

RENDERED: November 19, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

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

NO. 2003-CA-001309-MR

WALTER HELTON

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 98-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel in failing to investigate and interview certain witnesses regarding the testimony of one of the Commonwealth's witnesses, a jailhouse snitch. From our review of the record,

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<sup>1</sup> Senior Judge 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.

appellant's trial counsel adequately investigated the potential impeachment of the witness and did, in fact, attempt to so impeach the witness at trial. Hence, there was no ineffective assistance of counsel.

In March of 1999, appellant, Walter Helton, was tried by a jury for arson, the attempted murder of one individual, and the murder of three individuals. The trial ended in a hung jury and a mistrial was declared. In January of 2000, Helton was retried by a jury and convicted of arson and three counts of murder. Helton was sentenced to fifty (50) years in prison. His convictions were affirmed by the Kentucky Supreme Court on January 10, 2002.

At the second trial, the Commonwealth presented the testimony of Robert Stout, who had been in jail with Helton and who did not testify at the first trial. Stout testified that Helton admitted to him while they were incarcerated together that he had committed the murders and the arson. On August 13, 2002, Helton filed a prose motion to vacate judgment pursuant to RCr 11.42 alleging that his trial counsel rendered ineffective assistance when he failed to investigate, interview, and call certain witnesses who could potentially impeach Robert Stout. In particular, Helton claimed that his counsel should have: allowed Helton to testify at the hearing on the motion to prohibit Stout's testimony that he had never confessed the

crimes to Stout; called the prosecutor, Tom Handy, to testify at the hearing that Stout was a notorious deal seeker and that Handy had rented an apartment to Stout's wife; interviewed other prisoners who were in the same jail cell with Stout and Helton and called them to testify that Helton never discussed the crime with anyone; interviewed the jail guard and called him to testify that Helton asked to have Stout removed from the cell because of his incessant questioning of Helton; and interviewed Stout's wife. The trial court denied the motion without a hearing. This appeal followed.

To prevail on a claim of ineffective assistance of counsel, the defendant must prove 1) his counsel's performance was deficient and 2) but for counsel's deficient performance, there is a reasonable likelihood that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An alleged failure to adequately investigate a case "must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 700 (1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2203, 95 L. Ed. 2d 858 (1987). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy." Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999) (quoting Strickland, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 694-95).

In his direct appeal, Helton argued that Stout should not have been allowed to testify at trial and, in the alternative, that Helton was improperly denied the opportunity to impeach Stout's testimony at trial. In rejecting these arguments, the Court recognized the fact that Helton's trial counsel: sought information through discovery relative to Stout's background (aliases, social security numbers, dates of birth, criminal history, bad acts, probation and parole status, and any deals offered by prosecution in exchange for his testimony); tried to preclude Stout's testimony at trial; in the alternative, sought a continuance to investigate certain letters written by Stout prior to Helton's trial regarding his offer to testify on behalf of the Commonwealth in another case; "thoroughly questioned Stout regarding the letters in an attempt to impeach him with regard to his motivation to testify in Appellant's brief"; and, despite Stout's assertion of his 5<sup>th</sup> Amendment right not to testify, "was still able to question Stout regarding his motivation to testify against him."

In viewing the record of Helton's second trial, we also see that his counsel filed numerous pre-trial motions in the case - for discovery, exculpatory evidence, to exclude KRE 404 evidence - and subpoenaed many witnesses to testify on behalf of Helton. The pretrial motion for disclosure of impeachment evidence regarding the testimony of Stout was exhaustive and sought all manner of information relative to Stout. As to defense counsel's trial performance, the trial court found:

The record also reveals that Movant's trial counsel very effectively cross examined Stout, getting him to admit that he had lied on several occasions. On cross-examination, Stout admitted that he had acted as an informant in Alabama; that he had written the Commonwealth Attorney several letters asking for help; and, that his wife rented an apartment from the Commonwealth Attorney.

A trial court's findings of fact on an RCr 11.42 motion will not be overturned unless they are clearly erroneous. Bowling v. Commonwealth, Ky., 80 S.W.3d 405 (2002), cert. denied, 538 U.S. 931, 123 S. Ct. 1587, 155 L. Ed. 2d 327 (2003). Here, the trial court's findings on the motion were clearly supported by the record. Further, the Supreme Court's determinations are binding upon us under the law of the case doctrine. Hogan v. Long, Ky., 922 S.W.2d 368 (1995). Accordingly, we agree that Helton's counsel's performance at trial was not deficient relative to the impeachment of Stout.

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

ALL CONCUR.

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