

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000647-MR

DWAYNE JOHNSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 98-CR-00474

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Dwayne Johnson appeals *pro se* from an order of the Campbell Circuit Court denying his motion seeking RCr 11.42 relief. Johnson claims in this appeal that he was afforded ineffective assistance at trial. After reviewing the record, we affirm.

A jury convicted Johnson on two counts of first-degree trafficking in a controlled substance. The jury recommended and the court imposed ten years imprisonment on each charge. Johnson's initial trial counsel then withdrew and another

attorney was substituted as counsel to represent Johnson on the pending charge of being a convicted felon in possession of a handgun. After the jury convicted him on that charge, Johnson agreed to, and the court accepted, the Commonwealth's recommendation of a five-year sentence, with that sentence and the two trafficking sentences to run consecutively for a total of twenty-five years. The supreme court affirmed the Campbell Circuit Court's judgment on appeal.<sup>1</sup>

Johnson then made a timely motion to set aside or vacate his conviction and sentence pursuant to RCr 11.42. After an evidentiary hearing, the Campbell Circuit Court denied Johnson's motion but ordered his sentence for being in possession of a handgun to run concurrent to his other sentence. This appeal followed.

In *Strickland v. Washington*,<sup>2</sup> the Supreme Court stated that in order to overturn a conviction the defendant's counsel's assistance must have included "errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." And the deficient performance so prejudiced the defendant that it deprived him "of a fair trial, a trial

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<sup>1</sup> *Johnson v. Commonwealth*, 90 S.W.3d 39 (Ky. 2002).

<sup>2</sup> 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed 2d 674 (1984).

whose result is reliable."<sup>3</sup> Only when both of these showings are made can the conviction be overturned.

Johnson argues that the Campbell Circuit Court erred by failing to find that he was afforded ineffective assistance when his initial trial counsel failed to object to the audiotapes which were played at trial. However, in reviewing Johnson's direct appeal, the Kentucky Supreme Court noted:

On August 16, 1999, defense counsel made a motion to exclude the audio tape recordings on grounds that they were inaudible. The trial court did not rule on the motion until defense counsel renewed the motion mere minutes before the trial was set to begin. In renewing the motion, defense counsel argued that the trial court needed to listen to the tapes prior to ruling on their admissibility.<sup>4</sup>

As trial counsel objected to the introduction of the audiotapes, we conclude that Johnson's complaint is unfounded and that the circuit court did not err by denying him relief on this ground.

Johnson's next complaint is that Johnson's initial trial counsel failed to move for a mistrial after the court found that the Commonwealth's confidential informant was incompetent to testify at trial, and failed to insist upon cross-examining the confidential informant. Johnson relies on

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<sup>3</sup> 466 U.S. at 687, 104 S.Ct. at 2064.

<sup>4</sup> 90 S.W.3d at 45.

*Pointer v. Texas*,<sup>5</sup> wherein the recorded testimony of an unavailable witness was read into evidence at trial even though the defendant had not cross-examined the witness when the recording was made. The United States Supreme Court confirmed "the right of an accused in a criminal case to confront the witnesses against him."<sup>6</sup> Here, by contrast, the confidential informant never testified at trial. No grounds existed upon which trial counsel could insist on cross-examining him.

Johnson also claims that the Commonwealth's opening statements, in which they refer to the statements made by the CI, was so prejudicial that initial trial counsel was ineffective for failing to request a mistrial. Johnson, in his brief, admits that trial counsel, in a side bar, informed the court that "the jury should be made aware that the confidential informer . . . had been found incompetent to testify." Johnson makes no attempt to supply this court with the grounds on which to reverse the trial court's determination. The trial court is best situated to determine what remedial measures should be taken during the course of a trial to ensure the highest standards of justice. Further, as the Kentucky Supreme Court has previously noted, absent a showing of bad faith a prosecutor's misstatements regarding the evidence to be produced

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<sup>5</sup> 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

<sup>6</sup> 380 U.S. at 404, 85 S.Ct. at 1068.

at trial need not result in a mistrial unless the trial court determines that prejudice will result to the defendant.<sup>7</sup> Johnson makes no showing that the statements made by the Commonwealth were so prejudicial that without them a different outcome was likely to result. The Campbell Circuit Court did not err by denying his motion.

Johnson's complaints do not overcome the strong presumption that counsel's actions fell within the realm of sound trial strategy.<sup>8</sup> Indeed, as stated by the Supreme Court, we "must be highly deferential in scrutinizing counsel's performance. The tendency and temptation to second guess is strong and should be avoided."<sup>9</sup> Contrary to Johnson's contentions, we are not persuaded that initial trial counsel's waiving opening statement, failing to discuss defenses with Johnson, failing to prepare Johnson to testify, failure to subpoena Joan Walters,<sup>10</sup> or failing to provide a more eloquent closing argument fell outside the wide range of professionally competent assistance.<sup>11</sup> As noted by the trial court, allegations concerning trial strategy do not provide grounds for RCr 11.42

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<sup>7</sup> *Freeman v. Commonwealth*, 425 S.W.2d 575, 578 (Ky. 1967).

<sup>8</sup> *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

<sup>9</sup> *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998).

<sup>10</sup> Johnson's ex-wife and roommate

<sup>11</sup> *Harper*, 978 S.W.2d at 315.

relief,<sup>12</sup> and here Johnson fails to show that any alleged error was likely to result in a different outcome.

Johnson next claims that the circuit court erred by failing to find his second trial counsel provided ineffective assistance of counsel by allowing Johnson to agree to a sentence which exceeded the length permitted by statute. Since the circuit court corrected the error by running the five-year sentence for the handgun charge concurrent with the sentences for the trafficking charges, Johnson was not prejudiced by any error and is not entitled to relief on this ground.

Next, Johnson claims that the circuit court erred by failing to find that his trial attorneys were ineffective by not requesting new trials after a prosecution witness was charged with a felony. We disagree.

Drug charges against the prosecution's witness, a law enforcement officer, were initiated between the two trials. As noted by Kentucky's highest court, a new trial will be granted based on newly discovered evidence only when the evidence is of such a "compelling weight that it probably would have induced the jury to reach a different verdict."<sup>13</sup>

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<sup>12</sup> *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

<sup>13</sup> *McGregor v. Commonwealth*, 253 S.W.2d 624, 625 (Ky. 1952).

Although Johnson speculates that the jurors would have determined that the witness was a bad cop who was out to get him if they had known of the charges against the witness, those charges were unrelated to the charges against Johnson. Thus, we are not persuaded that they carried such weight that the jury probably would have been induced to reach a different verdict.<sup>14</sup> Indeed, during the second trial the jury convicted Johnson of the handgun charge even though the witness was impeached as to his use of Prozac.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwayne Johnson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>14</sup> 253 S.W.2d at 625.