

# Commonwealth of Kentucky

## Court of Appeals

NO. 2004-CA-002076-MR

CLAYTON G. MANNING

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 98-CR-002702

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from an order of the Jefferson Circuit Court overruling Clayton Manning's (Appellant) motion filed pursuant to RCr 11.42 without first holding a hearing. In general, an evidentiary hearing is not required by a RCr 11.42 motion unless there is a material issue of fact that cannot be conclusively resolved by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Appellant presents two arguments that he contends cannot be conclusively resolved

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

without an evidentiary hearing to determine whether his counsel was effective. Specifically, he argues that his trial counsel was ineffective in failing to raise the defense of misidentification by presenting an expert in that field and by failing to properly defend against the persistent felony offender (PFO) charge. After a thorough review of the record and the decision of the lower court, we affirm.

In September, 1998, a man robbed a Sav-a-Step Food Store in Louisville, Kentucky. Two clerks who were working at the time of the robbery identified Appellant as the man. This identification was a stand-up identification, where Appellant was brought to the window of the store and each of the clerks identified him as the man who robbed the store. Based on the identification by these witnesses, Appellant was convicted by a jury of first-degree robbery and first-degree PFO. He was sentenced to 15 years, enhanced to 20 years because of the PFO.

Appellant's first argument is that trial counsel was ineffective by failing to properly prepare a viable defense on the issue of misidentification. He argues that his trial counsel should have hired an expert in the field of misidentification to explain the unreliability of witness identifications. In order to prove ineffective assistance of counsel, Appellant must show that counsel's performance was so deficient that he was not performing as counsel as guaranteed by the Sixth Amendment, and that this deficiency prejudiced his case to the point that the result of the trial was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Defense counsel unsuccessfully moved to suppress the stand-up and in court identification of Manning. Counsel also moved for a new trial based on this same issue. Neither motion was successful. On direct appeal to the Kentucky Supreme Court, the only issue raised by appellate counsel was whether the trial court erred in failing to instruct on second-degree robbery. No mention of the identification issue was made. Clearly, then, this is an issue that should have been raised on direct appeal. RCr 11.42 motions are limited to issues that were not and could not be raised on direct appeal. *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). Further, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. The trial court considered whether the result would have differed with the introduction of expert testimony and concluded that “[w]hile this may have bolstered [Appellant’s] testimony, the jury would have still had the option to find the eyewitnesses’ testimony credible.” We find no error.

Appellant’s PFO argument is also without merit. KRS 532.080(3) describes the elements of a persistent felony offender in the first-degree charge. As it relates to Appellant, he was found to be a first-degree PFO because he had been convicted of two previous felonies. Appellant argues that he should have been charged with second-degree PFO because one of his convictions fell outside the five-year statutory limitation. KRS

532.080(3)(c)(1) states that the offender must have “[c]ompleted service of the sentence imposed on *any* of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted . . . .”

(Emphasis added). Appellant’s previous convictions occurred in 1990 and 1997. When Appellant was convicted of the Sav-a-Step robbery, only the 1997 conviction fell into the five-year statutory limit. Appellant claims that since the 1990 conviction was outside this five-year period, defense counsel was ineffective in not challenging it.

*Howard v. Commonwealth*, 608 S.W.2d 62 (Ky. App. 1980), establishes that only one, not both, of the previous felony sentences must have been completed within the five-year window at the time of the current felony. Since the 1997 conviction fell within the five-year limitation, both it and the 1990 conviction could be used to charge Appellant with first-degree PFO. *Howard* is conclusive of this issue and it is clear that Appellant’s trial counsel was not ineffective in this regard.

For these reasons, we find that an evidentiary hearing was not necessary and that the trial court properly denied the motion.

ALL CONCUR.

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