

RENDERED: July 7, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2005-CA-001867-MR

ROBERT MATTIE

APPELLANT

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS
INDICTMENT NOS. 99-CR-00099 & 99-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND KNOPF¹, JUDGES; AND EMBERTON, SENIOR JUDGE.²

KNOPF, JUDGE: During the latter part of 1999, a Pulaski County grand jury returned two indictments charging Robert D. Mattie for the offense of theft by unlawful taking over \$300.00,³ first-

¹ This opinion was completed and concurred in prior to Judge William L. Knopf's retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

² 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.

³ KRS 514.030.

degree wanton endangerment,⁴ and with being a persistent felony offender in the second decree.⁵ Because the charges arose out of the same incident, the court ordered the indictments consolidated for trial. Following the trial, the jury convicted Mattie of the theft and PFO charge and of second-degree wanton endangerment. The jury fixed his sentence at twelve months for wanton endangerment, and five years for the theft, enhanced to ten years by virtue of his status as a PFO II. This Court affirmed on direct appeal.⁶ Thereafter, Mattie filed a pro se motion to alter, amend or vacate his conviction pursuant to RCr 11.42. The trial court denied his motion on August 12, 2005, without appointing counsel or conducting a hearing. This appeal followed. Finding no error, we affirm.

The charges against Mattie arose from the theft of a pickup truck from a hospital in Somerset on July 30, 1999. Shortly after the truck was reported stolen, police officers located and attempted to stop the truck. The driver led the police on a high-speed chase, which ended after the truck crashed. Mattie was ejected from the vehicle and he was the only one found at the scene. In addition, the two police officers

⁴ KRS 508.060.

⁵ KRS 532.080.

⁶ Robert Mattie v. Commonwealth, Nos. 2002-CA-000094-MR & 2002-CA-000095-MR (Not-to-be-Published Opinion rendered July 11, 2003).

testified that there was only one person in the truck and that Mattie was the driver.

Nevertheless, Mattie denied that he stole the truck. He testified that he was picked up by an acquaintance named Brenda Colton, who offered him a ride. Mattie contends that his trial counsel did not believe this story and urged him to accept a guilty plea. When Mattie insisted on going to trial, Mattie asserts that his trial counsel made no effort to locate Brenda Colton, to identify other potential witnesses to corroborate his story, or to adequately impeach the testimony of the police officers. Mattie also states that his trial counsel did not call character witnesses during the penalty phase. Mattie thus asserts that his trial counsel provided ineffective assistance that result in substantial prejudice to his defense.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding.⁷ Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis.

⁷ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky., 1985).

First, it must be determined whether a reasonable investigation should have uncovered the defense. If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. Counsel's tactical choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.⁸

Based on the record, the trial court concluded that counsel's assistance was within the range of reasonable professional assistance. We agree. Although Mattie contends that counsel should have tried to find Brenda Colton, he was unable to provide any useful information concerning where she might be found. Furthermore, he fails to identify any other witnesses who could corroborate his version of events. The strong testimony from the police officers that there was only one person in the pickup truck before the crash also supports trial counsel's decision not to pursue this line of inquiry.

Mattie also faults trial counsel for failing to conduct any pre-trial discovery to support his cross-examination of the police officers, but he does not indicate what exculpatory

⁸ Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001). See also Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

evidence could have been found had trial counsel done so. Trial counsel vigorously cross-examined the officers on their testimony, and in particular focused on the lack of any video recording of the chase even though their cars were equipped with recording equipment. Finally, the trial transcript contradicted Mattie's claim that counsel provided no evidence for the jury to consider during the penalty phase of his trial. "[Counsel] beseeched the jury to consider a variety of factors, including Mattie's age, his marriage and small child, and the impossibility of predicting when Mattie might be granted parole. [Counsel] also asked to the jury [*sic*] to 'show some leniency and show some mercy' for Mattie."

An RCr 11.42 motion must set forth all the facts necessary to establish existence of a constitutional violation and that the court will not presume that facts omitted from the motion establish existence of such a violation.⁹ The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by post-conviction proceeding.¹⁰ Because the record refutes Mattie's allegations of ineffective assistance of counsel, the trial court did not err by denying the

⁹ Sanders v. Commonwealth, 89 S.W.3d 380 (Ky.2002). See also Hodge v. Commonwealth, 116 S.W.3d 463 (Ky.2003).

¹⁰ Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001), citing Dorton v. Commonwealth, 433 S.W.2d 117 (Ky.1968).

motion without appointing counsel or conducting an evidentiary hearing.¹¹

Accordingly, the order of the Pulaski Circuit Court denying Mattie's RCr 11.42 motion is affirmed.

ALL CONCUR.

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¹¹ Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).