

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000256-MR
AND
NO. 2003-CA-000257-MR

JAMES A. SLAUGHTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
INDICTMENT NO. 97-CR-002198

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE. James A. Slaughter appeals from two judgments of the Jefferson Circuit Court that denied his post-conviction motions. On September 16, 2002, the circuit court denied Slaughter's motion to alter, amend, or vacate, filed pursuant to RCr 11.42. The circuit court, on January 14, 2003, also denied Slaughter's motion to reconsider the denial of his RCr 11.42 motion. We affirm.

On September 11, 1997, Slaughter, Michael A. Bates and Timothy D. Miller were indicted by the Jefferson County Grand Jury on the charge of trafficking in a controlled substance (cocaine).¹ Slaughter was also charged with being a first-degree persistent felony offender.² These indictments stemmed from an incident that occurred on the night of May 19, 1997, in Louisville, Kentucky. On this night, detectives from the Louisville Police Department set up surveillance at a Shell gas station on Floyd Street in response to information indicating that a drug transaction was going to occur at that location. As the detectives observed Bates standing in front of the Shell station, a van pulled into the parking lot. The detectives would later testify that they saw Slaughter get out of the van and give Bates what appeared to be a plastic bag containing a white substance. Following this transaction, the police moved in and arrested Slaughter, Bates, and van driver, Miller. The police searched Bates and found a bag containing approximately two ounces of powder cocaine on his person.

This matter proceeded to trial on the charges against Slaughter and Bates. The police were not able to locate Miller prior to trial. At trial, Bates testified that he never received any cocaine from Slaughter on the night in question.

¹ KRS 218A.1412.

² KRS 532.080.

Rather, Bates testified that he was in possession of the cocaine after stealing it from a drug dealer. Bates further stated that he was not standing in front of the gas station as the detectives testified, but rather arrived in the van with Slaughter and Miller. Similarly, Slaughter testified that the three individuals had arrived in the van together and that he had not given Bates any cocaine. Slaughter stated that he was at the Shell station only to purchase lottery tickets.

The jury found Slaughter guilty of trafficking in cocaine and sentenced him to seven years' imprisonment. After the jury reached its verdict, Slaughter, pursuant to a plea agreement, entered a guilty plea to the first-degree persistent felony offender charge. The plea agreement required the enhancement of the seven-year prison sentence to 15 years.³ Slaughter's motion for a new trial was denied by the trial court. On direct appeal, this Court affirmed Slaughter's conviction.⁴

During the pendency of his direct appeal, Slaughter filed a "Supplemental Motion for a New Trial." As a basis for this motion, Slaughter noted that co-indictee Miller had been

³ Bates was also found guilty of cocaine trafficking, but his sentence was probated.

⁴ Slaughter v. Commonwealth, No. 1999-CA-000185-MR (not-to-be published opinion rendered August 4, 2000).

located and had entered a guilty plea to cocaine trafficking. Slaughter further asserted that the information contained in Miller's guilty plea colloquy confirmed the version of events offered by Slaughter and Bates at trial. Shortly thereafter, Slaughter filed another supplemental motion for a new trial. On September 13, 1999, the circuit court conducted a hearing on Slaughter's motions and ultimately denied his requests for a new trial. This Court affirmed the trial court's decision.⁵

On July 10, 2002, Slaughter filed his motion to alter, amend, or vacate his conviction pursuant to RCr 11.42. In his RCr 11.42 motion, Slaughter alleged that his trial counsel provided ineffective assistance by refusing to seek independent testing of the white powder taken from Bates, by failing to object to the introduction of the cocaine, by failing to make a motion to suppress the cocaine found on Bates, by refusing to locate, interview, or subpoena Miller to testify at trial, and by coercing him into entering a guilty plea to the persistent felony offender charge. Slaughter also filed a supplemental RCr 11.42 motion alleging that his trial counsel advised him to enter a guilty plea to an unindicted offense. The trial court denied Slaughter's RCr 11.42 motions on September 16, 2002.

⁵ Slaughter v. Commonwealth, No. 2000-CA-000297-MR (not-to-be published opinion rendered November 2, 2001).

Following the trial court's denial of his RCr 11.42 motion, Slaughter filed a motion to reconsider pursuant to CR 52.02 and CR 52.04. In this motion, Slaughter clarified⁶ that he was advised to enter a guilty plea to an unindicted offense because he was indicted for trafficking in a controlled substance "sworn to be 'crack cocaine,' but the only evidence presented for trial was powdered cocaine." The trial court, on January 14, 2003, denied Slaughter's motion to reconsider. This appeal followed.

On appeal, Slaughter argues that the trial court committed reversible error in denying his post-conviction motions. Slaughter maintains that trial counsel was ineffective by not objecting to the "variance" between the indictment and the produced evidence, by failing to interview or subpoena Miller to testify at trial, by advising him to enter a guilty plea to the persistent felony offender charge and by failing to request independent testing of the cocaine seized from Bates. We have reviewed Slaughter's arguments and find no error.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance

⁶ Slaughter filed his motion to reconsider after believing that the trial court misunderstood the arguments presented in the RCr 11.42 motion.

prejudiced the defense.⁷ The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.⁸ A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.⁹ The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance.¹⁰ 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹¹ The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient.¹²

⁷ Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986).

⁸ Strickland, 466 U.S. at 688-89, 80 L. Ed. 2d at 694.

⁹ Id.

¹⁰ Id. at 690, 80 L. Ed. 2d at 695.

¹¹ Id. at 694, 80 L. Ed. 2d at 698.

¹² Id. at 689, 80 L. Ed. 2d at 694; Commonwealth v. Pelphery, Ky., 998 S.W.2d 460, 463 (1999).

First, Slaughter claims that his trial counsel was ineffective in failing to object to the indictment because of a "variance" in the evidence. Slaughter believes that the indictment was based on a detective's testimony before the grand jury that the cocaine herein was "crack cocaine" while the evidence presented at trial revealed that the cocaine was actually "powdered cocaine." We reject this argument.

In order to establish error from a variance between the indictment and the proof, an appellant must show that he did not receive fair notice of the charges against him.¹³ An indictment is sufficient if its language, coupled with the applicable statute, informs the accused of the offense charged with reasonable certainty.¹⁴

Count One of Slaughter's indictment read as follows:

That on or about the 19th day of May, 1997, in Jefferson County, Kentucky, the above-named Defendants, MICHAEL A. BATES, TIMOTHY D. MILLER, and JAMES A. SLAUGHTER, acting alone or in complicity with another, committed the offense of Trafficking in a Controlled Substance in the First Degree by knowingly and unlawfully manufacturing, distributing, dispensing, selling, transferring or possessing with intent to manufacture, distribute, dispense or sell a controlled substance classified as a Schedule II Controlled Substance known as Cocaine.

¹³ Johnson v. Commonwealth, Ky., 864 S.W.2d 266, 272-73 (1993).

¹⁴ Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996).

Contrary to Slaughter's argument, Kentucky law does not differentiate between "crack cocaine" and "powder cocaine." KRS 218A.070(1)(d) categorizes cocaine, its salts, optical and geometric isomers and salts of isomers or any derivative therefrom as a Schedule II drug. Under this statute, Kentucky recognizes any and all derivatives of cocaine simply as a Schedule II controlled substance known as cocaine. Whether the cocaine was in powder or "crack" form is not fatal to an indictment because KRS 218A.1412 prohibits trafficking in all forms of Schedule II drugs. On appeal, Slaughter does not contend that he was surprised or prejudiced at trial by the language of the indictment. Moreover, the indictment herein contained a sufficient statement of the facts alleged plus citations of the applicable statute. Thus, we find no error.

Next, Slaughter claims that his attorney ineffectively failed to locate, interview or subpoena co-defendant Miller to testify in Slaughter's defense at trial. We disagree.

Recently, in Fraser v. Commonwealth,¹⁵ the Kentucky Supreme Court emphasized that a hearing is required for an RCr 11.42 motion if there exists a material fact that cannot be conclusively resolved by an examination of the record. The trial judge may not simply disbelieve factual allegations in the

¹⁵ Ky., 59 S.W.3d 448 (2001).

absence of evidence in the record refuting them.¹⁶ Slaughter argues that Miller's guilty plea colloquy raises a material issue of fact which cannot be conclusively proved or disproved by an examination of the record. Slaughter asserts that his trial counsel failed to adequately locate Miller or even subpoena him to testify. Slaughter believes that, since Miller's statements during the entry of his guilty plea were consistent with the testimony given by Bates and Slaughter at trial, the jury might have been more favorably disposed to believe Slaughter's version of the facts. Consequently, Slaughter concludes that his trial attorney's failure to locate Miller constituted prejudicial ineffective assistance that would have been proven at a hearing.

Nevertheless, Fraser does not require a hearing unless the defendant raises a material issue of fact which, if true, would satisfy both elements of the Strickland test.¹⁷ The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

¹⁶ Id. at 452.

¹⁷ Id. at 456-57. See also Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986).

At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment.¹⁸ Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.¹⁹

At trial, Slaughter and Bates both testified that Slaughter did not sell or give cocaine to Bates at the Shell station on May 19, 1997. Miller was to be tried with Slaughter and Bates, but had fled Kentucky prior to trial. If Miller had stayed for trial and testified, he would have been forced either to implicate himself as an accomplice or to deny any involvement in the drug trafficking. Moreover, if subpoenaed to testify, given his own admissions during his guilty plea colloquy, any testimony Miller would have provided would have been cumulative. Under the circumstances as they existed at the time, Slaughter's trial counsel had sound reasons to believe Miller's availability as a witness would have been fruitless or even harmful. Thus, counsel's failure to actively pursue Miller's appearance at trial

¹⁸ Strickland, 466 U.S. at 690, 80 L. Ed. 2d at 695.

¹⁹ Id. at 692, 80 L. Ed. 2d at 696.

may be deemed a reasonable trial strategy and cannot be challenged as ineffective assistance.²⁰

Third, Slaughter argues that his trial counsel provided ineffective assistance by advising him to enter a guilty plea to the persistent felony offender charge because he received an illegal sentence. Slaughter believes that, in violation of Pace v. Commonwealth,²¹ he received prison sentences for both the underlying cocaine trafficking offense as well as the enhanced sentence for the persistent felony offender charge. We disagree.

In Pace, the Kentucky Supreme Court determined that, if the jury finds the defendant guilty of the principal offense and of the previous convictions, only the penalty prescribed by the persistent felony offender statute shall be imposed.²² Any attempt to run the sentence imposed for the persistent felony offender conviction either concurrently with or consecutively to the underlying offense on which it is based is improper.²³

In this matter before us, Slaughter's contention that he received concurrent sentences for both the persistent felony offender charge and the underlying cocaine trafficking charge is

²⁰ Strickland, 460 U.S. at 691, 80 L. Ed. 2d at 695-96.

²¹ Ky., 636 S.W.2d 887 (1982), *overruled on other grounds by Commonwealth v. Harrell*, Ky., 3 S.W.3d 349 (1999).

²² Pace, 636 S.W.2d at 890-91.

²³ Id.

misguided. The trial court, in its March 30, 1998, judgment, found Slaughter guilty of trafficking in cocaine and recognized the jury's recommended sentence of seven years' imprisonment. Moreover, the trial court noted that this sentence was enhanced to fifteen years by virtue of Slaughter's conviction for being a persistent felony offender. Accordingly, the trial court sentenced Slaughter to a total of fifteen years imprisonment in conformance with the plea agreement. Slaughter cannot identify any order or judgment issued by the trial court sentencing him to serve both sentences concurrently or consecutively. As such, Slaughter's arguments as to this claimed error are without merit.

Next, Slaughter argues that his trial attorney was ineffective by failing to request an independent analysis of the cocaine seized from Bates. Again, we find this argument to be completely without merit. The record reveals that co-defendant Bates verified the conclusion reached by the Kentucky State Police Crime Lab that the substance seized from him was, in fact, cocaine. With Bates's trial admission, there is no question that an independent analysis of the cocaine would have again determined that the substance was cocaine. It is not ineffective assistance for counsel to fail to perform a futile act.²⁴ Hence, we find this argument to be completely without merit.

²⁴ Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 415 (2002).

Finally, Slaughter presents two additional assertions regarding his belief that his trial counsel rendered ineffective assistance. Slaughter argues that defense counsel was ineffective in failing to call an "alibi witness" or present a "defense theory." In his brief, Slaughter admits that these two assertions were not presented to the trial court in his original RCr 11.42 motions. Since these assertions were not raised below, they are not properly before this Court.²⁵ Thus, we shall not address these arguments now.

For the aforementioned reasons, the judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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²⁵ White v. Commonwealth, Ky. App., 695 S.W.2d 438, 440 (1985). See also Shelton v. Commonwealth, Ky. App., 928 S.W.2d 817, 818 (1996).