

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002151-MR

CALVIN LEE GODDARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 91-CR-00344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM AND VANMETER, JUDGES; EMBERTON, SENIOR
JUDGE.¹

BUCKINGHAM, JUDGE: Calvin Lee Goddard appeals from an opinion
and order of the Fayette Circuit Court that denied his RCr² 11.42
motion to vacate, set aside, or correct sentence alleging
ineffective assistance of counsel in connection with his
conviction for first-degree trafficking in a controlled

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

substance (cocaine) and being a persistent felony offender in the first degree. Finding no error, we affirm.

In March 1991, William "Bucky" Green was acting as a confidential informant participating in "controlled buys" of cocaine as part of a drug operation targeting mid-level dealers being conducted by the Kentucky State Police in Lexington, Kentucky. After obtaining information that he could purchase several ounces of cocaine from Goddard, Green contacted Goddard by telephone at Goddard's place of employment to schedule a drug transaction. The Kentucky State Police recorded two telephone conversations between Green and Goddard setting up a transaction for March 6, after Goddard left work that evening.

On March 6, 1991, Green met with three Kentucky State Police detectives who gave him the money to purchase the drugs and equipped him with a transmission devise that allowed the police to listen to and record the transaction. Green drove to Goddard's workplace, Griffith's Market, and then followed Goddard, who was in his vehicle, to an apartment nearby. Two persons in a white vehicle also followed Green and Goddard to the apartment complex from Griffith's Market.

When they arrived at the apartment complex, another person exited a maroon vehicle parked at the complex and accompanied Goddard, Green, and the two persons from the white vehicle into the apartment. Goddard had a key to the apartment,

which he used to open the door. Sally Martin, who lived there, was in the apartment at the time. Green purchased two ounces of cocaine for \$2,400 from Goddard and left the apartment.

In April 1991, in a sealed indictment, the Fayette County grand jury indicted Goddard on one felony count of trafficking in a controlled substance (cocaine)(KRS³ 218A.140) and being a persistent felony offender in the first degree (PFO I) involving the drug transaction on March 6, 1991. On April 23, 1991, Goddard was arrested in Florida on charges of trafficking in cocaine. In May or June 1991, Kentucky authorities filed a detainer with Florida authorities on the Fayette County indictment. After pleading guilty to the drug charges in Florida, Goddard was returned to Kentucky in 1993 for a jury trial on June 15, 1994.

During the trial held on June 15, 1994, the Commonwealth called Green as a witness and introduced the audiotapes of the two telephone conversations between Green and Goddard and the drug transaction. Goddard testified for the defense acknowledging his participation in the three events but stating he was acting solely as a middleman for a person he knew only as Marcello.⁴ Defense counsel argued that Goddard was

³ Kentucky Revised Statutes.

⁴ Goddard testified that he did not know Marcello's last name.

guilty of the misdemeanor offense of facilitation, but not of the felony offense of trafficking.

The jury found Goddard guilty of trafficking in cocaine and being a PFO I, and it recommended an enhanced sentence of seventeen years. On July 12, 1994, the trial court entered a judgment consistent with the jury's recommendation sentencing Goddard to eight years for trafficking in a controlled substance (cocaine) enhanced to seventeen years for being a PFO I. This court affirmed Goddard's conviction on direct appeal, and the Kentucky Supreme Court denied discretionary review. See Goddard v. Commonwealth, 94-CA-001716-MR (not to be published opinion rendered April 5, 1996).

On April 23, 1998, Goddard filed a pro se RCr 11.42 motion alleging several instances of ineffective assistance of counsel, a motion for an evidentiary hearing on the motion, and a motion for appointment of counsel. The trial court denied the motion for appointment of counsel but granted the motion for an evidentiary hearing. On February 23, 2000, the trial court conducted an evidentiary hearing in which Goddard and his trial counsel testified as witnesses and Goddard acted as his own attorney. On March 21, 2000, the trial court entered an opinion and order denying the RCr 11.42 motion. Upon appeal, this court vacated the order denying the RCr 11.42 motion and remanded the

case to the circuit court to appoint an attorney to represent Goddard and conduct a full evidentiary hearing on the motion.

Upon remand, the trial court appointed counsel to represent Goddard, and he filed a supplemental memorandum expanding on two issues of ineffective assistance raised in Goddard's initial pro se RCr 11.42 motion. On March 22, 2002, the trial court conducted a second RCr 11.42 hearing with Goddard being represented by counsel. Goddard and his trial counsel testified again with the parties agreeing to incorporate the testimony from the first hearing for purposes of the motion. On October 1, 2002, the trial court issued an opinion and order denying the RCr 11.42 motion. This appeal followed.

Goddard raises several allegations of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314-15 (1998). The major focus is whether the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999). The defendant bears the burden of

establishing ineffective assistance. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 469 (2002).

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. Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2064-65; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992); Tamme, 83 S.W.3d at 469. A court must be highly deferential in scrutinizing counsel's performance and avoid second-guessing counsel's actions based on the benefit of hindsight. Harper, 978 S.W.2d at 315; Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999). There is a strong presumption that counsel's conduct fell within the wide range of reasonable assistance that the defendant must overcome. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Tamme, 83 S.W.3d at 470; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client

in the same way.” Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 469 (2003).

In measuring prejudice, the relevant inquiry is whether there is a reasonable probability, that but for counsel’s unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Norton v. Commonwealth, Ky., 63 S.W.3d 175, 177 (2001). A reasonable probability is a probability sufficient to undermine confidence in the outcome given the totality of the evidence before the jury. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998); Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 412 (2002). It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002).

Goddard contends that defense counsel was ineffective for failing to subpoena and call Sally Martin to testify at the trial. During the trial, the defense strategy was to concede that Goddard was guilty of the misdemeanor offense of criminal facilitation but contest that he was guilty of the felony offense of trafficking in a controlled substance. In his testimony, Goddard asserted that the cocaine was supplied by a person he knew as Marcello, who Goddard claimed was one of the

persons in the white Datsun and was present at the apartment during the drug transaction with Green. Goddard argues that Sally Martin, who was Goddard's girlfriend and was an occupant in the apartment where the drug transaction occurred, was a critical witness because she knew Marcello and could have supported his version of the transaction. Goddard points out that the prosecution questioned the existence of Marcello and argued that Goddard had "made up" this person to diminish his culpability for the events.

Unfortunately, trial counsel testified at the RCr 11.42 hearings that he did not remember much of the circumstances concerning the trial, including why he did not subpoena Sally Martin as a witness. Goddard testified that Martin told him that she had talked with trial counsel and was willing to testify at the trial. Trial counsel did not specifically recall speaking with Martin but did not disagree with Goddard's claim that he had spoken with her.

At the first RCr 11.42 hearing, trial counsel indicated that if Martin had been willing to testify and could have provided useful support for Goddard's position, he likely would have subpoenaed her, so he speculated that she was unwilling to admit that she had been present and allowed her apartment to be used for drug transactions. At the second RCr 11.42 hearing, trial counsel indicated concern that while

Martin's testimony could have supported aspects of the defense case, it also was potentially harmful by reinforcing Goddard's extensive role in the drug transaction.

The trial court rejected Goddard's ineffective assistance of counsel claim on this issue stating Goddard had failed to show adequately what Sally Martin would have testified to at the trial because she did not testify at either RCr 11.42 hearing. Goddard contends that there is no absolute legal requirement that a defendant present direct testimony in a post-conviction proceeding from a witness in order to support his claim of ineffective assistance for counsel's failure to call that witness at trial.

The decision whether to call a particular witness is generally considered a tactical decision within the discretion of counsel. See Foley v. Commonwealth, Ky., 17 S.W.3d 878, 885 (2000); United States v. Williams, 106 F.3d 1362, 1367 (7th Cir. 1997). In assessing defense counsel's strategic decision whether to call a particular witness, a court must balance the benefits and risks of the anticipated testimony. See Horton v. Allen, 370 F.3d 75, 86 (1st Cir. 2004). A witness "may not testify as anticipated or the witness's demeanor or character may impress the jury unfavorably and taint the jury's perception of the accused; or the testimony, though sympathetic, may prompt jurors to draw inferences unfavorable to the accused." Id. A

defendant also must show not only that the testimony of the uncalled witness would have been helpful, but also that the witness actually would have testified at the trial. See Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990); Stewart v. Nix, 31 F.3d 741, 744 (8th Cir. 1994).

For instance, if a witness's potential testimony would implicate his Fifth Amendment right not to incriminate himself, a defendant must show that the witness would have been willing to waive his Fifth Amendment right at the time of the trial, see, e.g., United States v. Davis, 939 F.Supp. 810, 814 (D. Kan. 1996)(stating without affirmative waiver of Fifth Amendment rights, proffered testimony of uncalled witness would be merely speculative), or that the testimony would otherwise have been admissible at the trial, see, e.g., Luna v. Cambra, 306 F.3d 954, 963-65 (9th Cir. 2002)(involving witness who provided written statements saying that he would have provided testimony implicating himself and exculpating the defendant that court found would have been admissible under exception to hearsay rule for statements against penal interest). Moreover, if the potential trial witness is not called to testify at the post-conviction hearing on defense counsel's trial performance, the defendant ordinarily should provide sufficient explanation for the witness's absence and "demonstrate, with some precision, the content of the testimony [he or she] would have given at trial."

Lawrence, 900 F.2d at 130 (quoting United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1014-15 (7th Cir. 1987)). See also Patel v. United States, 19 F.3d 1231, 1237 (7th Cir. 1994)(petitioner claiming trial counsel failed to call witness must make specific, affirmative showing as to content of the missing evidence). The court will view a claim of ineffective assistance for counsel's failure to call a witness at trial with great caution especially where the only evidence of the witness's anticipated testimony is from the defendant and the witness does not testify at the post-conviction hearing. See Sayre v. Anderson, 238 F.3d 631, 635-36 (5th Cir. 2001).

The evidence concerning why trial counsel did not call Sally Martin as a witness is somewhat ambiguous, but it appears that counsel did interview her. Counsel suggested that he did not call Martin because she was reluctant to incriminate herself with testimony implicating herself in criminal drug activity. Goddard failed to present any direct evidence from Martin, either by testimony at the RCr 11.42 hearings or an affidavit, but rather merely testified at the first hearing that Martin told him at some unknown point before the trial that she was willing to testify on his behalf.

We conclude that Goddard did not present sufficient evidence to show that trial counsel rendered deficient performance in failing to call Martin at the trial. Trial

counsel expressed legitimate concerns that Martin either would not testify or would have provided detrimental evidence based on his conversation with her. Goddard offered only his own self-serving claim that she expressed to him a willingness to testify. He provided no other supporting evidence such as letters or statements to other persons. Martin also would have been entitled to assert a Fifth Amendment claim that Goddard failed to show she would have voluntarily relinquished.

Goddard's motion counsel stated at the second RCr 11.42 hearing that through investigation, he had determined that Martin was residing at a specific residence in Lexington, but he had been unable to serve her with a subpoena for the hearing. Goddard indicated that he consented to conducting the hearing without Martin's presence. Goddard had the opportunity to call Martin as a witness at two hearings, yet he voluntarily consented to submit the RCr 11.42 motion for a decision without her.

In addition, Goddard did not provide sufficient specificity as to what Martin would have testified. He merely indicated that she would have confirmed the existence of Marcello and that the cocaine sold to Bucky Green belonged to Marcello. The Commonwealth, however, was unable to cross-examine Martin because she was not called as a witness at the RCr 11.42 hearing. Thus, both this court and the trial court

are severely hampered in assessing the potential risks and benefits had trial counsel called her to testify at the trial. Trial counsel also questioned the overall usefulness of her potential testimony. Given the deference accorded attorneys in deciding whether to call witnesses and the deficiencies in the evidence, Goddard has not satisfied his burden of showing that trial counsel was deficient for failing to call Sally Martin as a witness at the trial.

Goddard also contends that trial counsel was ineffective for failing to use peremptory challenges to exclude two jurors who indicated in voir dire that they had worked late the night prior to the trial. Just after the jury was selected, defense counsel approached the bench and told the judge that he had inadvertently failed to strike one of the jurors that had indicated he had worked late the previous night. The trial judge interpreted defense counsel's comments as a request to strike the juror for cause, which he denied. Defense counsel did not pursue the issue or explicitly ask the court to allow him to exercise one of the two peremptory challenges he had remaining. Goddard asserts that he asked defense counsel to strike the two jurors and counsel's failure to do so effectively deprived him of his right to exercise the peremptory challenges allotted to him. The trial court rejected this argument because Goddard had not shown he had been prejudiced by trial counsel's

conduct. Relying on Thomas v. Commonwealth, Ky., 864 S.W.2d 252 (1993), Goddard argues that because peremptory challenges are “substantial rights”, counsel’s deficient performance depriving him of the use of his peremptory challenges is presumed to be prejudicial.

In Thomas, the court held that prejudice is presumed and the defendant is entitled to reversal of a conviction as a matter of procedural due process where he is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause. 864 S.W.2d at 259. See also Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 372 (2002). The court stated that “[t]he rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced.” Thomas, 864 S.W.2d at 259. In other words, the court held that in addition to the right to an impartial jury, a defendant’s substantive procedural due process rights are violated when a defendant has been denied the full use of his peremptory challenges by having been required to use them to remove unqualified prospective jurors who should have been excluded for cause, and prejudice would be presumed.

Goddard alleges that trial counsel’s failure to exercise his peremptory challenges to strike the two venire persons who indicated they had worked late the previous night

deprived him of a substantial right and that he need not show actual prejudice resulting from counsel's deficient performance. Goddard asserts that defense counsel's interference with the exercise of his peremptory challenges constituted structural error that does not require a showing of prejudice, but is presumed to be prejudicial.

First, we note that this issue was not properly preserved. While Goddard challenged his trial attorney's failure to exercise peremptory challenges to the two prospective jurors based on ineffective assistance of counsel in his original RCr 11.42 motion, he at no time argued that prejudice should be presumed. The trial court rejected the ineffective assistance of counsel claim because of the lack of prejudice. Goddard did not present the argument that he need not show actual prejudice in this situation to the trial court, as he does on this appeal. See, e.g., Henson v. Commonwealth, Ky., 20 S.W.3d 466, 470 (1999)(argument not presented to trial court is not properly preserved for appellate review); Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976)(appellant may not feed one can of worms to trial judge and another to appellate court); Bowling, 80 S.W.3d at 419 (ineffective assistance of counsel claim raised for first time on appeal of denial of RCr 11.42 motion and not raised in original motion was not preserved).

In addition, Goddard's position lacks substantive merit. Goddard's analogy between the situation in Thomas and defense counsel's failure to use a peremptory challenge is faulty. Thomas involves a defendant being forced to use a peremptory challenge to strike an unqualified juror that should have been removed for cause. The defendant also must have exhausted his allotment of peremptory challenges. See, e.g., Baze v. Commonwealth, Ky., 965 S.W.2d 817, 825 (1997). None of these factors exist in Goddard's case. Thus, we do not believe Thomas is controlling in this situation.

For instance, in Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001), the Kentucky Supreme Court rejected an argument similar to the position Goddard presents here. The court distinguished Thomas from a situation involving ineffective assistance of counsel for failure to exercise a peremptory challenge. Id. at 443. It also refused to apply the doctrine of structural error because the defense had received the proper allotment of peremptory challenges and the jurors allegedly not stricken because of defense counsel's erroneous failure to exercise peremptory challenges were not otherwise unqualified. Id. at 444. The court indicated that a defendant must establish actual prejudice in order to succeed on a claim of ineffective assistance of counsel concerning the use of peremptory challenges.

Similarly, in Baze v. Commonwealth, Ky., 23 S.W.3d 619 (2000), Baze argued that defense counsel was ineffective when he negligently failed to exercise the ninth peremptory challenge through mere oversight. The court indicated that a defendant raising an ineffective assistance of counsel claim for failure to exercise a peremptory challenge must establish actual prejudice affecting the outcome and cannot rely solely on a bald assertion that the result might have been more favorable with another juror. See also United States v. Taylor, 832 F.2d 1187, 1195-96 (10th Cir. 1987)(stating counsel's failure to exercise peremptory challenges does not give rise to a claim of ineffective assistance of counsel absent a showing that the defendant was prejudiced by his counsel's failure to exercise the challenges); Wilcher v. State, 863 So.2d 719, 755 (Miss. 2003)(same); United States v. Martinez-Salazar, 528 U.S. 304, 317 n.4, 120 S.Ct. 774, 782 n.4, 145 L.Ed.2d 792 (2000)(suggesting that prejudice requirement applied for due process claim even where defendant's right to exercise peremptory challenges are substantially impaired by failure to remove jurors for cause).

Goddard has not shown that the presence of the two questioned jurors affected the outcome of the trial in any way. Defense counsel and the trial judge both remarked at the second RCr 11.42 hearing that they did not observe the two jurors being

unattentive during the trial. Thus, Goddard has not established ineffective assistance related to counsel's failure to exercise peremptory challenges.

Goddard contends that defense counsel was ineffective for failing to object to prosecutorial misconduct involving several statements made by the prosecutor in his closing argument. In his closing argument, the prosecutor stated that while the confidential informant, Bucky Green, had some criminal charges pending against him dismissed in return for his cooperation, the state benefited from his assistance by taking drugs off the streets before they were sold to other persons. He said that Green had been responsible for the arrest and conviction of sixteen individuals. The prosecutor further commented, "We got a deal out of him. I wish I had a hundred Bucky Greens because then maybe we could make a dent in this problem. If he wanted to work again, we probably would think about it seriously."

Goddard acknowledges that both counsel, including the prosecutor, are allowed wide latitude in closing argument. See Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 12 (2002); Foley v. Commonwealth, Ky., 953 S.W.2d 924, 939 (1997). In closing argument, a prosecutor may comment on the tactics of the defense, the evidence, and the falsity of a defense proposition. Parrish v. Commonwealth, Ky., 121 S.W.3d 198, 205 (2003); Hodge

v. Commonwealth, Ky., 17 S.W.3d 824, 854 (2000)(quoting Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987)); Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 806 (2001).

Additionally, an advocate is permitted considerable latitude in responding to his opponent's arguments. See, e.g., Foley, 953 S.W.2d at 940; United States v. Beaman, 361 F.3d 1061, 1065 (8th Cir. 2004); United States v. Perez-Ruiz, 353 F.3d 1, 10 (1st Cir. 2003). However, a prosecutor may not argue facts that are not in evidence or reasonably inferable from the evidence, Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83, 89 (1991); Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 16 (2001), or improperly vouch for the credibility of a witness, see United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985); United States v. Modena, 302 F.3d 626, 634 (6th Cir. 2002); United States v. Cornett, 232 F.3d 570, 575 (7th Cir. 2000). "Improper vouching occurs when a prosecutor refers to facts outside the record, implies that the witness's testimony is supported by facts not available to the jury, gives an implied guarantee of truthfulness, or expresses a personal opinion regarding witness credibility." Beaman, 361 F.3d at 1065. See also United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999); United States v. Brennan, 326 F.3d 176, 183 (3rd Cir. 2003).

Goddard claims that the prosecutor's statements in closing argument concerning Bucky Green constituted improper vouching for Green's credibility based on facts not in evidence. A review of the record belies this assertion because the prosecution's statements were supported by testimony from several witnesses on Green's role as a confidential informant in the drug operation that resulted in several arrests. In addition, the prosecutor's statements were in response to the defense attorney's attack on Green's credibility and the Commonwealth's use of Green as a confidential informant. Trial counsel testified at the second RCr 11.42 that he did not object because he believed the prosecutor's statements were legitimate rebuttal argument to his criticism of Green on cross-examination and in the defense's closing argument. Trial counsel also stated that given the latitude allowed prosecutors to comment on the evidence and respond to defense arguments, he did not feel an objection would have been successful. While the prosecutor's statements, especially concerning the use of Green in the future, might arguably have crossed the line into improper vouching, they were not so egregious or clearly improper that trial counsel's failure to object was outside the wide range of competent performance.

In his fourth complaint, Goddard alleges that trial counsel was ineffective for failing to object to the jury

instructions. More specifically, the jury instructions stated in the definitions section, "Traffic -- means to manufacture, sell, transfer or possess with intent to sell a controlled substance." Goddard argues that including the several various forms of conduct that would constitute trafficking deprived him of a unanimous verdict in violation of Section 7 of the Kentucky Constitution because there was no evidence to support the theory that he "manufactured" cocaine.

In Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000), the Kentucky Supreme Court held a jury instruction for first-degree trafficking that required the jury to find, among other things, that the defendant had "cocaine in his possession with the intent to traffic in it" and included a general definition of "Trafficking" as meaning "to manufacture, distribute, dispense, sell or transfer a controlled substance" violated Section 7 of the Kentucky Constitution and due process. Id. at 881-84. The court held that where the instructions allow the jury to find guilt based on alternative theories, a defendant is denied his constitutional right to a unanimous verdict unless the evidence supports the verdict beyond a reasonable doubt on all the alternate theories. Id.

In the current case, Goddard contends trial counsel was ineffective for failing to object to the instructions on grounds similar to those accepted by the Kentucky Supreme Court

in Burnett. However, there is no general duty on an attorney to anticipate changes or advances in the law. See Sistrunk v. Vaughn, 96 F.3d 666, 670-71 (3rd Cir. 1996); Sellan v. Kuhlman, 261 F.3d 303, 315 (2nd Cir. 2001); Valenzuela v. United States, 261 F.3d 694, 700 (7th Cir. 2001). Under Strickland, counsel's performance is to be viewed as of the time of the attorney's conduct, so an attorney's failure to raise novel issues, as opposed to established legal theories, or anticipate changes in the law typically will not constitute deficient performance. See, e.g., Haight, 41 S.W.3d at 448; Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 165 (2001)(involving failure to request instruction); Skaggs v. Commonwealth, Ky. App., 885 S.W.2d 318, 319 (1994)(failure to anticipate challenge to grand jury impaneling procedure not ineffective assistance of counsel); Lott v. Coyle, 261 F.3d 594, 609 (6th Cir. 2001).

As the trial court noted, including the various alternate types of conduct in the definition of "traffic" was typical, established procedure in 1994 when Goddard's trial occurred. Goddard's reliance on the 1981 case of Hayes v. Commonwealth, Ky., 625 S.W.2d 583 (1981), is misplaced because it dealt with a prosecution for murder and merely stated the general rule of law. The Burnett case indicates the uncertainty surrounding application of the unanimous verdict principle to the drug trafficking instructions prior to 2000. Given the

state of the law at the time, trial counsel's failure to challenge the trafficking instruction was not deficient performance outside the wide range of objective competence.

In addition to the above-discussed inadequacies, Goddard's claim that he was prejudiced by counsel's alleged errors because the jury probably would have convicted him of criminal facilitation, rather than trafficking, is unpersuasive. Criminal facilitation requires that a person knowingly provide the means or opportunity for the commission of a crime by another person. The Kentucky Supreme Court has held that "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1995). See also Thompkins v. Commonwealth, Ky., 54 S.W.3d 147, 150 (2001).

The jury instruction on criminal facilitation in the current case required the jury to find that Goddard "brought Bucky Green in contact with a person identified as Marcello; and that Defendant knew Marcello intended to sell Bucky Green a quantity of cocaine." Even if Sally Martin had testified, the jury had believed Marcello existed, and the alleged errors by trial counsel had not occurred, the evidence of Goddard's involvement was so strong it is not reasonably probable that the jury would have convicted him of criminal facilitation, rather than trafficking. Goddard admitted at the trial and the

audiotape evidence showed that Goddard was the only person who dealt with Green. Goddard arranged the drug transaction, accompanied Green to the location of the transaction, provided the location in an apartment under his partial control, negotiated the terms and participated in the transfer of the drugs, and obtained remuneration⁵ for his participation. Marcello never spoke with Green. Goddard's belief that acting as a "middleman" in a drug transaction constitutes criminal facilitation is erroneous where he acts with the intent that the crime be committed. The undisputed evidence overwhelmingly indicated that Goddard was not "wholly indifferent" to the sale of the cocaine to Green or that he merely provided the means or opportunity for the crime by bringing Green in contact with Marcello. Accordingly, Goddard has not established that the outcome of the trial would have been different absent counsel's errors.

Goddard's next argument is that his trial counsel rendered ineffective assistance by eliciting testimony from a police detective that Goddard had been imprisoned in Florida during the period of time before the trial herein. Although this issue was discussed at the evidentiary hearing on Goddard's RCr 11.42 motion, it was neither addressed in his motion nor in

⁵ Goddard testified that he received a quarter ounce of cocaine from Marcello in return for his participation in the transaction. Green testified that he gave the money to Goddard, but Goddard stated that Green merely laid the money on a table.

the court's ruling denying the motion. We conclude that this argument fails because it does not meet the second prong of the Strickland test.

Finally, Goddard asks this court to review a claim of ineffective assistance of appellate counsel in his direct appeal despite acknowledging that the Kentucky Supreme Court has repeatedly held that ineffective assistance of appellate counsel is not a cognizable issue in an RCr 11.42 motion. See, e.g., Harper v. Commonwealth, Ky., 978 S.W.2d 311, 318 (1998)(citing Vunetich v. Commonwealth, Ky., 847 S.W.2d 51 (1990); Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14-15 (1999); Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992)). Under Supreme Court Rule (SCR) 1.030(8)(a), this court is obligated to follow the applicable precedents established by the decisions of the Kentucky Supreme Court. Accordingly, Goddard's request that we act contrary to established Supreme Court precedent is without merit.

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher N. Lasch
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Anitria M. Alo
Assistant Attorney General
Frankfort, Kentucky