

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001717-MR

CHRISTIAN POWERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 02-CR-00801-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI<sup>1</sup> AND SCHRODER,<sup>2</sup> JUDGES; MILLER,<sup>3</sup> SPECIAL JUDGE.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel for failing to object to inadmissible testimony that improperly bolstered the testimony of a Commonwealth witness.

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<sup>1</sup> Judge Daniel T. Guidugli concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Judge Wilfrid A. Schroder completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>3</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Upon review of the trial record, we adjudge that defense counsel's performance was not deficient for failing to object to the testimony at issue and that the outcome would not have been different even if counsel had made the objection. Thus, we affirm.

Early on the morning of May 30, 2002, appellant, Christian Powers, drove into the drive-thru at Fresh Liquors in Lexington and asked to cash a payroll check belonging to his female passenger whom he represented to be Janet Daum, the payee on the check. When Powers handed the check to Bruce Ledford, manager of Fresh Liquors, Ledford noticed there were already two signatures in the endorsement area of the check. Suspicious of the check, Ledford asked Powers and his passenger to come into the store and endorse the check again. Ledford testified that when the two came into the store, the female had no identification and asked Powers what name she was supposed to sign on the check. Because the female did not have identification, Ledford told Powers that he would have to sign the check also and show some identification. After the female and Powers endorsed the check and Ledford checked Powers' identification, Ledford told the pair to wait a moment. Ledford then went in the back of the store and called the police.

Officer Tony Richards of the Lexington Police Department was dispatched to the store on the report of a bad

check. When Officer Richards arrived at the store, he spoke with Ledford and then interviewed Powers and the female separately. The female told Officer Richards that she was Janet Daum. Richards thereupon called Bob Evans Restaurant, the payor on the check, and asked for a description of employee Janet Daum. After obtaining a description of Janet Daum that did not match the description of the female in the store, the female, who was later determined to be Joyce Villareal, and Powers were arrested. Powers was charged with forgery in the second degree and persistent felony offender in the second degree (PFO II). Villareal was charged with forgery in the second degree and possession of drug paraphernalia. Villareal ultimately pled guilty prior to Powers' trial and, as part of her plea bargain, testified against Powers at his trial on October 31, 2002. The jury found Powers guilty of forgery in the second degree and PFO II, and he was sentenced to ten years' imprisonment. Powers filed a direct appeal to this Court, which was affirmed by an opinion rendered on March 5, 2004. A *pro se* RCr 11.42 motion followed, which was later supplemented by appointed counsel. On August 5, 2005, the trial court entered its order denying the RCr 11.42 motion without an evidentiary hearing. This appeal followed.

Powers' primary argument is that his trial counsel was ineffective for failing to object to certain inadmissible

testimony of Officer Richards which improperly bolstered the testimony of Joyce Villareal. The testimony in question, which was offered on cross-examination, was as follows:

Defense counsel: Christian told you that Joyce had the car, picked him up, she had the check and wanted him to go with her to cash it because she didn't have an ID.

Officer Richards: That is what he had stated.

Defense Counsel: Joyce told you that her name was Janet Daum at the beginning didn't she?

Officer Richards: What had happened when I separated them and talked to them, she had made the statement to the reverse, basically saying that Mr. Powers had approached her and had picked her up in the car. They had been together and he said he needed to get a check cashed.

At that point, defense counsel responded, "I didn't ask you that though Officer. Thank you for the information." Defense counsel did not object, request an admonishment or move for a mistrial. Defense counsel thereafter proceeded with his questioning of Richards.

Powers maintains that the statement volunteered by Officer Richards that Villareal had told him that Powers had approached her, picked her up and said he needed to get a check cashed, was inadmissible as a prior consistent statement of Villareal's which improperly bolstered her testimony to that effect at trial. Contrary to Powers' theory of the case at

trial that Villareal asked him for a ride to the store to cash a check, Villareal testified that Powers asked her to get into the car with him and then asked her to help him get a check cashed by signing the payee's name. Powers faults his trial counsel for failing to object to the testimony and ask for a mistrial.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient relative to current professional standards, and that but for the deficient performance, there is a reasonable likelihood that the outcome would have been different.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). There is a presumption that counsel's performance was adequate and was sound trial strategy. Moore v. Commonwealth, 983 S.W.2d 479 (Ky. 1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999).

On direct appeal, Powers argued that the testimony at issue of Officer Richards constituted palpable error. In its opinion, the Court acknowledged that the testimony was improper, but adjudged that it did not rise to the level of palpable error. In its ruling on the RCr 11.42 motion, the trial court found that the testimony was:

not responsive to the question, but in the context of the series of questions is not so prejudicial that it's removal would necessitate a different result than that found by the jury. Defense counsel could reasonably have decided at that point that the nature of the comment made it less prejudicial than objecting during his own questioning of the witness, and instead chose another method of downplaying the response by sarcastically thanking the witness for the unasked-for information. As such, this is reasonable trial strategy, and is not ineffective assistance of counsel.

Assuming the testimony at issue was improper as this Court adjudged on direct appeal, we cannot say that defense counsel rendered ineffective assistance when he failed to object to the testimony and move for a mistrial. From our review of the trial, if defense counsel had objected, it would have likely drawn more attention to the testimony and made the jury focus on the fact that the testimony was consistent with Villareal's earlier testimony. As noted by the trial court, counsel instead chose to downplay the testimony and proceed with his questioning. We agree with the trial court that under the circumstances, this was sound trial strategy.

Further, we would point out that defense counsel aggressively impeached the credibility of Villareal at trial. Defense counsel brought out Villareal's prior felony conviction, and attempted to bring out convictions from other jurisdictions when she arguably opened the door to that evidence. Defense

counsel also went to great lengths (obtaining a tape of her guilty plea and playing it at trial) to get Villareal to admit that part of her plea deal with the Commonwealth was to testify against Powers. Villareal's drug use was emphasized on cross-examination as well.

It is also noteworthy that some of the cases cited by Powers regarding the bolstering of a Commonwealth witness with a prior consistent statement were cases where the witness whose testimony was bolstered was the victim of the crime. See Smith v. Commonwealth, 920 S.W.2d 514 (Ky. 1995) and Belt v. Commonwealth, 2 S.W.3d 790 (Ky.App. 1999). Here the witness at issue was not the victim, but a co-defendant whose credibility had been thoroughly impeached during her testimony. Hence, we feel the jury would have been less likely to give more credibility and weight to Villareal's testimony as a result of the bolstering testimony.

Finally, considering the totality of the evidence adduced at trial, we believe that the outcome of the case would have been the same even had the improper testimony of Officer Richards not been offered or had defense counsel objected to the testimony. Villareal, although a key witness, was not the only witness in this case. Ledford, the manager of the store, testified that Powers was the one who handed him the check and that Villareal asked Powers what name to sign on the check.

Powers' final argument is that he was at least entitled to an evidentiary hearing on the allegations in his RCr 11.42 motion. An evidentiary hearing on an RCr 11.42 motion is not required where the record as a whole refutes the defendant's allegations. Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986). Per the above analysis, Powers' allegations were refuted on the face of the record. Hence, no hearing was required.

For the reasons stated above, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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