RENDERED: MAY 20, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000371-MR

KEITH STALLWORTH — APPELLANT

V.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 98-CR-00135

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

MINTON, JUDGE:

I. INTRODUCTION.

Keith Stallworth appeals the circuit court's denial of his motion for post-conviction relief. He argues that the trial

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court erred in determining that he did not establish ineffective assistance of counsel based on his claim that trial counsel relied upon a defense strategy that had virtually no chance of success as a matter of law. He also argues that the trial court erred by denying him an evidentiary hearing on his motion. We affirm the circuit court's denial of relief on all issues.

II. FACTUAL AND PROCEDURAL BACKGROUND.

On the first occasion, James Hunt, an informant, went to the residence of Steve Givens, a suspected drug dealer, as part of an undercover investigation by the Danville Police Department, to see if he could buy drugs. Hunt's girlfriend, Rebecca Bishop, accompanied him to Givens's residence; but she remained in the car while Hunt entered Givens's residence. Bishop and undercover police soon saw Stallworth exit Givens's residence, retrieve something from his truck, and reenter the residence. Shortly afterward, Hunt left the residence with crack cocaine which he gave to the police. Hunt told them that Givens was present but that Stallworth sold him the crack cocaine.

On the second occasion, Hunt attempted to make another undercover drug buy. This time, he went to Stallworth's residence wearing a wire to capture an audio recording of the transaction. Bishop accompanied him again. Stallworth and

Givens were both present at Stallworth's residence. Hunt paid Stallworth $100.00 in exchange for some cocaine. This time Bishop witnessed the drug transaction.

Stallworth was later indicted for these two transactions in two counts of trafficking in a controlled substance, first degree.[2] He was also indicted for being a persistent felony offender (PFO), second degree.[3] A jury found Stallworth guilty of the second count of trafficking in a controlled substance, first degree, based on the latter transaction. It recommended a sentence of ten years' imprisonment for this offense. The jury also found Stallworth guilty of being a PFO, second degree, for which it recommended a sentence of twenty years' imprisonment.

The jury hung on the first trafficking count, and the Commonwealth apparently decided not to seek a retrial of it. It was eventually dismissed by agreed order.

Under KRS 532.080,[4] the trial court sentenced Stallworth to an enhanced sentence of up to twenty years'

---

[2] Kentucky Revised Statutes (KRS) 218A.1412. *See* Indictment No. 98-CR-00135. Count 1 deals with the June 30, 1998, transaction; Count 2 deals with the September 30, 1998, transaction.

[3] KRS 532.080(2). The PFO indictment is not included in the record; but the parties do not dispute that Stallworth was indicted for being a persistent felony offender, second degree.

[4] KRS 532.080(1) states, in relevant part, as follows:

imprisonment as a second-degree PFO in lieu of the ten-year sentence for the underlying offense of trafficking in a controlled substance, first degree.[5]

The Supreme Court affirmed the judgment and sentence on direct appeal.[6]

III. THE RCr 11.42 MOTION.

After the direct appeal concluded, Stallworth filed a *pro se* motion in the trial court to vacate his sentence and conviction citing RCr[7] 11.42; and the trial court appointed counsel for him. Both Stallworth and his appointed counsel supplemented the original *pro se* motion.

The motion and supplements raised two grounds for relief under RCr 11.42 on the basis of ineffective assistance of counsel: (1) trial counsel's failure to investigate and present

---

When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section.

[5] In its original sentencing order, the trial court erroneously sentenced Stallworth to twenty years' imprisonment for the PFO charge and ten years for the underlying trafficking offense. But the trial court granted Stallworth's motion to vacate that portion of the sentencing order sentencing Stallworth to ten years imprisonment for the trafficking charge on the ground that it is an illegal sentence. Neither party has raised this decision on appeal.

[6] We note that the issue of the illegal, voidable sentence was apparently not raised on direct appeal.

[7] Kentucky Rules of Criminal Procedure.

an alibi defense to the second trafficking charge, and (2) trial counsel's reliance on a defense strategy for the second trafficking charge that hinged on receiving a jury instruction to which Stallworth was not entitled as a matter of law.[8] We will address both, in turn, to see the basis of the claim and how the trial court dealt with it.

A. Ineffective Assistance of Counsel—— Failure to Investigate and Present Alibi Defense.

As one ground for relief under RCr 11.42, Stallworth asserted that he received ineffective assistance of counsel due to his trial counsel's failure to investigate and present an alibi defense. Stallworth asserted in his *pro se* RCr 11.42 motion that he told his trial counsel that witnesses could place him in North Carolina on the second occasion when he was alleged to have been selling drugs in Boyle County, Kentucky. He further asserted that trial counsel did not investigate or pursue this defense.

[8] Stallworth also nominally raised the issue that his conviction was nullified by the agreed order dismissing the first trafficking count after the Commonwealth decided not to seek a retrial on that count following the hung jury. But before the trial court could rule on this issue, Stallworth's own counsel pointed out that this issue had been raised in an unverified, *pro se* motion. Moreover, Stallworth's trial counsel told the trial court that he could not, in good faith, advise Stallworth to verify this earlier motion "because it contains erroneous information as a matter of law, in counsel's opinion." Supplement to RCr 11.42, 1/15/2004, at 2. A motion for relief under RCr 11.42 must be "signed and verified by the movant" pursuant to RCr 11.42(2). The trial court never ruled on this issue, doubtless because it was not properly raised in a verified motion. Regardless, Stallworth has apparently abandoned this issue on appeal.

Because the facts supporting this claim could not be resolved purely on the record, the trial court granted Stallworth an evidentiary hearing on the issue of whether trial counsel failed to investigate and present an alibi defense. The evidentiary hearing was twice rescheduled—once on Stallworth's motion and once by agreed order. In both instances, Stallworth's inability to locate the alleged alibi witnesses caused the continuance. The record shows that at Stallworth's request, the trial court sent certificates to several North Carolina counties to secure the attendance of the two alleged witnesses named by Stallworth; but these witnesses apparently were never served.[9]

On the last date set for the evidentiary hearing, Stallworth requested, through counsel and in open court, that the trial court permit him to withdraw from consideration by the court the issue of ineffective assistance of counsel due to failure to investigate and pursue the alibi defense. And in the order denying his motion for RCr 11.42 relief from which Stallworth appeals, the trial court granted his motion to withdraw the issue of the alibi defense. Therefore, at Stallworth's request, the trial court never considered the merits of his ineffective assistance claim based on the alibi

[9] The trial court received a letter from the deputy clerk of the Superior Court of Wayne County, North Carolina, stating that one of the witnesses sought had died in April 2003.

defense. The trial court also did not conduct an evidentiary hearing since it had previously deemed this to be the only claim requiring a hearing.

B. Ineffective Assistance of Counsel—Relying on Defense Strategy That Was Not Legally Viable.

As another ground for relief under RCr 11.42, Stallworth asserted that he received ineffective assistance of counsel because his trial counsel exclusively relied upon a defense strategy for the second alleged drug buy[10] that had no chance of success as a matter of law. He states that trial counsel's sole strategy regarding this charge was to seek a jury instruction for criminal facilitation as a lesser-included offense of the trafficking charge. Presumably, the theory behind this facilitation instruction was that given the presence of Givens, a suspected drug dealer, the jury could have believed that Stallworth provided a place for the drug transaction but did not take part in it.

In connection with the second transaction, Stallworth was facing a charge of trafficking in a controlled substance in

[10] Stallworth concedes that trial counsel may also have relied, in part, on another defense strategy for the first alleged drug buy, namely, challenging the integrity of the witnesses and the investigation. But since Stallworth was not convicted on the first count of the indictment, this is not relevant to his motion for relief under RCr 11.42.

the first degree, a Class C felony.[11] Criminal facilitation is a Class A misdemeanor when the underlying crime is a Class C felony.[12] Therefore, a conviction of criminal facilitation, instead of trafficking in the first degree, would result in a greatly reduced sentence going from a maximum of ten years' imprisonment to a maximum of twelve months.[13]

Consistent with this strategy, trial counsel sought an instruction on criminal facilitation. But the trial court refused to give this instruction, a decision later affirmed by the Supreme Court. The Supreme Court had already held in Houston v. Commonwealth[14] that criminal facilitation is not a lesser-included offense of trafficking in a controlled substance.[15] Because Houston was final and published about six months ahead of Stallworth's trial, Stallworth asserts that a reasonably proficient attorney would have been aware of its holding and would not have relied upon a facilitation defense.

---

[11] *See* KRS 218A.1412(2)(a). Trafficking in a controlled substance is a Class C felony for a first offense and a Class B felony for each subsequent offense. KRS 218A.1412(2). Stallworth was charged as a first offender.

[12] KRS 506.080(2)(b).

[13] KRS 532.020(1)(b), KRS 532.020(2).

[14] 975 S.W.2d 925 (Ky. 1998).

[15] *Id*. at 930.

The trial court ruled that the fact that trial counsel asked for an instruction on criminal facilitation, which he did not receive, did not demonstrate that trial counsel was ineffective. This appeal followed.

IV. ANALYSIS.

A. Standard of Review.

A motion for relief under RCr 11.42 is a collateral attack that is limited to issues which were not and could not have been raised on direct appeal.[16] An issue which was raised on direct appeal may not be reconsidered just by recasting that issue as the result of ineffective assistance of counsel.[17]

A motion for relief under RCr 11.42 must set forth all the facts necessary to establish that a constitutional violation occurred.[18] The court will not presume the existence of any omitted facts which are necessary to establish a constitutional violation.[19]

RCr 11.42(5) states that an evidentiary hearing shall be granted when there is "a material issue of fact that cannot be determined on the face of the record." If the allegations in

---

[16] Hodge v. Commonwealth, 116 S.W.3d 463, 467-468 (Ky. 2003).

[17] Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

[18] Hodge, 116 S.W.3d at 468.

[19] *Id*.

the motion can be conclusively resolved, either proved or disproved, by the record, a hearing is not required.[20] Conclusory allegations unsupported by facts do not justify an evidentiary hearing because an evidentiary hearing under RCr 11.42 is not intended to be a discovery tool.[21]

The United States Supreme Court has stated that "[t]he benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[22] The two-part test for establishing ineffective assistance of counsel requires a movant to show that counsel's performance was deficient and that the deficiency resulted in actual prejudice.[23]

When considering the first prong of the test, the court must decide whether "counsel's representation fell below

---

[20] Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

[21] Hodge, 116 S.W.3d at 468. *See* Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993) (stating that "[i]t is inappropriate for a movant to seek a hearing hoping . . . that 'something would turn up.'")

[22] Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *See also*, Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985) (recognizing that Kentucky's courts are bound by the principles established in Strickland for analyzing ineffective assistance of counsel claims under the Sixth and Fourteen Amendments).

[23] Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

an objective standard of reasonableness"[24] based on prevailing professional standards[25] and in light of the facts of the particular case as they existed at the time of counsel's conduct.[26] Because of the difficulty in fairly evaluating counsel's performance in hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[27]

Because there is no constitutional guarantee of error-free counsel,[28] the fact that counsel may have erred is not dispositive. The court must also consider whether the defendant was harmed by this error. Establishing that the defendant was prejudiced by counsel's error or errors requires the defendant to "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."[29]

---

[24] *Id.*, 466 U.S. at 687-688, 104 S.Ct. at 2064.

[25] *Id.*, 466 U.S. at 688, 104 S.Ct. at 2065.

[26] *Id.*, 466 U.S. at 690. 104 S.Ct. at 2066; Commonwealth v. Tamme, 83 S.W.3d 465, 470 (Ky. 2002).

[27] Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

[28] McQueen v. Commonwealth, 949 S.W.2d 70, 71 (Ky. 1997).

[29] Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

It is not enough to show that the error had some conceivable or remote effect on the outcome of the proceeding.[30]

Although the test for ineffectiveness of counsel is a two-pronged test, there is no requirement that the court deciding a claim of ineffectiveness of counsel address the prongs in a particular order or even that it address both prongs of the test.[31] If the court can determine that there is insufficient proof of prejudice, it should dispose of the claim on that basis without ever determining whether counsel's performance was deficient.[32]

Both halves of the test for ineffective assistance of counsel—the performance prong and the prejudice prong—involve mixed questions of law and fact.[33] The trial court's factual findings concerning the determination of ineffective assistance of counsel are subject to review only for clear error.[34] But the ultimate decision on the existence of deficient performance and actual prejudice are subject to de novo review.[35]

---

[30] *Id.*, 466 U.S. at 693, 104 S.Ct. at 2067; Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002).

[31] Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

[32] *Id.*; Brewster v. Commonwealth, 723 S.W.2d 863, 864-865 (Ky. 1986).

[33] Strickland, 466 U.S. at 698, 104 S.Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997).

[34] Groseclose, 130 F.3d at 1164.

[35] *Id.*

B. NO PREJUDICE DUE TO RELIANCE UPON CRIMINAL FACILITATION DEFENSE STRATEGY.

Stallworth asserts that his trial counsel erred by relying exclusively on a criminal facilitation defense that was not legally viable. He cites trial counsel's request for a criminal facilitation instruction as a lesser-included offense of the trafficking charge as proof of trial counsel's misguided reliance on this defense. He asserts that a reasonably competent attorney under the same circumstances would have been aware that he was not eligible for this instruction as a matter of law and would have adopted another trial strategy. Moreover, he alleges that he was prejudiced by this wrongheaded trial strategy since reliance on it essentially left him defenseless on the count of which he was convicted.

As we discussed earlier, Stallworth raised the issue of the criminal facilitation instruction on direct appeal arguing that the trial court erred by refusing to give the criminal facilitation instruction. Since he raised the matter of the facilitation instruction on direct appeal, it might appear at first blush that Stallworth cannot raise this issue again in his 11.42 motion. [36] But Stallworth is not arguing the same thing in his motion for RCr 11.42 relief as in his direct appeal; in fact, he is arguing the opposite position. Now, he

[36] *See* Sanborn, 975 S.W.2d at 909.

asserts that it was error for trial counsel to even request a criminal facilitation instruction, part of trial counsel's larger error of relying on an unavailable defense. Thus, this is not a case in which a party impermissibly seeks to revive an issue raised on direct appeal by recasting it as ineffective assistance of counsel.[37]

The Commonwealth disputes Stallworth's assessment of trial counsel's defense, stating that:

> [I]t is clear that the defense did not "rely" on the defense of facilitation with regard to the transaction that occurred on September 30. . . . In the lengthy discussion of the jury instructions, defense counsel revealed that his defense was premised on the lack of integrity of the police investigation with regard to both transactions, the lack of credibility of the informant and the presence of another drug dealer at appellant's home who could have made the sale but appellant provided the means for the sale.[38]

The Commonwealth asserts that defense counsel vigorously cross-examined the witnesses for the prosecution raising questions regarding their integrity and the integrity of the evidence. The Commonwealth further states that trial counsel "did not argue facilitation at closing, but chose to focus on the lack of integrity of the police, the inconsistencies in the story of the

---

[37] *See Id*.

[38] Commonwealth Br. at 7-8 (references to transcript record omitted).

police and James Hunt, and the presence of other dealers that could have made the [drug] sale."[39]

We recognize this dispute over trial counsel's actual defense strategy, but we do not need to resolve it. We also do not need to determine whether or not trial counsel's performance was deficient. This is because we dispose of this case on the ground of lack of prejudice. Even if we assume for argument's sake that trial counsel relied entirely on the facilitation defense for the second trafficking charge, that this defense was legally unavailable, and that this strategic decision fell outside the wide range of prevailing professional norms based on an objective standard of reasonableness, Stallworth still is not entitled to relief. This is because he has not shown that he was prejudiced by trial counsel's alleged deficiency.

In order to be entitled to relief, Stallworth must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[40] The trial court properly noted that the mere fact that trial counsel asked for an instruction on criminal facilitation that he did not receive was not prejudicial to Stallworth. Even if trial counsel did rely exclusively on the unavailable facilitation defense for the

[39] *Id*. at 8.

[40] Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

trafficking charge, this was also not inherently prejudicial. Stallworth must demonstrate a reasonable probability that the outcome of his trial, and specifically the outcome related to this charge, would have been more favorable if trial counsel had not relied on the facilitation defense.

Stallworth asserts that he was prejudiced by trial counsel's decision to rely on the facilitation defense because, as a result of this strategy, he had to forgo other options that had a reasonable probability of producing a favorable outcome. He asserts that the Commonwealth made a plea offer to recommend a five-year sentence in return for a guilty plea. If Stallworth had taken this plea offer and if the trial court had accepted this recommended sentence, this would certainly have been a more favorable outcome than his ultimate twenty-year sentence.

But the record contains no evidence of a plea offer. The only mention of the existence of a plea offer before Stallworth's assertion in his brief was a passing, self-serving reference to that effect by Stallworth's 11.42 counsel in a hearing before the trial court. So even if we accept that such a plea offer was made, Stallworth never properly raised this matter in his RCr 11.42 motion before the trial court. He may not raise it for the first time now. It is axiomatic that this

Court should not consider issues on review that were not raised before the trial court nor adjudicated by it.[41]

Moreover, Stallworth does not assert that he refused the plea offer because of trial counsel's representation that he had a viable defense based on a criminal facilitation instruction. He never actually asserts that he refused the plea offer. As far as we can tell, the plea offer may have expired or been withdrawn. Thus, Stallworth's alleged lost opportunity to accept the plea agreement, which he asserts as proof of prejudice due to counsel's deficient performance, may have been totally unrelated to trial counsel's performance. An RCr 11.42 motion must set forth all the facts required to establish that a constitutional violation occurred.[42] This Court is not required to fill the gaps needed to state a valid claim of ineffective assistance of counsel.[43] Here, Stallworth's claim about passing up a more favorable plea opportunity does not show that he suffered actual prejudice as a result of trial counsel's deficient performance. Therefore, he is not entitled to relief under RCr 11.42.

Stallworth also alludes to the fact that "trial counsel did not choose to pursue a defense of alibi as to the

---

[41] Marksberry v. Chandler, 126 S.W.3d 747, 753-754 (Ky.App. 2003).

[42] Hodge, 116 S.W.3d at 468.

[43] *Id*.

September 30th allegation."[44] This looks like another attempt to show prejudice. The implication here is that Stallworth, as a result of his counsel's deficient advice, opted to forgo a viable alibi defense for the futile criminal facilitation defense. But Stallworth abandoned any claim to having a viable alibi defense when he expressly asked the court to dismiss that portion of his RCr 11.42 motion. So the trial court was never given the opportunity to rule upon this claim. Stallworth may not now resurrect this abandoned claim. As Kentucky's highest court has stated, an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court."[45] Since Stallworth has not established that he had a viable alibi defense, he also has not shown that he was prejudiced by trial counsel's decision to rely upon the facilitation defense instead of this alibi defense.

Another factor to consider in determining whether counsel's alleged deficiency prejudiced a movant for relief under RCr 11.42 is the other evidence against Stallworth. There was ample evidence presented at trial to support the trafficking conviction. In addition to Hunt, Bishop also testified as a witness to the drug transaction. In addition, the Commonwealth presented the audio recording of this drug transaction from

[44] Appellant Br. at 5.

[45] Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

Hunt's wire. This overwhelming evidence makes it difficult for Stallworth to argue that there was a reasonable probability of a more favorable outcome if only trial counsel had not relied on the criminal facilitation defense.

C. No Basis for Evidentiary Hearing.

Stallworth suggests that the fact that a plea offer was made raises questions concerning what trial counsel may have told him about his chances of succeeding based on the facilitation defense and what trial counsel may have advised him to do. So he argues that the trial court should have conducted an evidentiary hearing to resolve this issue. Stallworth really does not specifically assert that trial counsel gave him deficient advice with regard to the plea agreement, he simply suggests the possibility that it might have occurred. This mere possibility is not enough to warrant an evidentiary hearing. The Kentucky Supreme Court has stated that an RCr 11.42 movant is not entitled to an evidentiary hearing for this type of fishing expedition in the hopes that something will turn up.[46]

Stallworth also asserts that the Commonwealth's answer to Stallworth's RCr 11.42 motion raises a question that requires an evidentiary hearing. In its answer, the Commonwealth stated that Stallworth was consulted about the decision to seek a

[46] *See* Stanford, 854 S.W.2d at 748.

criminal facilitation instruction. Because the existence of this consultation cannot be verified by the record, Stallworth insists that the trial court was obligated to hold an evidentiary hearing to resolve that issue.

An evidentiary hearing is necessary when there is "a material issue of fact that cannot be determined on the face of the record."[47] Here the issue over this consultation is not material because it only goes to whether counsel's performance was deficient. Even if we assume that trial counsel never told Stallworth that he had almost no chance of receiving a criminal facilitation instruction at trial, this still cannot rise to ineffective assistance of counsel unless Stallworth can prove how he was prejudiced by this action or inaction. And, as discussed previously, Stallworth has not made this showing of prejudice. Therefore, the trial court was not required to conduct an evidentiary hearing to resolve whether or not trial counsel consulted with Stallworth about the merits of the criminal facilitation defense strategy because Stallworth's RCr 11.42 claim can be disposed of on other grounds regardless of the answer to this factual question.

[47] RCr 11.42(5).

V. CONCLUSION

Based upon our analysis of the issues raised in this appeal, we affirm the Boyle Circuit Court's denial of Stallworth's motion for relief under RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Ray Myers
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky