

RENDERED: January 23, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2003-CA-000281-MR

LEONARD MARSH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 99-CR-001370

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: COMBS, JOHNSON, AND MINTON, JUDGES.

MINTON, JUDGE. Leonard Marsh appeals pro se from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42 and CR<sup>2</sup> 60.02. Marsh alleges that, for various reasons, he received ineffective assistance of counsel in his prosecution under a multi-count

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

<sup>2</sup> Kentucky Rules of Civil Procedure.

indictment, and that the trial court erred by denying his motion without holding an evidentiary hearing. For the reasons stated below, we affirm.

According to police testimony, on May 10, 1999, Officer Kenton Buckner observed Marsh seated in his vehicle and engaged in a drug transaction with a female who was standing outside Marsh's vehicle.<sup>3</sup> Buckner called for additional law enforcement support and began following Marsh. While the cars were stopped for a red light, Buckner and Officer Joseph Dennis, both working undercover and in plainclothes, exited their vehicles and approached Marsh's car with their weapons drawn. Both officers testified that they identified themselves as policemen. Marsh accelerated forward, colliding with the car in front of him and forcing that car into another vehicle directly ahead. Marsh then put his car in reverse and backed up, nearly hitting the officers. He then went forward again, and eventually drove over a sidewalk and came to rest against a concrete barrier. Marsh was arrested and charged with trafficking in a controlled substance, and several counts of assault and wanton endangerment. The search incident to arrest turned up some crack cocaine in the car and \$682.00 on Marsh's person. Shena Hogan, Marsh's then-fiancé and a passenger in his

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<sup>3</sup> The factual background of the case is developed, in large part, from the unpublished opinion rendered by this Court on November 9, 2001, in Marsh v. Commonwealth, 2000-CA-02566-MR, the direct appeal in this proceeding.

vehicle, gave a statement to the police indicating that Marsh had sold crack cocaine to the female observed by Buckner.

Marsh's version of the events differed dramatically. He claimed that he had picked Hogan up from work and was returning to her mother's house when he was paged by Robin Bridwell, a part-time employee of his janitorial service. When he drove to her apartment building, she came out to his car asking if he could take her to cash a check in the amount of \$27.38. He instead elected to cash it for her, and gave her thirty dollars in exchange for the endorsed check. A few minutes later, while sitting at a stoplight, he was frightened by armed men approaching his car and assumed he was being robbed, which led to his frantic attempt to escape by ramming the vehicles to his front and rear. He denied selling crack cocaine to Bridwell. Hogan testified at trial that she gave her statement implicating Marsh to Buckner only because she feared being arrested.

On June 3, 1999, Marsh was indicted for first-degree trafficking in a controlled substance, Schedule II, cocaine (KRS<sup>4</sup> 218A.1412); seven counts of first-degree wanton endangerment (KRS 508.060); two counts of fourth-degree assault (KRS 508.030); failure to stop and render aid (KRS 189.580); and first-degree persistent felony offender (KRS 532.080).

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<sup>4</sup> Kentucky Revised Statutes.

Following a jury trial, Marsh was convicted of first-degree trafficking in a controlled substance; three counts of second-degree wanton endangerment (KRS 508.070); two counts of fourth-degree assault; and first-degree persistent felony offender. The jury recommended a sentence of six years' imprisonment on the trafficking conviction and 12 months and a \$500.00 fine on each of the wanton endangerment and assault convictions. Following the persistent felony offender phase of the trial, the jury recommended that the first-degree trafficking sentence be enhanced to 15 years. The trial court denied Marsh's motion for a new trial; and on October 17, 2000, final judgment was entered consistent with the jury's recommendations. On November 9, 2001, this Court rendered an unpublished opinion affirming Marsh's conviction and sentence. (See Case No. 2000-CA-002566-MR).

On April 22, 2002, Marsh filed a pro se motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02(f). On December 16, 2002, the circuit court entered an order denying the motion. This appeal followed.

Marsh contends that, for various reasons, he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that (1) counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice

affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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). In order to demonstrate prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 104 S.Ct. at 2065.

Marsh's first allegation of ineffective assistance is that trial counsel failed to object to the trafficking instruction given by the trial court. Marsh alleges that the trafficking instructions were inadequate under Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000), and that, due to the inadequacy of the instructions, he was denied his right to a unanimous jury verdict. The trafficking instructions given at trial were as follows:

INSTRUCTION NO. 1a - TRAFFICKING IN A  
CONTROLLED SUBSTANCE IN THE FIRST DEGREE,  
COCAINE

You will find the defendant, LEONARD MARSH,  
guilty under this Instruction if, and only  
if, you believe from the evidence beyond a  
reasonable doubt, all of the following:

(a) That in this county on or about the 10<sup>th</sup>  
day of March, 1999, the defendant engaged in  
the trafficking of a controlled substance  
known as cocaine;

AND

(b) That in so doing, he knew the substance  
was cocaine.

. . . .

INSTRUCTION NO. 9 - DEFINITIONS

. . . .

"Traffic" - Means to manufacture,  
distribute, dispense, sell, transfer or  
possess with the intent to manufacture,  
distribute, dispense, or sell a controlled  
substance.

The above instruction is similar to the instruction  
disapproved by the Supreme Court in Burnett, supra. The problem  
with the instruction is that the principal instruction informs  
the jury to find the defendant guilty if he trafficked in  
cocaine, and then refers the jury to a definitional section that  
includes trafficking theories unsupported by the evidence. For  
example, though no evidence was presented that Marsh  
manufactured cocaine, and though not within a reasonable

probability in this case, theoretically, a juror could have voted to convict Marsh not on the basis that he sold cocaine on May 10, 1999, as testified to by Officer Buckner, but, rather, on the basis that Marsh manufactured cocaine on March 10, 1999. As explained in Burnett, such a result would have violated Marsh's right to a unanimous verdict under Section 7 of the Kentucky Constitution. Burnett at 882.<sup>5</sup>

However, in this case, Marsh's trial was held on August 1 - 3, 2000, while Burnett was not rendered until November 22, 2000. Failure to anticipate changes in the law cannot constitute ineffective assistance of counsel. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 913 (1998), *cert. denied*, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999); Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 165 (2001). Moreover, while a preserved error of this type is not subject to harmless error analysis on direct appeal, Burnett at 883, under Strickland, in order for there to be ineffective assistance of counsel, an error by trial counsel must result in a reasonable probability that the outcome of the trial would have been different. The basis for the guilty verdict in this case lends itself to only one reasonable interpretation--that all guilty votes were cast based upon the belief that Marsh sold cocaine under the

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<sup>5</sup> The right is not violated if jurors vote guilty under alternative theories which are supported by the evidence. Wells v. Commonwealth, Ky., 561 S.W.2d 85, 88 (1978).

circumstances as observed by Officer Buckner. In summary, had the instruction approved in Burnett been submitted to the jury rather than the disapproved instruction, there is no reasonable probability that the outcome of the trial would have been different. Strickland, supra.

Marsh also contends that trial counsel was ineffective for failing to request a supplemental instruction following a jury question directed to the trial court in the course of its deliberations. The question concerned whether there was a certain amount of cocaine which resulted in the charge against a person being properly upgraded from possession for personal use to possession for the purpose of trafficking. The trial court's response to the jury was that it could not give the jury any further instruction because the jury was asking it to provide the jury with information that had not been introduced as evidence in the case. Marsh does not specify what the supplemental instruction should have been and, as we discern no fault with the trial court's response to the jury question, we are not persuaded that trial counsel provided deficient performance by failing to request a supplemental instruction. Strickland, supra.

Next, Marsh contends that he received ineffective assistance because trial counsel failed to object to the introduction of prior bad acts evidence and to object to the

Commonwealth's failure to comply with the notice requirements of KRE<sup>6</sup> 404(c) concerning its intention to introduce prior bad act evidence.

When he was arrested on October 10, 1999, Marsh was carrying \$682.00. Apparently to disassociate the cash from the drug trafficking allegation, during his direct testimony, Marsh testified that he often carried large amounts of cash. During cross-examination, the Commonwealth sought to explore further Marsh's habit of carrying large amounts of cash. In particular, the Commonwealth sought to question Marsh concerning an occasion when, while a passenger in his brother's vehicle, the vehicle was pulled over and Marsh was found with \$1,700.00.

At the first bench conference, trial counsel objected to any phrasing of a question referring to a prior police stop involving Marsh. The trial court agreed that the Commonwealth should not refer to the issue of the police stop, but could inquire whether Marsh recalled carrying a large quantity of cash during the relevant period. The prosecutor, contrary to the trial court's ruling, asked Marsh if he recalled having a large amount of money on him on an occasion when he was a passenger in his brother's vehicle when the vehicle was stopped by the police. Trial counsel immediately objected, and at a second

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<sup>6</sup> Kentucky Rules of Evidence.

bench conference the prosecutor offered to rephrase the question and did so without further incident.

Marsh raised this issue on direct appeal. This Court held that the issue was not properly preserved for review, stating that “[c]ounsel’s objection was general, the trial court sustained the objection, the question was rephrased to omit any reference to the stop, and Marsh asked for no additional remedy.” We also held that there was no manifest injustice requiring palpable error review under RCr 10.26.

We first note that an issue raised and rejected on direct appeal may not be relitigated in a post-conviction proceeding by claiming it amounts to ineffective assistance of counsel. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). However, we further note that trial counsel on two occasions objected to the Commonwealth asking a question which mentioned a prior police stop. On both occasions, the trial court sustained trial counsel’s objection. As trial counsel objected to the admission of the evidence, she did not act outside of the wide range of reasonable professional assistance. Further, trial counsel’s decision not to request any sort of additional remedy, such as an admonition to the jury, was reasonable trial strategy as such an admonition would only have highlighted the police stop. Strickland, supra.

Marsh also alleges that trial counsel was ineffective for failing specifically to cite to KRE 404(c) in her argument to the trial court; however, implicit in trial counsel's argument was that the Commonwealth was attempting improperly to admit prior bad act evidence. A specific reference to KRE 404(c) was unnecessary.

Next, Marsh contends that he received ineffective assistance because trial counsel failed to investigate the case properly, which resulted in materially false statements being admitted into evidence. Specifically, Marsh contends that trial counsel failed to investigate properly (1) whether the original arrest citation had been altered; (2) the inconsistency between police testimony and witness Shena Hogan's statement regarding the time of the event; and (3) whether Officer Joseph Dennis offered a false statement when he stated that he did not discharge his weapon into the rear tire of Marsh's vehicle.

Marsh's basis for alleging that the police citation had been altered is based upon his recollection of having at some point read a citation which was different from the citation provided in discovery, and a discrepancy between where the cocaine was found as provided in police testimony (found in a cigarette package between Marsh's legs) versus the location as stated on the citation (cocaine came out of the vehicle). With regard to the discrepancy in time, Officer Buckner alleged that

the transaction occurred between 3:00 p.m. and 3:30 p.m. but Shena Hogan, who was a passenger in Marsh's vehicle, testified that she did not get off work until 4:30 p.m. Marsh does not state a basis for his belief that officer Dennis lied about shooting out his rear tire.

We are not persuaded that trial counsel provided deficient performance by failing to investigate these issues further. The allegation regarding the altered citation and the shooting-out of the tires is based upon speculation. In neither his motion or on appeal does Marsh provide a specific factual basis for his claim. Trial counsel was not ineffective for failure to investigate these speculative theories more fully. Further, there is not a reasonable likelihood that such investigation would have changed the result of the trial. Strickland, supra.

With regard to the time discrepancy, in order to be entitled to post-conviction relief, the movant must demonstrate that but for trial counsel's error, there is a reasonable probability that the outcome of his trial would have been different. It is not reasonably probable that trial counsel's further investigation of this time discrepancy would have altered the outcome of the trial. Strickland, supra.

Next, Marsh contends that he received ineffective assistance because trial counsel failed to present mitigating

evidence in the penalty phase of the trial. Marsh argues that "[trial counsel] at the very least should have presented evidence in mitigation of punishment, which could have been done with the documented proof of Marsh's then drug counseling and documented proof of drug abuse."

It is fairly debatable whether telling the jury that a defendant is a drug abuser who is in drug counseling amounts to mitigating evidence. While on the one hand the evidence would tend to demonstrate that Marsh was attempting to control his drug addiction, which might have been mitigating, on the other hand, such evidence would have tended to emphasize Marsh's history of drug abuse and violation of drug laws, which would tend to be prejudicial. We are persuaded that trial counsel's decision not to present evidence of Marsh's drug addiction and drug counseling in the penalty phase was reasonable trial strategy. Strickland, supra.

Next, Marsh contends that he received ineffective assistance because trial counsel engaged in ex parte communication with the jury prior to sentencing.

The record reflects that at some point after the jury had returned its verdict in the guilt phase of the trial but before the penalty phase had commenced, some of the jurors went to the designated smoking room. Trial counsel was also in the smoking room and some conversation was exchanged between trial

counsel and the jurors. This was brought to the trial court's attention and the trial court conducted individual voir dire of the affected jurors. After interviewing the jurors, the trial court concluded that there was no prejudice and the case proceeded into the penalty phase of the trial.

As the event occurred after the guilt phase, no prejudice occurred concerning the guilty verdict. Having reviewed the relevant portions of the videotape, including the individual voir dire, we are also persuaded that no prejudice occurred concerning the sentencing phase as a result of trial counsel's contact with the jurors. Nothing was reported to have been said that would have caused any of the jurors to be motivated to increase Marsh's sentence. Absent the contact, there is no reasonable likelihood that the outcome of the sentence would have been different. Strickland, supra.

Next, Marsh filed his motion under both RCr 11.42 and CR 60.02(f). With regard to the CR 60.02(f) aspect of the motion, CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983); McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998). The arguments raised by Marsh in his post-conviction motion concerning ineffective assistance of counsel sought relief available under

RCr 11.42. As those issues could be raised in an RCr 11.42 proceeding, the issues are not proper arguments to be raised under CR 60.02(f). Id.

Finally, Marsh contends that the trial court erred by failing to hold an evidentiary hearing on his motion for post-conviction relief.

When an RCr 11.42 motion is filed, the trial judge must first examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed. Odewahn v. Ropke, Ky., 385 S.W.2d 163, 164 (1964).

After the answer is filed, the trial judge must then 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. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting

them. Drake v. United States, 439 F.2d 1319, 1320 (6th Cir. 1971).

In this case, Marsh's allegations could be determined from the face of the record, and an evidentiary hearing was not required.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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