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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001538-MR

RAHIM SHABAZZ APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00092

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Rahim Adil Dante Shabazz, *pro se*, appeals from an order of the McCracken Circuit Court that denied his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After reviewing his claims alleging ineffective assistance of counsel, we conclude that the trial court did not abuse its discretion in denying the motion. Thus, we affirm.

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On March 27, 2001, an anonymous confidential informant reported to Detective Scott Aycock of the Paducah Police Department that Shabazz was returning to Kentucky from Texas with a large shipment of marijuana. Aycock conducted a "trash pull" outside Shabazz's residence and recovered three bags of trash. In one of the bags, Aycock found clothing receipts with Shabazz's name on them, two dozen marijuana seeds, a small amount of marijuana, and some marijuana stems. Aycock used this information to obtain a search warrant for the residence. There they found and recovered several bags of marijuana; a pistol; a notebook containing addresses, phone numbers, and numerical computations; a digital scale; plastic baggies; and about $450.00 in cash.

After one mis-trial, Shabazz was tried and found guilty of the following charges: (1) Trafficking in Marijuana, over Eight Ounces, less than Five Pounds, First Offense, with a Firearm Enhancement; (2) Use/Possession of Drug Paraphernalia with a Firearm Enhancement; (3) First-Degree Persistent Felony Offender (PFO). He was sentenced to serve a term totalling twenty (20) years. The Kentucky Supreme Court confirmed his conviction in a published opinion, *Shabazz v. Commonwealth*, 153 S.W.3d 806 (Ky. 2005).

On April 4, 2005, Shabazz filed a motion pursuant to RCr 11.42 to vacate, to set aside or to correct judgment; he

also filed accompanying motions for appointment of counsel and for an evidentiary hearing. All of the motions were denied in orders of June 20, 2005, and this appeal followed.

Shabazz alleges numerous errors on the part of his trial counsel. He charges that counsel was ineffective: for failing to make a motion to suppress the evidence found at his residence; for failing to object to the introduction into evidence of an out-of-state judgment to support his PFO conviction; and for failing to pursue an objection to an alleged violation of the standards for jury selection as set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 687 (1984).

Shabazz first alleges ineffectiveness for counsel's failure to make a motion to suppress the evidence recovered in the police search of his residence. He claims that the affidavit tendered in support of the search warrant was inadequate and that the evidence gathered was tainted.

The Commonwealth contends that because this argument concerns admissibility of evidence, it could have been raised on direct appeal under the palpable error standard. Failure to raise it on direct appeal precludes it from any consideration under RCr 11.42. A motion under RCr 11.42 "is limited to the issues that were not and could not be raised on direct appeal." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998, 122 S.Ct. 471, 151 L.Ed.2d 386 (2001). The Commonwealth argues that Shabazz is merely trying to circumvent *Haight* by re-asserting his Fourth Amendment claim under the guise of ineffective assistance of counsel.

It is true that a direct attack on the legitimacy of the search warrant is an issue that could have -- and should have -- been raised on direct appeal. Nonetheless, Shabazz's Fourth Amendment claim may be considered in the context of his claim of ineffective assistance of counsel under the Sixth Amendment. If legitimate claims of ineffective assistance of counsel relate to issues that could have been raised on direct appeal, they are not automatically barred from consideration under RCr 11.42.

In *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the United States Supreme Court distinguished between Fourth Amendment claims and Sixth Amendment claims for purposes of post-conviction review.

Although a Fourth Amendment claim was not directly subject to *habeas corpus* review, counsel's failure to object to a violation of the Fourth Amendment could be considered as a claim for ineffective assistance of counsel. The *Kimmelman* Court observed as follows:

> while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

477 U.S. at 375, 106 S.Ct. at 2583. The Court then set forth the standard that a claimant must meet in order to preserve his RCr 11.42 claim premised on a Fourth Amendment issue:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove **that his Fourth Amendment claim is meritorious** and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. (Emphasis added).

Id.

Shabazz argues that the affidavit sworn by Detective Adcock did not form an adequate basis for a valid search warrant. He relies on *Henson v. Commonwealth*, 347 S.W.2d 546 (Ky. 1961) in which our Supreme Court held that an affidavit was constitutionally deficient if the affiant merely stated the ultimate fact (*i.e.*, that the suspect possessed an illegal substance) without elaborating as to how and when that conduct

was observed. Shabazz cites the following omissions under *Henson*: (1) that neither the confidential informant nor Detective Aycock personally observed him committing any crime; (2) that the affidavit did not reveal how, when, or if the informant observed him returning from Texas with the large shipment of marijuana; and (3) that the confidential informant did not personally observe Shabazz with the marijuana at all.

A valid search warrant must be supported by probable cause:

> A magistrate's determination of probable cause is entitled to "great deference" and should be upheld so long as the magistrate had a "substantial basis for concluding that a search would uncover evidence of wrongdoing." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983) (internal quotation omitted); *Beemer v. Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984); *see also Massachusetts v. Upton*, 466 U.S. 727, 732-33, 104 S.Ct. 2085, 2087, 80 L.Ed.2d 721 (1984) (reemphasizing *Gates*). *Gates* established a "totality of the circumstances" approach to probable cause. 462 U.S. at 230-31, 103 S.Ct. at 2328. Under this test, the issuing magistrate need only "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ··· there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238, 103 S.Ct. at 2332.

Ragland v. Commonwealth, 191 S.W.3d 569, 583 (Ky. 2006).

Before issuing the warrant in this case, the judge had before him in an affidavit sworn evidence of the confidential

informant's tip regarding the transportation of the marijuana from Texas to Kentucky -- as well as the corroborating evidence of Detective Aycock's description of the highly incriminating items recovered in the trash pull. The totality of the circumstances underlying the affidavit provided sufficient probable cause for the judge to issue a search warrant. Thus, under the *Kimmelman* criteria, Shabazz has failed to demonstrate that his Fourth Amendment claim was meritorious in order to support a charge of ineffective assistance of counsel. Counsel simply had no basis to pursue a motion to suppress under these circumstances.

Shabazz next argues that his trial counsel was ineffective for failing to object to an allegedly improperly authenticated out-of-state judgment as evidence to support his conviction as a persistent felony offender. The Commonwealth correctly notes that a different version of this argument has been presented previously. During his direct appeal, Shabazz had contended that the Commonwealth presented <u>insufficient evidence</u> to prove that he was on probation, parole, or conditional discharge at the time he committed the charged offenses in Kentucky. Therefore, he contended that the PFO status conviction should be reversed. *Shabazz*, 153 S.W.3d at 812.

The Kentucky Supreme Court held that the evidence was sufficient to create a reasonable inference that Shabazz had been on probation at the time he committed the crimes in Kentucky. Thus, the evidence was adequate to justify the refusal of the trial court to grant a directed verdict.

> [A] final decision, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved and is binding upon the parties, the trial court, and the Court of Appeals.

Hogan v. Long, 922 S.W.2d 368, 370 (Ky. 1995) *citing Williamson v. Commonwealth*, 767 S.W.2d 323 (Ky. 1989). The doctrine of "the law of the case" dictates that the first prong of the *Strickland* test (deficient performance of counsel) cannot be met. As the Kentucky Supreme Court carefully considered the nature and sufficiency of the evidence in the out-of-state judgment, Shabazz cannot relitigate this issue in the context of his claim of ineffective assistance of counsel.

Shabazz's final argument concerns an objection made by counsel during *voir dire* when the prosecution used peremptory strikes to exclude the only two African-Americans from the jury pool. He argues that pursuant to *Batson*, *supra*, improper composition of a jury based on racial factors requires reversal. Shabazz acknowledges that his trial counsel properly raised a *Batson* objection -- thus preserving the issue for appellate review. However, he complains that his trial counsel later

erred when he abandoned the *Batson* claim by failing to demand further explanation from the trial court when his objection was overruled.

The Commonwealth explained its reasons for asking for the peremptory strikes, which the trial court accepted as adequate grounds for striking these jurors. Counsel's objection elicited and preserved these explanations and exchanges for the record. There was neither a requirement nor a justification that he pursue it any further. "There is no requirement that any counsel make useless objections[.]" *Relford v. Commonwealth*, 558 S.W.2d 175, 178 (Ky.App. 1977). Thus, there was no error on this issue.

Finally, Shabazz has asked us to review additional claims raised in his RCr 11.42 motion that are not mentioned in his brief. We decline to do so:

> [a]n appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. Consequently, the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed.

Milby v. Mears, 580 S.W.2d 724, 727 (Ky.App. 1979)(citations omitted).

We affirm the order of the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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