

RENDERED: OCTOBER 21, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2004-CA-001440-MR

MARC LOUIS BINDER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
INDICTMENT NO. 00-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>

DYCHE, JUDGE: Mark Louis Binder was convicted in 2001 of engaging in a criminal syndicate, trafficking in a controlled substance (two counts), and unlawful transaction with a minor (two counts). Binder is currently serving a thirty-four year sentence for those convictions. The Kentucky Supreme Court

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

affirmed on August 22, 2002. Binder sought collateral relief pursuant to RCr 11.42 from his convictions on August 25, 2003, and the Fayette Circuit Court entered its orders denying Binder's motion on May 11 and June 28, 2004. Binder appeals.

In arguing that he was denied effective assistance of counsel at trial, Binder asserts that counsel made four grievous errors. His first and second claims are in regard to the jury instructions given by the trial court. Binder faults counsel for not objecting to the fact that the instructions on criminal syndication varied from the language in the indictment. Because the language in the instructions was broader than in the indictment, Binder insists that he was prejudiced by counsel's alleged error.

Our Supreme Court, in its review of Binder's direct appeal, found that "the indictment gave Binder fair notice of the charges against him," and that the omission of certain language in the indictment (see KRS 506.120) did not rise to the level of palpable error. Binder has failed to demonstrate that he was prejudiced by the lack of an objection to the instructions, and the trial court correctly found that this allegation of ineffective assistance of counsel was without merit. Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

Binder secondly argues that, because there was no evidence that he dispensed cocaine, trial counsel was ineffective for failing to object to the use of that word in the instructions. Inclusion of this word, he continues, violated his right to a unanimous verdict by allowing the jury to find alternate theories of guilt.

Again we disagree. In addressing Binder's claim of insufficient evidence on direct appeal, the Supreme Court stated that "there was overwhelming evidence that Binder was the leader of a major drug syndicate in Lexington, Kentucky, and that he was the guiding force behind the drug trafficking charged in the indictment." That being the case (see SCR 1.030(8)(a)), it is difficult to conceive that the mere inclusion of the word "dispense" in an instruction would have affected the outcome of the case. The burden rests on Binder to demonstrate that it did, and he has failed to do so. Strickland, supra; Gall, supra. Counsel was not ineffective for not objecting to the language in the instruction.

Binder next contends that the indictment was defective for failing to charge him with engaging in organized crime "on a continuing basis," and that counsel was ineffective in neglecting to object to it. The issue of defective indictment was addressed on direct appeal. The Supreme Court found that, although the indictment lacked the aforementioned phrase, Binder

suffered no prejudice. Thus appellant necessarily cannot prove that, absent this alleged error, the outcome of his trial would have been different. Strickland, supra; Gall, supra.

Binder's last argument is that trial counsel's performance was deficient for failing "to contact an important exculpatory defense witness and subpoena him to trial." His specific complaint is that Donell Wilson "would have testified that the police had threatened him to make him make false statements that appellant was involved in drug activity." Wilson was not called during the Commonwealth's presentation of evidence. The trial court correctly found that it was within trial counsel's discretion not to include Wilson's testimony. See Robbins v. Commonwealth, 719 S.W.2d 742, 743 (Ky.App. 1986), overruled on other grounds by Norton v. Commonwealth, 63 S.W.3d 175 (Ky. 2001).

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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