

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001643-MR

JAMES C. MAXIE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 00-CR-00256

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: James C. Maxie appeals, pro se, from orders of the McCracken Circuit Court denying his motion for RCr² 11.42 relief and denying his motion for the return of \$348.00 taken from his person in concurrence with his arrest. On review, we affirm in part and vacate in part, and remand for further proceedings.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

On September 14, 2000, the McCracken County Sheriff's Department was involved in a drug investigation focused upon Aaron Rottering. Rottering was arrested and agreed to cooperate with the police in the arrest of his cocaine supplier, whom he identified as Appellant Maxie. As instructed by the police, Rottering paged Maxie and arranged a buy at Maxie's residence, where Rottering had been seen prior to his arrest. Rottering was outfitted with a transmitter and drove to Maxie's residence where, on his signal, the police entered and began a search while other officers remained in position outside.

Those officers who stayed outside observed a man, whom they would later identify as Maxie, come to an upstairs window in the back of the residence and open the window. The officers thought that Maxie was going to jump, so they drew their guns and told him not to move. Maxie then threw something out of the window, ducked back into the room, and slammed the window shut. An officer then recovered what had been thrown out – a baggie that subsequently tested positive for cocaine residue. Another officer, who was involved in the search of the residence, found Maxie emerging from an upstairs bedroom. Although there was another adult male in the residence, there was testimony that only Maxie was found upstairs. Officers confiscated \$348.00 in cash from Maxie's person, and a razor blade containing cocaine

residue was found on a dresser in a bedroom. No usable quantities of cocaine were recovered.

On October 20, 2000, Maxie was indicted by the McCracken County Grand Jury on charges of first-degree trafficking in a controlled substance, tampering with physical evidence, and being a second-degree persistent felony offender. A jury trial was held on July 27, 2001, with the jury being instructed on the first-degree trafficking charge, the tampering charge, and a charge of first-degree possession of a controlled substance. The jury found Maxie not guilty of the trafficking and possession charges, but guilty of the tampering charge, for which it recommended a sentence of five years. The jury subsequently found him guilty of being a second-degree persistent felony offender and recommended a sentence of ten years. On August 1, 2001, Maxie, in accordance with the jury's recommendation, was sentenced to five years' imprisonment for the tampering conviction, with the sentence being enhanced to ten years as a result of the persistent felony offender conviction.

Maxie then appealed his conviction to this court, arguing that the trial court erred in allowing the jury to return a not guilty verdict on the trafficking and possession charges and a guilty verdict on the tampering charge when the two results were inconsistent with one another. However, we

determined that this issue was not properly preserved for appellate review and consequently affirmed Maxie's conviction.

On November 14, 2003, Maxie filed a pro se motion requesting the return of the \$348.00 taken from him at the time of his arrest on September 14, 2000 due to the fact that he was not convicted of the possession or trafficking charges. The Commonwealth's response was that, pursuant to the presumption set forth in KRS³ 218A.410(1)(j), forfeiture of the cash was justified by the fact that the baggie containing cocaine residue (which Maxie threw out the window) had been in close proximity to the money on Maxie's person. On December 23, 2003, Maxie also filed a pro se motion, pursuant to RCr 11.42, requesting an evidentiary hearing on his claim that he received ineffective assistance of counsel when his attorney failed to object to the purportedly inconsistent verdicts rendered by the jury at his trial. The motions were brought before the trial court on January 9, 2004 and were rejected. This appeal followed.

Maxie's first argument on appeal is that his attorney provided ineffective assistance of counsel in failing to object to the purportedly inconsistent verdicts rendered by the jury. He specifically contends that the jury's failure to find that he was in "possession" of cocaine – a necessity for conviction under the trafficking and possession charges – necessarily

³ Kentucky Revised Statutes.

precluded a conviction for tampering with physical evidence because he could not destroy, mutilate, conceal, remove, or alter evidence without possessing it. The trial court ruled, without a hearing, that the verdicts were not necessarily inconsistent, "as the jury could well have believed the defendant tampered with physical evidence, the cocaine, without believing the defendant actually knew that the substance he tampered with was, in fact, cocaine," that "the consistency of verdicts is no longer really an issue," and that "[t]here was ample evidence to support each of the jury's verdicts in this case."

On appeal, Maxie does not take issue with the fact that he was not afforded a hearing on his RCr 11.42 motion, but we note that the substantive issues he raises are of a sort that can be resolved by reference to the record. A movant is not entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record. Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986), citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985).

To establish ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and a result that was unreliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); see also Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002) (Citation omitted). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action "might be considered sound trial strategy." Strickland, 466 U.S. at 689 (Citation omitted); see also Sanborn v. Commonwealth, 975 S.W.2d 905, 911 (Ky. 1998) (Citation omitted). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. See Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001) (Citation omitted); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998) (Citation omitted).

In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-89. "A defendant is not guaranteed errorless counsel, or counsel

adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"

Sanborn, 975 S.W.2d at 911, quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997). In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. Strickland, 466 U.S. at 694; see also Bowling v. Commonwealth, 80 S.W.3d 405, 412 (Ky. 2002) (Citation omitted). Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. Strickland, 466 U.S. at 694-95; see also Bowling, 80 S.W.3d at 412 (Citation omitted).

Although Maxie places great emphasis upon the allegedly contradictory nature of the verdicts rendered by the jury as a ground for his motion, our Supreme Court has held that "rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity." Harrell v. Commonwealth, 3 S.W.3d 349, 351 (Ky. 1998), citing Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356, 359 (1932); United States v. Powell, 469 U.S. 57, 61, 105 S.Ct. 471, 474, 83 L.Ed.2d 461, 466 (1984). "Such an approach would unduly restrict the right of

the jury to consider the evidence broadly and convict or acquit based upon its view of the evidence pertaining to each charge. Moreover, that approach requires analytical precision that would inevitably lead to confusion and needless appellate reversals.” Id.

Instead, our Supreme Court has concluded that the “better approach would be to examine the sufficiency of the evidence to support each verdict. This approach is consistent with the United States Supreme Court’s holding that each count of an indictment should be regarded as a separate indictment, and thus consistency in a verdict is not necessary.” Id., citing Dunn, 284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 358; Powell, 469 U.S. at 67, 105 S.Ct. at 475, 83 L.Ed.2d at 467. As the U.S. Supreme Court further noted in Dunn v. United States:

“Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold”

Dunn, 284 U.S. at 393 (Internal citations omitted).

We have examined Maxie’s argument with a particular emphasis upon whether sufficient evidence exists to support the

purportedly conflicting verdicts. Our review of the record reveals that there was ample evidence to support the jury's decision to find Maxie guilty of tampering with physical evidence. Two police officers testified that they saw a man matching Maxie's physical description toss the baggie with cocaine residue out of a second-story window after the police entered the residence to execute the search warrant, with one officer specifically testifying that he recognized this person as Maxie. While Maxie may argue that such a verdict is inappropriate because it conflicts with the jury's conclusion that he was not guilty of trafficking or possession of cocaine, we note that the statutory predicates for a conviction of tampering under KRS 524.100 differ from those for a conviction of first-degree trafficking in a controlled substance under KRS 218A.1412 and those for a conviction of first-degree possession of a controlled substance under KRS 218A.1415. Given this fact, along with our obligation to treat each count of an indictment as a separate indictment and the evidence supporting the tampering conviction, we are not inclined to conclude that the verdicts reached by the jury here are inconsistent to such an extent that Maxie's conviction would merit a reversal. Consequently, we cannot say that Maxie's counsel was "ineffective" in failing to voice an objection after the jury

rendered its decision, and we must therefore reject Maxie's argument that he is entitled to RCr 11.42 relief.

Maxie's second and final argument is that the trial court erred in failing to order that the \$348.00 taken from his possession at the time of his arrest be returned to him. He additionally contends in the alternative that the court failed to conduct an appropriate forfeiture hearing and to afford him an opportunity to refute the presumption of forfeiture set forth in KRS 218A.410(1)(j).⁴

KRS 218A.410(1)(j), which covers the forfeiture of currency in drug-related cases, reads, in relevant part, as follows:

It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph.

⁴ Maxie also contends that the trial court failed to follow the forfeiture hearing procedures set forth in KRS 218A.415(3)(a)(1) and (2); however, this provision by its own terms is limited in applicability to "[r]eal property subject to forfeiture." Accordingly, it is irrelevant to the case at hand.

In Osborne v. Commonwealth, 839 S.W.2d 281 (Ky. 1992), the Supreme Court of Kentucky described the Commonwealth's burden under the statute as follows:

On examination of [KRS 218A.410(1)(j)], it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute. Without such a requirement, the statute would mandate forfeiture of property which was without any relationship to the criminal act and would be of dubious constitutional validity....

...

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a prima facie case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

Id. at 284; see also Harbin v. Commonwealth, 121 S.W.3d 191, 196-97 (Ky. 2003). In setting forth this standard, however, the Supreme Court clarified that "nothing in the forfeiture statute requires criminal conviction of the person whose property is

sought to be forfeited. It is sufficient under KRS 218A.410(h) and (j) to show a nexus between the property sought to be forfeited and its use to facilitate violation of the Controlled Substances Act, KRS 218A." Osborne, 839 S.W.2d at 283, citing Smith v. Commonwealth, 707 S.W.2d 342 (Ky. 1986).

When the trial court heard Maxie's forfeiture motion, the Commonwealth did not put on any evidence - although it did offer to produce testimony from one of the officers involved in the arrest about the events that occurred at that time, as well as his previous dealings with Maxie, including one occasion in which he purportedly admitted to being a cocaine dealer. Counsel for the Commonwealth also reminded the trial court that the testimony at trial was that Maxie had been seen by two officers throwing a baggie with cocaine residue out of a window, and he was subsequently arrested, with the money in question being seized from his person. The trial court then advised Maxie of the statutory presumption that funds are considered to be drug-related if they are found in close proximity to drugs, and of the fact that a conviction is not necessary for forfeiture to be ordered. Maxie argued that it was inappropriate for the Commonwealth to use past events as evidence that the funds seized on this particular occasion were drug-related; however, when the trial court offered him the opportunity to present testimony or evidence that the funds were

not drug-related, Maxie declined to do so. The court subsequently ruled, upon recalling the testimony given at trial as to the baggie being thrown from the window by Maxie, that the presumption in support of forfeiture was satisfied, and Maxie's motion was denied.

In Smith v. Commonwealth, 707 S.W.2d 342 (Ky. 1986), overruled on other grounds by Clay v. Commonwealth, 818 S.W.2d 264 (Ky. 1991), a case relied on by Maxie below, our Supreme Court was faced with another forfeiture situation in which the appellant had been acquitted of a trafficking charge. Of particular note there, the Court stated: "If [the appellant] had been convicted of trafficking in a controlled substance, K.R.S. 218A.410(j) would have created a rebuttable presumption that money found on his person was forfeitable. The acquittal on the charge of trafficking is ample rebuttal of the presumption that the money was used or intended to be used in exchange for a controlled substance. There was no testimony that the money found on appellant's possession had been received by him in exchange for a controlled substance." Id. at 343. The Osborne Court stated that its decision was consistent with Smith, noting that in that case "the defendant's acquittal of the trafficking charge and failure of the Commonwealth to prove a connection between the currency and the drug transaction was sufficient to require denial of forfeiture." Osborne, 839 S.W.2d at 284. The

Court added: "The difference between Smith and this case is that in the former, the trafficking charge was the only link between the money and the drug transaction and on acquittal, the link was broken. Here, the money was found in close proximity, indeed in the dwelling, of Donald Kimberly, one who was convicted of trafficking." Id.

While the trial court here rendered supportable findings of fact setting forth that the funds in question were in close proximity to cocaine at the time they were seized, we are unconvinced that the court properly examined the issue of traceability, specifically, that "the currency or some portion of it had been used or was intended to be used in a drug transaction," as required by Osborne. Id. We believe that this issue is of particular concern given that Maxie was acquitted of trafficking, a fact that was of some emphasis in Smith. While we recognize that Maxie failed to put forth any testimony or evidence at the forfeiture proceedings, our case law is clear that the Commonwealth is first required to produce "slight evidence of traceability" before the rebuttal presumption in favor of forfeiture comes into play. Accordingly, we find it necessary to remand this particular issue to the trial court for the taking of additional evidence and additional findings of fact. Id.

In summary, we affirm the trial court's denial of Maxie's motion for RCr 11.42 relief, but we vacate its decision to deny Maxie's motion for the return of the \$348.00 taken from him at the time of his arrest and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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