

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001138-MR

CHRISTOPHER LEE FLORENCE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 01-CR-00504

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Christopher Lee Florence brings this *pro se* appeal from a May 6, 2005, order of the Fayette Circuit Court denying his Ky. Rule Civ. Proc. (RCr) 11.42 motion. We affirm.

On July 18, 2001, appellant was convicted of second-degree criminal possession of a forged instrument, two counts of theft by deception over \$300.00, and with being a first-degree persistent felony offender. Appellant was sentenced to a total

¹ Senior Judge Joseph R. Huddleston 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.

of twenty years' imprisonment. On August 21, 2003, appellant's conviction was affirmed on direct appeal by the Supreme Court of Kentucky in Florence v. Commonwealth, 120 S.W.3d 699 (Ky. 2003).

On June 1, 2004, appellant filed a motion pursuant to RCr 11.42 to vacate sentence. Therein, appellant argued, *inter alia*, that trial counsel was ineffective for failing to object to the testimony of a handwriting expert. The circuit court subsequently appointed counsel for appellant and conducted an evidentiary hearing on appellant's motion. By order entered May 6, 2005, the circuit court denied appellant's RCr 11.42 motion. This appeal follows.

Appellant contends that his trial counsel was ineffective for failing to object to the testimony of the handwriting expert, Detective Chris White. Specifically, appellant argues that trial counsel was ineffective for failing to object to Detective White's testimony that "handwriting analysis is more precise than DNA testing." Appellant asserts that absent such testimony, he would not have been convicted of theft by deception.

The proper standard for reviewing claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985); Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998). The Strickland standard requires a showing that (1)

trial counsel's performance was deficient as it fell outside the range of professionally competent assistance and (2) such deficiency was prejudicial as there existed a reasonable probability the outcome would have been different if not for counsel's performance. Strickland, 466 U.S. 668 (1984).

In appellant's direct appeal, the Kentucky Supreme Court discussed Detective White's testimony as follows:

There is another issue, however, that causes concern. In addition to testifying generally about handwriting analysis and expressing the opinion that Appellant had created the fraudulent documents at issue, Detective White was also permitted to extravagantly opine that handwriting analysis is more precise than DNA evidence, thus, in effect, testifying in favor of his own testimony. However, there appears to be no objection to this facet of Detective White's testimony and Appellant's request for a Daubert hearing is not sufficient to preserve the issue. If Appellant objected to this element of Detective White's testimony, it was his duty to object contemporaneously and seek appropriate relief from the trial court. His failure in this regard is fatal to any relief in this Court.

Florence, 120 S.W.3d at 703 (Ky. 2003).

A decision by trial counsel not to raise a particular objection is considered trial strategy. When challenging trial strategy, an appellant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Furthermore, even if appellant could overcome the strong

presumption that counsel's strategy was sound, he would still be required to satisfy the prejudice inquiry of Strickland. The prejudice prong requires appellant to demonstrate that there is a reasonable probability the outcome of the trial would have been different but for counsel's deficient performance.

Even without Detective White's testimony, there was substantial evidence admitted at trial sufficient to convict appellant of theft by deception. One piece of critical evidence presented at trial was the identification card appellant used to open an account at Whitaker Bank. The identification card bore the name "William Cully Vance" but the photograph was of appellant. Appellant opened the account by depositing \$50.00 into the account. Two days later, appellant deposited a check made payable to William Culy Vance from Roof/Tek in the amount of \$3,740.00. The next day, appellant used a counter check and withdrew \$3,540.00 from the account. Appellant presented the identification card to the teller, and the teller cashed the check. The bank subsequently reported the incident to police. The identification card was eventually located in Ohio, at the residence of appellant's half-brother.

At trial, the identification card, with the name of William Cully Vance but the photograph of appellant, was admitted into evidence. Considering this with the other evidence proving appellant's guilt, we are of the opinion that

the jury's verdict would not have been different absent the admission of Detective White's testimony.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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