

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001947-MR

DARIUS BURDELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 98-CR-00661

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: TAYLOR, JUDGE; BUCKINGHAM AND EMBERTON, SENIOR JUDGES.¹
TAYLOR, JUDGE: Darius Burdell brings this *pro se* appeal from an
August 15, 2003, order of the Fayette Circuit Court denying his
motion pursuant to Ky. R. Crim. P. (RCr) 11.42 to vacate his
sentence. We affirm.

On June 29, 1998, appellant was indicted by the
Fayette County Grand Jury for the murder of his cousin, Fred
Dunson, on the evening of March 4, 1998. Following a jury

¹ Senior Judges David C. Buckingham and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

trial, appellant was convicted of first-degree manslaughter and sentenced to twenty years' imprisonment by judgment entered March 22, 1999. Appellant's conviction was affirmed by the Supreme Court of Kentucky in Appeal No. 1999-SC-000304-MR.

Appellant subsequently filed a *pro se* RCr 11.42 motion to vacate his sentence on February 14, 2003. The circuit court subsequently appointed counsel for appellant. Counsel did not supplement appellant's *pro se* motion. On August 15, 2003, the circuit court entered an order denying appellant's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

An RCr 11.42 motion is properly denied without an evidentiary hearing if the allegations raised therein are conclusively refuted upon the face of the record. Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). If the allegations cannot be conclusively proved or disproved by examination of the record, the circuit court must grant appellant a hearing on the motion. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

The proper standard for reviewing a claim of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Gall v. Commonwealth, 702 S.W.2d 37 (1985); Sanborn v. Commonwealth, 975 S.W.2d 905 (1998). The Strickland standard requires a showing that (1) counsel's performance was deficient as it fell outside the range of professionally competent assistance, and (2) such deficiency

was prejudicial as there exists a reasonable probability the outcome would have been different if not for counsel's performance. Id.

Appellant raises several allegations of error. Initially, appellant contends his trial counsel was ineffective for failing to move for dismissal of the indictment when the jury was dismissed resulting in violation of the constitutional proscription against double jeopardy.

The record reveals that prospective jurors were called and *voir dire* was conducted. Thirteen jurors were ultimately selected from the pool of prospective jurors. However, the court dismissed the selected jurors upon request by the Commonwealth for a continuance. The jurors were dismissed before being sworn by the court.

It is well-established that "jeopardy attaches in a jury trial when the jury is 'empanelled and sworn.'" Johnson v. Commonwealth, 12 S.W.3d 258, 265 (Ky. 1999) (quoting Crist v. Bretz, 437 U.S. 28, 38 (1978)). In the case *sub judice*, the record reflects that the jury selected and dismissed by the court was never sworn. As the jury was not sworn, the law is clear that jeopardy had not attached. Thus, we reject appellant's contention that counsel was ineffective for failing to move for dismissal of the indictment.

Appellant next contends trial counsel was ineffective for failing to conduct certain pretrial discovery. Specifically, appellant argues counsel was ineffective for failing to discover the identification procedures utilized by police officers when a witness, Rachel Birdsong, identified appellant as the perpetrator. However, as pointed out by the Commonwealth, the Fayette County Commonwealth Attorney's Office has an "open file policy" which renders filing a formal pretrial motion unnecessary. Moreover, as evidenced by testimony at trial, Birdsong knew appellant before the shooting and even identified appellant by his nickname. Because Birdsong was familiar with appellant, the identification procedures utilized by officers were not crucial to Birdsong's identification. As such, we believe trial counsel's alleged failure to discover the identification procedure was not outside the range of professionally competent assistance. See Strickland, 466 U.S. 668.

Appellant also asserts trial counsel was ineffective for admitting appellant's guilt during closing argument. Specifically, appellant complains of the following statement by counsel: "I am not standing here today telling you that you are necessarily gonna find that Darius Burdell did not shoot Fred Dunson." Appellant's Brief at 24. Appellant asserts that this "admission" of guilt by counsel constitutes ineffective

assistance because it was contrary to appellant's previous plea of "not guilty."

The Commonwealth responds that this statement by trial counsel was taken out of context. A review of the record reveals that counsel began closing argument by informing the jury it would be faced with two issues: (1) whether the Commonwealth had proven beyond a reasonable doubt that appellant shot Dunson, and (2) if so, whether appellant was guilty of murder. Counsel initially emphasized the weaknesses in the Commonwealth's case and argued the Commonwealth had not proved beyond a reasonable doubt that appellant shot Dunson. Counsel then argued that even if the jury believed appellant had shot Dunson, it should conclude appellant was not guilty of murder.

In light of the overwhelming evidence of appellant's guilt, including the victim's dying declaration and Birdsong's testimony that she saw appellant shoot Dunson, counsel's argument was appropriate and clearly constituted trial strategy. See Simmons v. Commonwealth, 191 S.W.3d 557 (Ky. 2006). As such, we reject appellant's contention that counsel was ineffective for the "admission" made during closing argument.

Appellant also contends his trial counsel was ineffective for presenting "false evidence" regarding a witness during closing argument. Appellant asserts counsel erroneously stated that a witness, Linda Hayes, testified that she "saw the

shooting” when, in fact, her testimony revealed she only heard the shooting. A review of the record reveals trial counsel did mistakenly state that Hayes “saw the shooting.” However, immediately preceding that statement, counsel correctly indicted Hayes heard the shooting. Appellant has failed to demonstrate how this misstatement was prejudicial. Considering the overwhelming evidence of guilt presented at trial, there does not exist a reasonable probability the outcome of the trial would have been different but for the misstatement. See Strickland, 466 U.S. 668. Accordingly, we reject appellant’s contention that counsel was ineffective for making the misstatement during closing argument.

Appellant next argues the circuit court “abused its discretion by erroneously finding that a proper foundation had been established for the admission of the dying declaration of the victim.”

Admissibility of testimony is an issue that should have been raised on direct appeal. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002). As admissibility of testimony is properly an issue for direct appeal, it cannot be raised in an RCr 11.42 motion. Id. (citing Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001)) (holding that an RCr 11.42 motion is limited to issues that were not and could not be raised on direct appeal).

Thus, we reject appellant's contention that the circuit court erroneously admitted the dying declaration of the victim.

Appellant finally contends he was "denied his 6th Amendment right to effectively confront and cross-examine his accuser, Dominico Morbley, as to a prior inconsistent statement made to police" In appellant's direct appeal, the Kentucky Supreme Court addressed the cross-examination and confrontation of Morbley and concluded no error had occurred. An opinion of this state's highest court "is the law of the case" and, thus, binding on this Court. Therefore, appellant's argument is without merit. Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996). Furthermore, a motion made pursuant to RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." Sanborn, 975 S.W.2d at 909. As such, we believe appellant is precluded from raising the issues of cross-examination and confrontation of Moberly in the RCr 11.42 motion. See id.

We view all of appellant's remaining contentions to be without merit.

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

ALL CONCUR.

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