

RENDERED: DECEMBER 2, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2004-CA-000799-MR

EWELL COCHRAN

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 00-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Ewell Cochran brings this *pro se* appeal from a January 28, 2004, order of the Rowan Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate his fifty-year sentence of imprisonment. We affirm.

Appellant was indicted by the Rowan County Grand Jury upon three counts of first-degree burglary, one count of second-degree burglary, and eleven counts of third-degree burglary. A

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<sup>1</sup> Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

jury subsequently found appellant guilty of all but one count and recommended a ninety-six year sentence of imprisonment. Appellant was sentenced by the trial court to a term of fifty years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed appellant's conviction in Appeal No. 2001-SC-000738-MR.

Appellant then filed a *pro se* RCr 11.42 motion to vacate his sentence based upon ineffective assistance of counsel. By order entered January 28, 2004, the circuit court denied appellant's RCr 11.42 motion. This appeal follows.

The Kentucky Supreme Court enunciated the standard for claims of ineffective assistance of counsel in Hodge v. Commonwealth, 116 S.W.3d 463, 460 (Ky. 2003):

The standards which measure ineffective assistance of counsel have been set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *accord* Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, *supra*. 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.

Guided by this authority, we now turn our attention to the merits of this appeal.

Appellant contends that his trial counsel was ineffective for failing to move the circuit court to sever the indictment pursuant to RCr 9.16. Specifically, appellant asserts:

[T]he prosecutor tried the case as if the alleged burglaries were committed in a chain of events and that they occurred back to back, in the same time frame with no interruption. This is not the case, in fact there has been a number of days between most of the offenses.

RCr 9.16 provides, in relevant part, as follows:

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

A review of the record reveals that the fourteen burglaries occurred during a three-month period and demonstrated the same *modus operandi*. It is well-established that where offenses are closely related in character, circumstance, and time, severance is not necessary. Cardine v. Commonwealth, 623 S.W.2d 895 (Ky.

1981). Therefore, pursuant to RCr 9.16, the circuit court would have likely denied a motion to sever the offenses for a separate trial. Thus, appellant cannot demonstrate that counsel's performance deprived him of a fair trial and resulted in any prejudice. Hodge, 116 S.W.3d 463. Based upon the foregoing, we are of the opinion that appellant's allegation of ineffective assistance for counsel's failure to move the circuit court to sever the indictment is without merit.

Appellant next contends his counsel was ineffective for failing to file a *motion in limine* regarding an audiotape the Commonwealth intended to introduce. The tape contained a conversation between appellant and a witness for the Commonwealth; wherein, appellant discussed the criminal activity he had engaged. A review of the record reveals that counsel did make such a motion. Before the trial began, appellant's counsel made a motion requesting those portions of the tape be redacted. The circuit court denied the motion. Based upon this fact, we are of the opinion appellant's claim that counsel was ineffective for failing to make such a motion is facially meritless.

Appellant's final contention is that his counsel was ineffective for failing to "move the court for a mistrial on cumulative errors that occurred during trial." Specifically,

appellant contends that counsel provided ineffective assistance during *voir dire*.

It is well-established that decisions made by counsel during *voir dire* of the jury are generally matters of trial strategy. Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000). Moreover, appellant has failed to adequately identify how any prejudice resulted from counsel's alleged deficient performance. See Hodge, 116 S.W.3d 463.

Accordingly, we hold that appellant failed to demonstrate that his counsel was deficient; thus, the circuit court properly denied his RCr 11.42 motion.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Ewell Cochran, *Pro Se*  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
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