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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002339-MR

RONNIE LEE BOWLING — APPELLANT

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
ACTION NO. 89-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: On February 25, 1989, Appellant, Ronnie Lee Bowling, entered the Quality Sunoco owned by Ricky Smith in Rockcastle County and began asking Mr. Smith about possible employment. Mr. Smith explained to Appellant that only one person ran the store each shift and currently no openings were available. Mr. Smith asked the Appellant to inquire again in the spring. The dispute in this case arises as to what occurred after the above described exchange.

Appellant contends that Mr. Smith began acting strangely and opened fire upon him in the store, hitting him twice. Appellant then fled the store, whereupon Mr. Smith fired at him once more, but missed. Appellant testified he fled in an effort to get home to his wife out of fear for losing his life due to his injuries.

The Commonwealth's position is that Appellant first opened fire on Mr. Smith and Mr. Smith returned fire in self-defense and struck Appellant. After Appellant fled the store, Mr. Smith fired once more in an attempt to flatten one of Appellant's tires, but missed. Mr. Smith then called the authorities and a police chase commenced shortly thereafter.

At the end of the pursuit, Appellant was immediately arrested and later indicted on April 28, 1989, for the attempted murder of Ricky Smith. His trial commenced on February 27, 1996, and ended the following day. Mr. Smith and Appellant each testified at trial as to what occurred that day. Appellant was convicted for attempted murder and subsequently sentenced to twenty years' imprisonment.

At the time of his Rockcastle County trial, Appellant was on death row for two Laurel County murder convictions which occurred in connection with service station robberies. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997), cert. denied, Bowling v. Kentucky, 522 U.S. 986, 118 S.Ct. 451, 139 L.Ed.2d

387 (1997). The Appellant's trial in Laurel County took place in September and October 1992 with sentencing in December of that same year.

Following his Rockcastle County trial, Appellant filed a direct appeal in this matter to the Kentucky Supreme Court. The appeal contained four claims for relief: (1) denial of speedy trial; (2) claim of double jeopardy; (3) admission of recorded testimony from the Laurel County trial; and (4) denial of his petition for change of venue. The Court issued an order of remand on the issue of denial of speedy trial on December 18, 1997. The Rockcastle Circuit Court had a hearing and issued an order on the matter on March 5, 1998. Following that order, the Supreme Court considered the appeal in its entirety and affirmed the Appellant's conviction. Bowling v. Commonwealth, case no. 96-SC-442, (October 15, 1998). Appellant then filed a Petition for Rehearing which was denied on January 21, 1999.

Appellant filed his first RCr 11.42 motion on January 22, 2002. A "corrected" copy was filed on February 5, 2002. On May 3, 2002, Appellant filed a motion to Amend his Motion to Vacate, Set Aside, or correct Sentence Pursuant to RCr 11.42. At the same time, Appellant tendered an Amended RCr 11.42 motion. On September 23, 2002, Appellant filed a motion for Leave of the Court to Amend Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42. Again at the same time,

Appellant tendered a Second Amended RCr 11.42 motion. Various responses and replies were filed in relation to these motions. There were hundreds of pages of documents filed or tendered relating to Appellant's RCr 11.42 motion. On June 16, 2003, the Rockcastle Circuit Court issued an order denying the relief requested under Appellant's RCr 11.42 motion. This order was issued without an evidentiary hearing.

Appellant is appealing the June 16, 2003 order claiming that he was entitled to an evidentiary hearing on his RCr 11.42 motion and asserts seventeen arguments as grounds for relief to support his position. Appellant has asserted the following: (1) twelve arguments based solely on ineffective assistance of counsel, i.e. Strickland[1] errors; (2) three arguments based on Strickland and/or Brady[2] violations; (3) an argument based on prosecutorial misconduct; and (4) an argument based upon an act of the court itself. We will first determine whether there were any Strickland violations as claimed by Appellant.

I. INEFFECTIVE ASSISTANCE OF COUNSEL.

The standards measuring ineffective assistance of counsel have been established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v.

[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Commonwealth, 702 S.W.2d 37 (Ky. 1985). Pursuant to Strickland, in order to show ineffective assistance of counsel, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694, 466 U.S. 668. A "reasonable probability" is defined as the probability sufficient to undermine the confidence in the outcome. Id. It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693, 466 U.S. 668; accord Sanders v. Commonwealth, 89 S.W.3d 380, 386, (Ky. 2002). The defendant must demonstrate that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. Hodge v. Commonwealth, 116 S.W.3d 463, 468, (Ky. 2003), cert. denied Hodge v. Kentucky, 541 U.S. 911, 124 S.Ct. 1619, 158 L.Ed.2d 258 (2004).

Strickland requires not optimal performance, but reasonably effective performance. Fields v. Bagley, 275 F.3d 478, 484, (6th Cir. 2001). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra 466 U.S. at 690. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct

the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689, 466 U.S. 668. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id. With these principles to guide us, we shall now address each of the ineffective assistance of counsel arguments raised by the Appellant.

A. Failure to Object to photo of Appellant.[3]

Appellant claims ineffective assistance of counsel when trial counsel failed to object to the admission of the photo of Bowling since its potential prejudice far outweighed its probative value. The photograph is of Appellant crouched down with a pistol lying on the countertop behind him. The trial transcript supports that trial counsel sufficiently handled the issue of the photo of Bowling. All parties, including Appellant, were aware of this photo from the Laurel County trial and that it would most likely be introduced into evidence at the Rockcastle County trial. In this instance, the prosecutor stated that he would introduce this photograph if and when Appellant testified. The prosecutor made this statement in chambers in the presence of Appellant, as well as trial counsel. However, Appellant chose to take the stand, which is his right,

[3] Appellant's Argument II.

to tell his side of the story. Upon the Appellant taking the stand, the prosecutor, as stated to Appellant in chambers, introduced this photograph into evidence. Also, we find it is important to note that reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Strickland, supra 466 U.S. at 691.

It is important to remember that just because another attorney would have approached the situation differently does not mean that Appellant's trial counsel provided him ineffective assistance of counsel. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690, 466 U.S. 668. It is our opinion Appellant fails to overcome this presumption. Trial counsel attempted to plant seeds of doubt in the jury's minds regarding the gun in the background of the picture. The simple fact that these seeds did not grow does not mean trial counsel provided ineffective assistance of counsel. Trial counsel handled the situation appropriately considering all the circumstances.

Even assuming trial counsel's performance was deficient we could not find that this failure to object prejudiced the Appellant. As explained earlier, it is not enough to show some conceivable effect on the proceeding, rather it must be shown that counsel's errors were so serious that

counsel deprived the defendant of a fair trial, a trial whose result is reliable. Id. at 687, 466 U.S. 668.

Testimony was received from a defense witness, Ledford Bowling, Sr.,[4] as well as Appellant, that the two guns in the photographs[5] were two different guns. Based upon the record, we are unable to find that trial counsel's failure to object to the admission of this photograph did not deprive Appellant of a fair trial. Hence, the Appellant has failed to prove the requirements established by Strickland and the decision not to object to the photograph's admission does not rise to the level of ineffective assistance of counsel.

B. Defense and Rebuttal Related to Two Pistols.[6],[7]

Appellant additionally argues the following in relation to the defense and rebuttal presented on the two pistols: (1) trial counsel failed to adequately investigate the law and facts regarding the defense's access to two pistols, thus failing to present an adequate defense and rebuttal; and (2) that trial counsel was ineffective for failing to object, request an admonition or limiting instruction, a continuance, or a viewing of the two actual pistols once the prejudicial photo

[4] Appellant's father.

[5] Commonwealth's Exhibits 9 and 24.

[6] Appellant's Argument III.

[7] Appellant's Argument IV.

was admitted. Appellant states that trial counsel should have used Ky. CR 75.07(3) to gain access to the two pistols for the Rockcastle County trial. We agree with the Commonwealth that this rule does not apply to trial at the circuit court level, but rather at the appellate level. We are unable to see how Appellant can claim ineffectiveness of his counsel based upon the non-use of a Kentucky Civil Procedure Rule that was inapplicable to his Rockcastle County trial.

Appellant also argues that trial counsel should have introduced a photograph of the two pistols side by side. The trial strategy urged by Appellant was utilized by his defense counsel in his Laurel County trial and he was found guilty of all charges in that matter. As stated before, Strickland requires not optimal performance, but reasonably effective performance. Fields, supra 275 F.3d at 484. Trial counsel chose not to introduce any additional photos of the second gun, but did question Ledford Bowling, Sr., and Appellant about the other gun. The jury had testimony presented to it that there were two different pistols. It is not for this Court to question why trial counsel chose the strategy it did, but rather was Appellant prejudiced by it. We believe that he was not, because testimony was received that there were, in fact, two different pistols and Appellant failed to prove that an additional photo would have resulted in a reasonable probability

that the jury's decision would have differed. Hodge, supra 116 S.W.3d at 468. Therefore, neither element of Strickland has been satisfied.

C. Witness Preparation.[8]

In relation to witness preparation, Appellant claims trial counsel: (1) failed to adequately prepare Mr. Ledford Bowling, Sr., for his testimony; (2) failed to request a short recess to prepare Mr. L. Bowling for his testimony; or (3) to adequately examine Mr. L. Bowling to elicit a key portion of the defense rebuttal. Again, we find Appellant's argument unpersuasive. Mr. Ledford Bowling had testified in the Laurel County trial on this same issue. Also, trial counsel was aware that there could be a possible issue with the guns, as evidenced by trial counsel asking Mr. Ledford Bowling to leave during Appellant's testimony so that he could be called for rebuttal purposes. Trial counsel did, in fact, call Mr. Ledford Bowling as a rebuttal witness. We do not believe that trial counsel's performance in relation to this witness was deficient. We also do not see that trial counsel's performance prejudiced Appellant. Appellant has not shown a reasonable probability that additional prep time would have resulted in information that may have caused a different result. Therefore, Appellant

[8] Appellant's Argument V.

has not proven the elements of a Strickland violation in relation to this argument.

D. Failure to Give Advice to Appellant About Testifying.[9]

Appellant next argues that trial counsel failed to advise Bowling that if he testified, the prosecutor would introduce the prejudicial photo. There is no merit in this argument. The trial transcript supports that Appellant and trial counsel were informed by the prosecutor, while in chambers, that the picture at issue would be utilized in some manner, if and when Appellant took the stand. This photograph had been used in the Laurel County trial for similar purposes. Trial counsel repeatedly advised the Appellant not to testify on his own behalf in this trial as evidenced by the trial transcript. The trial court itself even explained to Appellant that he was not required to testify. Against his counsel's advice, Appellant chose to take the stand to testify and on cross-examination the photograph was introduced. Simply because the Appellant chose not to adhere to the advice of his counsel and testify does not make what occurred during his testimony ineffective assistance of counsel. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Strickland, supra 466 U.S. at 691. Following a review of Appellant's testimony,

[9] Appellant's Argument VI.

we believe trial counsel's actions in this regard were neither deficient nor resulted in prejudice towards Appellant. Therefore, there is no Strickland violation in relation to this issue.

E. Expert Assistance and Roadside Gun.[10]

Appellant next argues defense counsel was ineffective for failing to investigate and requests expert assistance to present the defense theory that it was impossible to know how long the roadside gun had laid in the snow, and to consult an independent expert to assist in challenging the state's ballistics evidence. We note that Appellant omitted from his Appellate Brief that Bob Foley testified for the defense in relation to this very matter. Mr. Foley testified he was riding with David Gross along the road where the roadside gun was found on the morning of February 25, 1989. Mr. Foley testified that during the drive, Mr. Gross threw out a .38 Smith & Wesson, which is the same type of gun as the roadside pistol. Mr. Gross was unavailable as a witness because he was deceased at the time of trial. We are not persuaded by Appellant's argument that had an expert testified as to this matter, there is a reasonable probability the outcome would have differed. It is possible that such expert assistance may have strengthened the case for the Commonwealth. The defendant must overcome the presumption

[10] Appellant's Argument IX.

that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, supra 466 U.S. at 689. Appellant has failed to overcome this presumption particularly since a different possibility of ownership of the roadside gun was presented to the jury by the defense through Mr. Foley. Based on the surrounding circumstances, we believe that trial counsel's strategy in this matter was not deficient. We also do not believe there was a sufficient probability that such expert assistance would have undermined confidence in the outcome. Hence, we do not believe trial counsel's acts in relation to this matter prejudiced Appellant. Therefore, Appellant has failed to satisfy the elements of Strickland in relation to this argument.

Appellant provides no argument as to consulting an independent expert to assist in challenging the state's ballistics evidence. It is listed in the title of the argument only. Therefore, we shall not address this issue because it is not properly presented to this Court.

F. Pro Se Motion to Discharge Counsel.[11]

Appellant also argues that trial counsel provided ineffective assistance of counsel when he failed to move the trial court to conduct an inquiry or to hold a hearing on his

[11] Appellant's Argument XI.

client's motion to withdraw or discharge his appointed counsel, Tim Despotes.

As the parties are aware, an RCr 11.42 motion is limited to the issues that could not be raised on direct appeal. An issue that could have been raised on direct appeal, but was not, cannot be litigated in an RCr 11.42 motion by simply claiming that it amounts to ineffective assistance of counsel. Haight v. Commonwealth, 41 S.W.3d 436, 441, (Ky. 2001), cert. denied 534 U.S. 998, 122 S.Ct. 471, 151 L.Ed.2d 386 (2001), see also Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998); Brown v. Commonwealth, 788 S.W.2d 500 (Ky. 1990); and Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). This is exactly what the Appellant has tried to do in relation to this matter. However, we will review the merits of Appellant's argument.

This Pro Se motion was heard in chambers with Appellant present. Appellant said the request was made for the reasons he wrote in his motion. The detailed reasons in his Pro Se motion were eight pages in length. The trial court overruled the motion. The court stated:

> "And I would cite for the record it's not the first time in this case I've seen the situation of Mr. Bowling on one hand personally or through an attorney demanding a trial, and then at the same time or near the same time file a motion there's been a conflict with his lawyer or for his lawyer to withdraw or taken some other steps that

> prevents the court from going ahead with the trial. And it would seem now at the same time he demands a speedy trial he's again, it's like he wanted a speedy trial, but not today." The court also stated its familiarity with trial counsel and that his handling of the case had not yet been deficient.

An attorney's failure to request a hearing on whether to remove him the morning of trial is not deficient. We also cannot see based on the judge's reasoning that a different result would have occurred had a hearing been held. Hence, there is no reasonable probability the outcome of the trial would have changed following the hearing and trial counsel's actions did not prejudice Appellant. Therefore, Appellant has met neither requirement of Strickland.

G. Venue.[12]

Appellant argues that trial counsel provided ineffective assistance of counsel by failing to file an updated/amended or new petition for change of venue including new affidavits and examples of the prejudicial pretrial publicity to reflect the current state of public opinion in Rockcastle County at the time of trial and to produce evidence in open court in support of the motion. An issue raised on direct appeal cannot be relitigated in an RCr 11.42 motion by simply claiming that it amounts to ineffective assistance of

[12] Appellant's Argument XIII.

counsel. Haight, supra. The issue of change of venue was asserted by Appellant on direct appeal. Bowling v. Commonwealth, case no. 96-SC-442-MR, (October 15, 1998). Therefore, we decline to relitigate this issue simply because Appellant now claims ineffective assistance of counsel in relation to that matter.

H. Individual Sequestered Voir Dire.[13]

Appellant also argues that trial counsel provided ineffective assistance of counsel when he failed to move the trial court for individual sequestered voir dire on the issues of pretrial publicity, including the Laurel Circuit Court trial, the murder convictions and the death sentences. As correctly noted by the Commonwealth, RCr 9.38 requires individual voir dire in capital cases only. However, RCr 9.38 does not preclude counsel from requesting the same in other criminal trials. Such a decision is at the discretion of each attorney. Based upon the voir dire transcript, each juror was questioned related to the pretrial publicity surrounding this matter. Also, the events at issue in this trial occurred in 1989 and the Laurel County trial concluded in 1992. The Rockcastle County trial began in 1996. It had been several years since the alleged incidents had been in the forefront of the community's mind. Based on the foregoing, trial counsel's failure to request

[13] Appellant's Argument XIV.

individual voir dire did not render his performance deficient or result in prejudice to Appellant. Therefore, Appellant's argument fails to meet the standards established by Strickland.

I. Prosecutors Statements about Ricky Smith.[14]

Appellant's next argument is that counsel was ineffective for failing to object to the prosecutor's improper vouching for witness Ricky Smith in voir dire and closing argument, and stating his personal opinion that Bowling was guilty. Again, Appellant attempts to mask an argument that should have been raised on direct appeal using RCr 10.26 under an ineffective assistance of counsel claim. Despite the procedural deficiency, we shall analyze Appellant's argument.

We do not see that the statements made by the prosecutor during voir dire concerning Ricky Smith constitute improper vouching. Mr. Smith was seated at the table to ensure that no one on the jury panel knew him, which was explained to the jury. Because he was a key witness for the prosecution, we do not believe that the prosecutor acted improperly. We believe that a failure to object to an act that was proper could not result in deficient performance by trial counsel. We also do not believe that Appellant was prejudiced by trial counsel's actions. In fact, Appellant's right to a fair trial was benefited by an assurance no member of the jury knew Mr. Smith.

[14] Appellant's Argument XV.

Mr. Smith's presence during voir dire ensured no one would sit on the jury that had a favorable bias toward him.

In reference to the statements made by the prosecutor during his closing argument, we believe there is no merit to Appellant's arguments. The statements which Appellant refers to are as follows: (1) "First of all, I would like to say on behalf of Mr. Smith and his family, the Commonwealth of Kentucky who I represent. . ."; (2) "We're here today looking at Ricky Keith Smith. I suggest we look at him. But if he hadn't had some blessings and some luck on February 25, 1989, he would have been dead"; (3) "They say it's a question of who to believe. We will withstand the test. And we'll stand here with him."; (4) "He [Appellant] was too scared to stop. I believe that. I don't believe it was because he was wanting to get home to his wife, I believe it was because he knew that he had shot up the place trying to kill a man. . ."; and (5) "Mr. Ricky Smith, who was lucky enough, who was blessed enough on February 25 to survive to be able to defend himself. . ."

We must determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law. Slaughter v. Commonwealth, 744 S.W.2d 407, 411, (Ky. 1987), cert. denied, Slaughter v. Kentucky, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989), (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94

S.Ct. 1868, 40 L.Ed.2d 431 (1971)). The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor. Id. at 411-412, (citing Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Great leeway is allowed to both counsel in a closing argument. Id. at 412. Further, a prosecutor may express his personal opinion of a defendant's guilt as long as that opinion is based on evidence in the case. Id., (citing Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. 1970)).

In the first statement, the prosecutor was thanking the jury as well as the court for their time during the trial and he stated that he represented the Commonwealth. The other statements were the prosecutor's own inferences based on the evidence, which is appropriate. Tamme v. Commonwealth, 973 S.W.2d 13, 39, (Ky. 1998), cert. denied, Tamme v. Kentucky, 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999), (citing Bills v. Commonwealth, 851 S.W.2d 466 (Ky. 1993)). The statements made about Mr. Smith during prosecutor's closing arguments are not of an egregious nature.

Based on the foregoing, the prosecutor's statement about the Appellant's guilt was based upon the evidence presented by the Commonwealth and did not affect the overall fairness of the trial. There was no prosecutorial misconduct for trial counsel to object to in relation to the closing

argument. Trial counsel should not be expected to object to an act that was proper. Trial counsel's performance in relation to Appellant's argument was not deficient, nor did it result in any type of prejudice to Appellant. Therefore, Appellant has failed to satisfy the Strickland elements with either of his arguments.

J. Prosecutor's Closing Argument.[15]

Appellant claims trial counsel was ineffective for failing to object to the prosecutor's closing argument, containing "facts" not in evidence and misstatements of fact. Appellant refers to several statements made by the prosecutor about the pistols in the photos and Appellant's wounds from being shot by Mr. Ricky Smith. Appellant again argues that trial counsel was ineffective for failing to object to a portion of the prosecutor's closing argument. As stated earlier, this should have been raised on direct appeal under RCr 10.26, but we will again address Appellant's arguments.

In closing remarks, a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence. Tamme, supra 973 S.W.2d at 39, (Ky. 1998). Upon a review of the record, the alleged misstatements are more accurately characterized as interpretations of the evidence. Id., see also Stopher v. Commonwealth, 57 S.W.3d 787, 806, (Ky. 2001), cert. denied,

[15] Appellant's Argument XVI.

Stopher v. Kentucky, 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002). It has been consistently held that opening and closing arguments are not evidence and prosecutors have wide latitude during both. Stopher, supra 57 S.W.3d at 805-806. The prosecutor's interpretations of the testimony and evidence related to the guns and Appellant's wounds during closing arguments did not affect the overall fairness of the trial, which is essential to proving prosecutorial misconduct. Slaughter, supra 744 S.W.2d at 411-412. Again, we are unable to see how trial counsel would be deficient for failing to object to a matter which does not meet the definition of prosecutorial misconduct. We also are unable to see how the failure to object to proper conduct could result in prejudice toward Appellant. Therefore, Appellant has failed to prove either of the elements of Strickland.

K. Remand Hearing.[16]

Appellant next argues trial counsel provided ineffective assistance of counsel at the limited hearing on remand when she failed to adequately investigate matters relevant to the hearing, such as the court records pertaining to the prosecutor's schedule, and failed to controvert the prosecutor's unsupported assertions. The counsel appointed for the remand hearing differed from that of the original trial. As

[16] Appellant's Argument XVII.

stated earlier, an issue raised on direct appeal cannot be relitigated in an RCr 11.42 motion by simply claiming that it amounts to ineffective assistance of counsel. Haight supra. The timeliness issue was part of Appellant's direct appeal, which was remanded for a hearing by the Rockcastle County Circuit Court. Bowling v. Commonwealth, case no. 96-SC-442-MR, (December 18, 1997). A hearing was held on February 27, 1998, with an order issued finding the delay in trial reasonable. Subsequently, the Kentucky Supreme Court rendered a decision on the direct appeal, including the timeliness issue, affirming Appellant's conviction. Bowling v. Commonwealth, case no. 96-SC-442-MR, (October 15, 1998). It was held that the evidence presented at the hearing was sufficient to support the trial judge's conclusion that the continuance was necessary and reasonable. Id.

The purpose of an RCr 11.42 proceeding is to review a judgment and sentence for constitutional validity of the proceedings prior to judgment or in the sentence and judgment itself. Harper v. Commonwealth, 978 S.W.2d 311, 318, (Ky. 1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999). Therefore, we decline to relitigate this issue simply because Appellant now claims ineffective assistance of counsel in relation to this matter. Despite the procedural deficiency, Appellant's argument is without merit. There is no

constitutional right to an attorney in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1990), accord T.Bowling v. Commonwealth, 981 S.W.2d 545, 552, (Ky. 1998), cert. denied, T. Bowling v. Kentucky, 527 U.S. 1026, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999). Consequently, Appellant cannot claim constitutionally ineffective assistance of counsel in such proceedings. Id. We would like to note that following a review of the remand hearing transcript, we could not see that counsel's performance in relation to the remand hearing was either deficient or prejudicial to Appellant. Thus, even if we could have made a ruling in relation to this argument, it would not have satisfied the Strickland standard.

II. STRICKLAND AND/OR BRADY ERRORS.

The Appellant has three arguments in which he claims Strickland and/or Brady errors. The standards established by Strickland have been analyzed ad nauseum in the foregoing paragraphs; however, we have not yet discussed the elements of a Brady violation.

The United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland,

373 U.S. 83, 87, 88 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A reasonable probability is the probability sufficient to undermine the confidence in the outcome. Id. at 682, 473 U.S. 667.

The duty to disclose such evidence is applicable even though there has been no request by the accused. U.S. v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). Further, Brady only applies to the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. Id. at 103, 427 U.S. 97. In sum, there are three components of a true Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). With these guidelines, we will examine each argument propounded by the Appellant for Strickland as well as Brady violations.

A. Failure to Impeach.[17]

Appellant claims that key prosecution witnesses were not impeached, violating Strickland, Brady, or both. Appellant argues that a violation occurred when key prosecution witnesses, Ricky Smith and James Smith, were not impeached. According to the trial transcript, trial counsel did point out several inconsistencies in their testimony to the jury. At that point, it was for the jury to determine each witness' credibility. Simply because another attorney may have chosen an alternate strategy does not make trial counsel's performance deficient. We believe trial counsel's cross examination of these witnesses did not prejudice the Appellant. It is not sufficient to prove that the additional information would have had a conceivable effect on the outcome. Strickland, supra 466 U.S. at 693. All Appellant's arguments would have merit, if "conceivable effect" were the appropriate measure. Fortunately, it is not. Appellant has failed to prove that had the jury received the alleged prior inconsistent statements from the Laurel County trial and police statements that there would be a reasonable probability that the jury's determination would have differed. Therefore, the Appellant failed to establish either element of a Strickland violation.

[17] Appellant's Argument I.

We are also unpersuaded that Appellant's argument supports a Brady violation. It is true that impeachment evidence falls within the Brady rule. Bagley, supra 473 U.S. at 676, see also Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). However, as stated earlier, Brady only applies to the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. Agurs, supra 427 U.S. at 103. The prior testimony of both Ricky Smith and James Smith was available in the record from Appellant's Laurel County trial. Brady does not require a prosecutor to disclose information which is part of a public record. Sanborn v. Commonwealth, 892 S.W.2d 542, 556, (Ky. 1994), cert. denied, 516 U.S. 854, 116 S.Ct. 154, 133 L.Ed.2d 98 (1995). The record from the Laurel County trial is obviously a public record. Hence, the prosecutor did not have a duty to provide a trial transcript to trial counsel. Appellant does not make a specific argument that he failed to receive related police reports, including witnesses' statements, during discovery and we will not speculate as to what occurred. We cannot see that either of these arguments fall under the scope of Brady. Therefore, we believe there is no Brady violation.

B. Gun Ownership of Ricky Smith.[18]

[18] Appellant's Argument VIII.

Appellant argues that because of errors under Brady, Strickland, or both, the jury never learned that key prosecution witness, Ricky Smith, owned a Smith & Wesson .38 caliber pistol. According to the trial transcript, in chambers, trial counsel commented that based on his theory of the case, the motion for Ricky Smith's criminal history was "probably not too relevant." We agree.

We are unable to see support for a Strickland violation. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. Hodge supra 116 S.W.3d at 468. It is not enough to argue that this information could have had some sort of conceivable effect upon the jury. Strickland, supra 466 U.S. at 693. We believe this is exactly the type of argument Appellant has proposed. We do not believe that proving ownership of a .38 Smith & Wesson by witness, Ricky Smith, more than four years after the incident in February 1989 would result in a reasonable probability that the jury would have reached a different result. Trial counsel's decision not to inform the jury of this information is not deficient or prejudicial towards Appellant. Therefore, there is no Strickland violation in relation to Appellant's argument. We will now turn to Appellant's Brady argument.

As stated earlier, Brady does not require a prosecutor to disclose information which is part of a public record. Sanborn, supra 892 S.W.2d at 556. The information which Appellant claims would have assisted him, a misdemeanor conviction of Ricky Smith, was public record. Because the information in question does not fall within the Brady rule, we are unable to find a Brady violation in this argument.

C. Evidence Collected at Quality Sunoco.[19]

Appellant states that because of errors under Brady, Strickland, or both, the defense could not effectively challenge evidence collected at the Quality Sunoco, a critical aspect of the state's case.

An RCr 11.42 motion requires specificity that we are unable to find in this argument. Appellant does not argue what type of information he believes was withheld by the prosecution in this matter. It seems as though he believes omitted information exists even though he is not quite sure of its identity. Appellant's entire argument appears to be based on speculation. Testimony was presented to the jury about the time frames in which the investigation at the service station occurred. The prosecution cannot be under a Brady duty to disclose information the Appellant merely believes to exist. Also, as stated before, a conceivable effect on the outcome of a

[19] Appellant's Argument X.

proceeding is insufficient to support an ineffective counsel claim. Strickland, supra 466 U.S. at 693. Therefore, we are unable to see support for either a Brady or Strickland violation in this argument.

III. PROSECUTORIAL MISCONDUCT.[20]

Appellant claims that prosecutorial misconduct rendered Bowling's trial fundamentally unfair where the Commonwealth's unqualified agreement not to introduce the photo was not honored. The Commonwealth knew two real pistols existed, but the defense was unprepared to introduce them, and the Commonwealth misrepresented to the jury that only one pistol existed. It is presumed that Appellant intended this argument to be based upon ineffective assistance of counsel when trial counsel failed to object to the prosecutor's comments made in relation to the pistols during closing, since an allegation of prosecutorial misconduct is proper for direct appeal. With this in mind, we will examine this argument and determine whether a Strickland violation exists.

Upon a review of the record, the alleged misstatements are more accurately characterized as interpretations of the evidence. Tamme, supra 973 S.W.2d at 39. It has been consistently held that opening and closing arguments are not evidence and prosecutors have wide latitude during both.

[20] Appellant's Argument VII.

Stopher v. Commonwealth, 57 S.W.3d 787, 805-806, (Ky. 2001), cert. denied 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002). This did not affect the overall fairness of the trial, which is essential to proving prosecutorial misconduct. Slaughter supra 744 S.W.2d at 411-412. Trial counsel was not ineffective for failing to object to a matter which does not meet the definition of prosecutorial misconduct. As a result trial counsel's performance was reasonable and Appellant was not prejudiced by the failure to object to a non-issue. Therefore, Appellant has failed to meet the elements established by Strickland.

IV. FAILURE TO ACT BY THE COURT.[21]

Appellant claims the trial court denied Ronnie Bowling his Sixth Amendment right to counsel when the trial court failed to conduct a *sua sponte* inquiry or to hold a hearing on Bowling's motion to withdraw or discharge his appointed counsel, Tim Despotes. This is very similar to the argument presented earlier wherein Appellant claimed a Strickland error in relation to this motion. Then, as now, there is no support for that argument. The argument raised by the Appellant in relation to the trial court was appropriate for direct appeal, not an RCr 11.42 motion. Therefore, this argument is not properly before the court and will not be considered.

[21] Appellant's Argument XII.

V. AMENDMENT OF RCR 11.42 MOTION.

Appellant argues he was entitled to amend his RCr 11.42 motion. Appellant appeals the denial of a motion to amend his RCr 11.42 motion by order of the Rockcastle Circuit Court dated September 26, 2003. According to the record, the original order denying Appellant's RCr 11.42 motion states the matter was before the Court on the motion pursuant to RCr 11.42,[22] the Defendant's (i.e. Appellant) corrected copy of the motion to set aside the Judgment,[23] and the Defendant's second amended motion to set aside the Judgment.[24] This order was issued on June 16, 2003, by Judge Venters, the trial judge.

On September 26, 2003, a different judge, Judge Gillum, issued an order related to Appellant's CR 59.05 motion asking the Court to Alter, Amend or Vacate the judgment entered on June 16, 2003, which denied his RCr 11.42 motion to Vacate, Set Aside, or Correct Sentence overruling said motion. Judge Gillum also ruled on two previous motions related to Appellant's RCr 11.42 motions. The Court specifically overruled Appellant's motion to Amend Motion to Vacate, Set Aside, or Correct Sentence

[22] The original RCr 11.42 motion was filed on January 22, 2002.

[23] The "corrected" copy of the motion was filed February 5, 2002.

[24] The "second amended" motion was tendered September 23, 2002.

pursuant to RCr 11.42 filed May 3, 2002,[25] as well as Appellant's motion for Leave of Court to Amend Motion to Vacate, Set Aside, or Correct Sentence pursuant to RCr 11.42 filed September 23, 2002.[26] The September 26, 2003 order contradicts what the June 16, 2003 order states it considered before it rendered its decision. The record is unclear as to whether on June 16, 2003 the Court did consider the very documents not allowed to be filed per the September 23, 2003 order. In the interest of judicial economy, we will assume that the Appellant was not allowed to file any amendments other than his "corrected" copy that was filed on February 5, 2002.

The Kentucky Supreme Court held in Baze v. Commonwealth, 23 S.W.3d 619, 623, (2000), cert. denied , Baze v. Kentucky, 531 U.S. 1157, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001), that an RCr 11.42 motion must be filed in an expeditious manner and is subject to amendment, if appropriate, with leave of court. Further, a trial court's ruling on a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion. T. Bowling, supra 981 S.W.2d at 548, (citing Graves v. Winer, 351 S.W.2d 193 (Ky. 1961)). Appellant had three years to file his RCr 11.42 motion with the court.

[25] Appellant also tendered Movant's Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42 on May 3, 2002.

[26] Appellant also tendered Movant's Second Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42 on September 23, 2002.

The first amendment request was made nearly three months after the original motion was filed and the second amendment request was made more than seven months after the original motion was filed. None of the motions to amend in the record contain any reason for the delay in presenting the new arguments. Based on the record, we believe there was no abuse of discretion in disallowing Appellant to twice amend his RCr 11.42 motion months after filing his "corrected" motion. Notwithstanding our finding of no abuse of discretion, in the interest of judicial economy we will review the five additional claims that were contained in said motions and that are presented in this appeal.

A. Amended Claim I:

Because of Strickland errors, the jury never learned that the Commonwealth attributed two different serial numbers to the roadside gun.

The Appellant concedes in his brief that Sgt. Biggerstaff testified in the Laurel County trial that the serial number on one of his typewritten reports was incorrect and his handwritten report was correct. His testimony at the Laurel County trial was that the serial number to the roadside gun had a serial number consistent with that used in his handwritten report. The Laurel County trial resulted in a conviction despite this information. Trial counsel's failure to use a tactic that was unsuccessful in a prior trial is reasonable. Further, it has not been demonstrated that Appellant suffered

any prejudice as a result of not having this information presented to the jury. The Appellant has failed to prove that there is a reasonable probability that the jury's finding would have differed with this information. It is more likely that had Sgt. Biggerstaff been asked about the two different serial numbers, he would again testify that the typewritten report contained the error. Therefore, Appellant has failed to satisfy the elements of Strickland in relation to this argument.

Appellant also asserts issues related to the chain of custody of the roadside gun. According to the trial transcript, the chain of custody was established through Commonwealth witnesses Sgt. Biggerstaff and Det. Lewis. This argument is purely speculative in nature because Appellant fails to specifically state what information related to the chain of custody of the gun would have assisted him and how. This argument is without merit and fails to rise to the level of a Strickland violation because the information was presented to the jury.

B. Amended Claim II:

Trial Counsel was Ineffective for Failing to Investigate and Present Readily Available Evidence to Corroborate Ronnie Bowling's Defense and Trial Testimony. Specifically, Photos Showing How Bowling Looked After Ricky Smith Shot Him in the Head.

We do not believe trial counsel's performance was deficient in failing to introduce evidence which may have had a

negative effect on his client. After a review of the photos at issue, we find trial counsel's choice not to introduce such photos was reasonable. Such photos would have been open to interpretation by each member of the jury. Because of this, it is possible that those photos may have actually harmed Appellant's defense. Trial counsel's performance was not deficient in this regard. We also do not see that the failure to submit these photos resulted in prejudice to the Appellant. As stated earlier, it is possible the admission of the photo could have done more harm than good. Therefore, we are unable to find a Strickland error in relation to these photos.

C. AMENDED CLAIM III:

The Commonwealth Withheld Exculpatory Photos of Ronnie Bowling Showing How He Appeared After Ricky Smith Shot Him In the Head and Used the "Wound Locator" to Cast Bowling's Injuries In a False Light.

We would like to note that the prior amended claim referred to these same photos as being "readily available." Despite that statement, we will determine whether there was a Brady violation in relation to these photos. Appellant contends that the photos were in the custody of the London State Police Post. The Brady rule does encompass evidence known only to police investigators and not to the prosecutor. Stickler v. Greene, 527 U.S. 263, 280-281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in a case, including the policy. Id. at 281, 527 U.S. 263, (citing Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

With this in mind, we will determine whether the three components of a true Brady violation were met. We cannot say for certain that the photos were favorable to the accused. It is also unclear whether this evidence was suppressed by the State, especially since Appellant referred to it earlier as "readily available." Assuming arguendo that both of these requirements were met, the Appellant still cannot meet the requirement that prejudice ensued. As stated in the preceding argument, it is probable that these photos could have had a detrimental effect upon the Appellant because of the jurors own interpretations as to the severity of Appellant's wounds. Appellant failed to prove that there is a reasonable probability that the jury decision would have differed upon submission of this evidence. Therefore, we are unable to see a Brady violation in this argument.

D. Amended Claim IV:

Trial Counsels Failure to Obtain Readily Available Information about Weather Conditions in Mount Vernon in February of 1989, and to Provide That Information to a Firearms Expert.

This is a factual amendment of Appellant Argument IX which claimed that trial counsel was ineffective for failing to

investigate and request expert assistance related to the roadside gun. Even with this additional allegation, we are unable to substantiate a Strickland violation for the same reasons stated earlier.

E. AMENDED CLAIM V:

Trial Counsel Provided Ineffective Assistance of Counsel When He Failed to Investigate an Exculpatory Explanation for Bowling's Flight From the Gas Station and Police Pursuit, Specifically Bowling's Medical History, Including a Broken Neck in 1985 Resulting from a Truck Accident, and Failed to File a Motion to Obtain Funds to Retain the Services of an Independent Defense Neuropsychologist or Comparable Expert to Evaluate Bowling to Determine Whether He Suffered from PTSD or Organic Brain Injury at the Time of the Charged Offenses.

Defense counsel has an affirmative duty to make a reasonable investigation for mitigating evidence or to make a reasonable decision that a particular investigation is not necessary. Strickland, supra 466 U.S. at 691. The reasonableness of counsel's investigation depends on the circumstances of the case. Id. In the instant case, Appellant does not state how these alleged injuries may have changed the result of his trial.

Based upon the circumstances, it was reasonable for trial counsel to decide not to pursue investigation into Appellant's mental health at the time of the alleged criminal act. It was just as possible that evidence into Appellant's mental condition may have proven beneficial to the Commonwealth. Trial counsel's performance was not deficient, nor can it be

substantiated that this decision prejudiced the client, especially since there has been no mention of what evidence they hoped to secure using an expert. Therefore, Appellant has failed to establish the elements of Strickland.

Lack of an RCr 11.42 Evidentiary Hearing.

This entire appeal is based upon the trial court's failure to hold an evidentiary hearing on Appellant's RCr 11.42 motion. An RCr 11.42 movant is not automatically entitled to an evidentiary hearing. Stanford v. Commonwealth, 854 S.W.2d 742, 743, (Ky. 1993), cert. denied 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994), (citing Skaggs v. Commonwealth, 803 S.W.2d 573 (Ky. 1990), cert. denied 502 U.S. 844, 112 S.Ct. 140, 116 L.Ed.2d 106 (1991)). It is settled that a movant under RCr 11.42 is not entitled to a hearing if his motion on its face does not allege facts which, if true, render the judgment void. Maggard v. Commonwealth, 394 S.W.2d 893, 894, (Ky. 1965), (citing Maye v. Commonwealth, 386 S.W.2d 731 (Ky. 1965)). In other words, if the record refutes the claims of error, there is no basis for granting an RCr 11.42 motion. Stanford, supra 854 S.W.2d at 743, (citing Glass v. Commonwealth, 474 S.W.2d 400, 401, (Ky. 1971)). Based on the foregoing paragraphs, we were unable to substantiate any of alleged errors proposed by the Appellant based upon the record. The record refuted each error.

Therefore, there was no basis for holding an evidentiary hearing on the RCr 11.42.

For the reasons set forth above, we affirm the Rockcastle Circuit Court's denial of Bowling's RCr 11.42 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan M.J. Martin
Assistant Public Advocate
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonego
Assistant Attorney General
Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky