RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

2003-CA-001183-MR

JAMES E. MARTIN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 00-CR-00267

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, James E. Martin (Martin), Pro Se, has appealed from an order entered by the McCracken Circuit Court on May 16, 2003, denying his motion to vacate made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without appointing counsel or conducting an evidentiary hearing. Martin's underlying claims relate to ineffective assistance of counsel in (1) failing to investigate and interview witnesses and to adequately prepare a defense, and (2) failing to file a motion to suppress the fruits (cocaine) of an illegal search.

He also claimed cumulative error. Having concluded that the circuit court properly denied Martin relief, we affirm.

The facts are presented in this court's opinion rendered in Martin's direct appeal (Martin v. Commonwealth, 2001-CA-001888-MR, finality endorsed November 15, 2002):

> (T)he arresting detective testified that at about 10:00 PM on September 30, 2000, he and two other officers approached Happy's Chili Parlor in Paducah to investigate complaints of drug activity. As he arrived, he saw Martin preparing to enter the driver's door of an automobile. He stopped his car in front of Martin's, exited the vehicle, and, as he approached Martin, perceived a strong odor of marijuana coming from Martin's car. He obtained Martin's consent to search the car and under the armrest in the middle of the front seat found a crumpled paper napkin enclosing two small plastic bags. The bags contained what appeared to be marijuana. The detective testified that he squeezed the bags and in one of them felt something small and hard. He then looked inside the bag and found another wad of crumpled paper. Inside the paper, he found what later proved to be a piece of crack cocaine. He did not immediately confront Martin with an accusation about the cocaine, but arrested him on charges of marijuana possession and took him to a police processing station. There, about an hour later, Martin admitted that the two baggies of marijuana were his. At that point, the officer told him that he was going to "drop a bombshell" in his lap and charged him with possessing cocaine.
>
> Martin testified in his defense. He denied owning the automobile that had been attributed to him, but he admitted that he had been using it the night of his arrest and had had its keys in his possession. He

> also admitted that he had possessed two small baggies of marijuana. He swore, however, that neither baggie contained cocaine. That night in front of the chili parlor, he testified, many people had thrown down small bags of drugs when the police approached. Perhaps, he suggested, the officer had confused one of those bags with one from the car. Or perhaps the officer had himself placed the cocaine in the bag with the marijuana to make the offense a more serious one. In any event, Martin wondered, why would the cocaine allegations be a "bombshell," a surprise, unless the detective knew that Martin was unaware of the cocaine?
>
> Against these suppositions, the detective swore in rebuttal that he had not confiscated drugs from anyone else that night and had not planted cocaine in Martin's marijuana. The surprise, he testified, was not the existence of the cocaine, about which Martin presumably knew, but the more serious charge, which Martin may have believed was not to be forthcoming.

A jury found Martin guilty of first degree possession of a controlled substance (cocaine), second offense (KRS 218A.1415(2)(b)); misdemeanor possession of marijuana (KRS 218A.1422); and misdemeanor possession of drug paraphernalia (KRS 218A.500). On July 31, 2001, the circuit court sentenced him to concurrent terms of incarceration of ten years, twelve months, and six months, respectively, in accordance with the jury's recommendation.

On direct appeal Martin alleged error in the circuit court's failure to direct a verdict of acquittal for him on the

cocaine possession charge. On September 27, 2002, this Court affirmed Martin's conviction, holding that the circuit court properly denied Martin's directed verdict motion as the jury could reasonably find based on the detective's testimony that Martin knew about the paper-wrapped cocaine hidden inside his paper-wrapped baggie of marijuana.

On April 28, 2003, Martin filed a pro se motion to vacate the judgment pursuant to RCr 11.42. He also requested counsel and an evidentiary hearing. The pro se motion alleged ineffective assistance of counsel in (1) failing to investigate and interview witnesses and to adequately prepare a defense, and (2) failing to file a motion to suppress the fruits (cocaine) of an illegal search. He also claimed cumulative error. On May 16, 2003, the circuit court denied Martin's motion without appointment of counsel or an evidentiary hearing.

Martin's appeal raises the following issues: (1) error by the circuit court in denying the motion for appointment of counsel without allowing Martin time to supplement his RCr 11.42 motion; (2) error by the circuit court in failing to appoint counsel for the RCr 11.42 motion; (3) ineffectiveness of trial counsel for failing to file a motion to suppress; and (4) error by the circuit court in failing to appoint counsel for the RCr 11.42 motion for the purpose of litigating an issue regarding jury selection.

We will first address Martin's argument that trial counsel was ineffective in failing to file a motion to suppress the cocaine seized during the search of his car. To prevail on this claim, Martin must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 6873 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where defense counsel's failure to competently litigate a Fourth Amendment claim is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious. Actual prejudice is then proved by demonstrating a reasonable probability that the verdict would have been different absent the excludable evidence. Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986). Thus, the question here is whether there is a reasonable probability that the suppression motion would have been granted and would have led to the dismissal of the charges.

In contrast to Martin's trial testimony his RCr 11.42 motion concedes "(t)he officer obtained (his) consent to search the vehicle." At trial, the detective testified that Martin consented to the search of the car. Consent is an exception to the warrant requirement. United States v. Watson, 423 U.S. 411,

423, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976). Because of his consent, Martin has no meritorious Fourth Amendment claim under Kimmelman and has therefore failed to meet the Strickland test.

Regardless of consent, the search was proper. Detectives were in the area due to complaints of illegal drug activity. Upon arrival on the scene they observed a large crowd of people gathered in a non-loitering area. In the midst of the crowd a car was parked. The detectives verified that the car was registered to Martin. Everyone dropped to the ground upon hearing a detective shout "gun." An individual located at the passenger side door of Martin's car dropped some drugs and was arrested. A detective approached Martin at the driver's side door and smelled burnt marijuana emanating from the car. The search revealed two baggies of marijuana and a rock of cocaine in one of the baggies. A warrantless search of the car was proper based on the officer's sense of smell. Cooper v. Commonwealth, 577 S.W.2d 34, 36-37 (Ky.App. 1979), overruled on other grounds by Mash v. Commonwealth, 769 S.W.2d 42, 44 (Ky. 1989). Again, Martin has failed to prove that his Fourth Amendment claim is meritorious under Kimmelman and has therefore failed to meet the Strickland test.

We next address Martin's claims of circuit court error in failing to appoint counsel as requested to supplement the RCr 11.42 motion and in failing to allow him to, sua sponte,

supplement his motion upon failure to be appointed counsel. Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001) sets out the following procedural steps with respect to an evidentiary hearing and appointment of counsel:

> 1. The trial judge shall 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.
> 2. After the answer is filed, the trial judge 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. 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 . . .
> 3. If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing . . .
> 4. If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would (be) confined to the record."

Citations omitted.

Martin raised three issues in his motion. In contravention of RCr 11.42(2) he cited no facts in support of his first or third allegation. Due to the lack of a minimum of factual basis both issues were subject to summary dismissal. Fraser, supra. The record refutes Martin's suppression allegation. As all material issues of fact alleged in Martin's

RCr 11.42 motion can be decided on the record, no evidentiary hearing is required and the court need not appoint counsel. Fraser, supra.

Martin also claims on appeal that he needed counsel to supplement a jury composition issue that he did not raise in his RCr 11.42 motion. His failure to raise the allegation of irregularity in the jury panel before the circuit court precludes him from bringing it now. Fraser, supra. He also cites no controlling authority for requiring the circuit court to sua sponte allow him to supplement his original pleading.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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