

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000916-MR

WARREN H. WADLINGTON

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 00-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Warren H. Wadlington was convicted of trafficking in methamphetamine and possession of drug paraphernalia, second offense. He was sentenced to ten years' imprisonment on the trafficking charge and five years' imprisonment on the possession charge to be served consecutively for a total prison term of fifteen years. Following an unsuccessful appeal to this court and after the Supreme Court denied discretionary review, Wadlington filed an RCr 11.42

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

motion alleging ineffective assistance of counsel which was summarily denied by the circuit court. This appeal followed.

The standard for proving ineffective assistance of counsel is set out in Strickland v. Washington.² "In order to be ineffective, performance of 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."³ The relevant question is whether, but for counsel's alleged error, there is a reasonable probability that the result of the proceeding would have been different.⁴

Wadlington alleges that defense counsel did not present an expert concerning his drug addiction, which he maintains would have sustained a defense to the trafficking charge. He contends that proof of his addiction would have demonstrated that he possessed the methamphetamine for his own use rather than for sale. He also contends that counsel failed to seek suppression of money found in his residence at the time of his arrest. His third allegation of ineffective assistance of counsel concerns counsel's trial preparation. Wadlington maintains that even if any one error alone is not sufficient to set-aside his conviction, the errors combined, are sufficient.

² 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

³ Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001).

⁴ McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997).

A movant in an RCr 11.42 proceeding is not automatically entitled to a hearing.⁵ A hearing is required only if there is an issue of fact that cannot be determined on the face of the record.⁶ Mere allegations unsupported by specific facts are not sufficient to justify an evidentiary hearing.⁷

Wadlington contends that counsel should have called an expert witness to testify that Wadlington was a drug addict and that his dependency on drugs was a viable defense to the trafficking charge. It is extremely doubtful that the jury would have been persuaded that Wadlington intended to use the drugs for his own use and did not intend to profit from the drug sale. Wadlington's arrest was the result of a taped controlled sale to a police informant. Additionally, there was evidence that police had made an earlier unsuccessful attempt to complete a buy from Wadlington and that his residence had been under surveillance. In view of the evidence, it was trial strategy, and perhaps the best strategy, not to have an expert testify as to Wadlington's addiction to illegal substances. A reviewing court will not indulge in second guessing counsel's trial strategy.⁸

⁵ Stanford v. Commonwealth, 854 S.W.2d 742, 743 (Ky. 1993).

⁶ Id.

⁷ Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

⁸ Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

In Wadlington's direct appeal, he raised the suppression issue and it was considered and rejected by this court. This court will not reconsider the issue brought in a subsequent RCr 11.42 motion.⁹

We find that counsel's preparation for trial was not so inadequate as to constitute ineffective assistance of counsel. An appellate court "must indulge a strong presumption that counsel acted reasonably and effectively."¹⁰ Wadlington contends that prior to trial, counsel met with him only twice; that he failed to preserve certain issues for appeal, including the suppression issue; that he did not conduct a thorough investigation of the case; and that he failed to adequately prepare him (Wadlington) to testify. Again, this is an RCr 11.42 motion and the standard is not whether counsel's alleged deficient performance could have had a conceivable effect on the outcome, but is whether there is such a probability sufficient to undermine the confidence in the outcome.¹¹ The strong evidence presented by the Commonwealth, including the taped transaction, the money found in Wadlington's residence, and Wadlington's own testimony admitting his ownership of drug paraphernalia, resulted in Wadlington's conviction. The

⁹ Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002).

¹⁰ Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky. 2005).

¹¹ Strickland, *supra*.

remaining issues raised in his RCr 11.42 motion were considered and rejected by this court in his direct appeal.

The record clearly refutes Wadlington's allegations, and the trial court properly summarily denied his RCr 11.42 motion. The order of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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