pin had rusted firmly into place and the gun could not be fired.

Collier's trial counsel decided, as a matter of trial strategy, not to object to the introduction of the inoperable shotgun. Instead, he planned to allow the defective gun to be presented to the jury and then, based on the testimony of both experts, "to cut them off at the knees that it could not have been the murder weapon." (Transcript of Evidentiary Hearing,

July 16, 1996, p.15.) "There is a strong presumption that, under the circumstances, the actions of counsel might be considered sound trial strategy." Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999). "The tendency and temptation to second guess [counsel's performance] is strong and should be avoided." Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998). Consequently, we believe it was an acceptable trial strategy for counsel to permit the introduction of Collier's shotgun and then attempt to discredit the Commonwealth's case by proving that it could not have been the murder weapon.

For the forgoing reasons, the judgment of the Warren County Circuit Court is affirmed.

ALL CONCUR.

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