RENDERED: JULY 13, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002372-MR

GARY COURTNEY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY BARTLETT, JUDGE
ACTION NO. 99-CR-00184

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

WINE, JUDGE: Gary Courtney ("Courtney") appeals from an order of the Kenton Circuit Court entered on November 3, 2005, denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate the trial court's final judgment and sentence of imprisonment without holding an evidentiary hearing. Courtney raises three issues in his RCr 11.42 motion before the trial court. The record clearly refutes each one

[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.

of those and, thus, we affirm the trial court's decision to deny the motion without a hearing.

The underlying facts which resulted in Courtney's conviction are not in dispute. For the sake of brevity, we will adopt those set out in the 2002 Supreme Court decision affirming Courtney's conviction (2002-SC-0197-MR).

> In February 1999, seventy-four (74) year-old Ken Wigglesworth ("Wigglesworth") heard a loud crash in the kitchen of his home and went to investigate. In his kitchen Wigglesworth was surprised to find: (1) glass from the kitchen sliding door; (2) shovel that Wigglesworth kept outside; and, most significant for the purposes of this appeal, (3) Appellant, whom Wigglesworth had never before met. Appellant muttered unintelligibly in response to Wigglesworth's questions as to what he was doing in Wigglesworth's house.
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> Appellant advanced on Wigglesworth's position, but Wigglesworth managed to maintain some distance from the Appellant by stepping backwards. Wigglesworth's retreat led back to his kitchen table, and, eventually, the men began circling around the table. It was in the context of this scramble and by the hands of Appellant that a VCR and TV set crashed to the floor and that a chair was thrown in Wigglesworth's direction.
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> Wigglesworth called the police on his phone and then seized a baseball bat, swung, and struck Appellant in the head. Appellant continued to advance, and Wigglesworth struck him twice more with the baseball bat, and Appellant fell to the ground. Wigglesworth then advised Appellant to "stay down," but Appellant requested, "let me go," and began crawling across the glass-strewn floor toward the shattered door. Before Appellant left the house, the police arrived and arrested him.
>
> Officers arrived at the scene so quickly because a neighbor of Wigglesworth had earlier reported that an

> unknown man (later determined to be Appellant) had attempted to gain access to her house by kicking her door and by yelling expletives at her. Appellant left only after muttering another expletive in response after Wigglesworth's neighbor informed him that she had called 911. From what police pieced together after the fact, Appellant's departure was none-too-graceful as his tracks in the snow suggested that he tripped over the neighbor's fence and rolled over a couple of times in the yard. From there, Appellant went to Wigglesworth's house where he gained entry to Wigglesworth's home through the less-subtle means of smashing a glass door with the shovel he found.
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> At trial, Appellant claimed to have been disoriented after a night of drinking. Appellant maintained that after finding himself in the dark and snow, he was unable to find the way to his sister's house where he was temporarily staying. The neighborhood apparently had a few houses that roughly fit the description of his sister's. Appellant argued that, because of his intoxication, his confusion, or a combination thereof, he did enter Wigglesworth's home, but he did so under the belief that he was entering his sister's home, and he did so without the intent to commit a crime inside.[2]

In addition to those facts set out in the Supreme Court opinion, additional facts from the trial record will be developed as necessary to address the issues raised by Courtney.

Courtney challenges the competency of his counsel for failure to strike a juror who had a personal relationship with the prosecutor; for failure to object to the prosecution's attempt to have the jury commit to a verdict; and for failure to investigate the case and call witnesses.

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[2] Courtney did not testify at trial; however, the defense of voluntary intoxication was argued by trial counsel.

A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986), *citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985). Since the trial court denied Courtney's RCr 11.42 motion without a hearing, our review is limited to determining whether there was a material issue of fact that could not be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). If a material issue of fact existed that could not be conclusively resolved by an examination of the record, Courtney should have been granted an evidentiary hearing. *Id.*

As set out in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), a collateral attack under RCr 11.42 alleging ineffective assistance of counsel at the original trial is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998); *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990); *Stanford, supra*.

The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 647 (1984),

accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985); *Sanborn, supra*. 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. *Strickland, supra*. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 997 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*.

Following *voir dire* by both parties, the court selected thirteen jurors to hear the case. As some of the jurors approached the bench to speak with the court clerk to secure parking passes and work excuses, at least one sought to speak directly with the court. That juror, Sharon Webster, is described in the affidavits by both Courtney and his father as someone who knew the prosecutor and his grandmother. Courtney claims statements were made by the prosecutor, "You lost the lottery. Cheer up. It's only one or two days." However, the record demonstrates that numerous people were near the bench and at the time of those comments, the prosecutor and juror were not both on the camera. To attribute those comments to the prosecutor and to have them directed to Webster is pure speculation. What is clear is that the prosecutor turns toward the defense table to get counsel's attention. As the trial judge speaks with the juror, he clearly indicates that he has no problem with her serving based on their discussion. As both she and the prosecutor turn to leave, Courtney's counsel also leaves the bench. Again, contrary to

Courtney's contention, it is clear that his counsel was at the bench at the time of this discussion.

Obviously, the court may remove a juror for cause on either its own motion or a motion by either party. In the post-trial ruling denying Courtney's motion for relief pursuant to RCr 11.42, the court notes it did not remove Webster for cause. From this statement, we may reasonably infer either Courtney's counsel made the motion or the court considered the motion *sua sponte* and decided against granting such relief. In further support of this interpretation, we note that, on direct appeal, Courtney unsuccessfully challenged the failure of the trial court to grant two motions for cause, requiring trial counsel to exercise two peremptory challenges. Although not preserved for review, the Supreme Court held "even if we found merit in Courtney's allegations of error, none of them would rise to the level of manifest injustice for us to grant Appellant relief under RCr 10.26 for unpreserved, palpable errors. **Thus, we decline to address the merits of Appellant's allegations of error in jury selection.**" *Courtney v. Commonwealth*, 2000-SC-0197-MR, p. 12 (emphasis added).

"[T]he decision of whether a juror should be excused for cause is a matter within the sound discretion of the trial court." *Gamble v. Commonwealth*, 68 S.W.3d 367, 373 (Ky. 2002). A trial court's decision concerning whether a juror should be stricken for cause "must be viewed in the totality of circumstances. It is not limited to the juror's response to a 'magic question.'" *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

The mere fact that a juror knew the prosecutor or his grandmother does not raise a constitutional question or form the basis for relief under RCr 11.42. Thus, even if Courtney's counsel did not make the motion to excuse Webster, the trial court clearly considered the prospect and decided not to excuse that juror for cause. We cannot find the trial court abused its discretion by not excusing Webster. *Commonwealth v. Lewis*, 903 S.W.2d 524 (Ky. 1995).

Courtney also raised the issue of trial counsel's failure to challenge the prosecutor's mode of questioning in his direct appeal before the Kentucky Supreme Court. As previously noted, the Supreme Court did not find the unpreserved alleged error rose to the level of manifest injustice which would require relief under RCr 10.26. In the context of this RCr 11.42 motion, we likewise agree that trial counsel's failure to object did not constitute ineffective assistance.

It is not a proper function of *voir dire* to have jurors indicate in advance or commit themselves to certain ideas and views before examining the evidence. *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001); *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). But while the prosecutor's endless list of hypotheticals does not meet the standard question and answer format of *voir dire*, it did not mandate a "commitment" as suggested by Courtney. Again, Courtney has failed to show that the failure of trial counsel to object to the form of the prosecutor's questions resulted in any prejudice to him.

As to both of the above grounds, Courtney has failed to show counsel's performance was below professional standards causing "the defendant to lose what he otherwise would probably have won." *Morrow*, *supra*. The Supreme Court made it clear Courtney would not have prevailed on either of these issues even if they had been raised at trial and preserved for appellate review.

Finally, Courtney claims trial counsel did not adequately investigate the case or call witnesses who would substantiate his defense that he was so intoxicated he could not formulate the intent to commit a burglary. Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances. *Haight*, 41 S.W.3d at 446.

Courtney relies on the witnesses called in his case-in-chief to substantiate this claim of ineffective assistance of counsel. While it may be convenient for him not to consider witnesses called by the Commonwealth, this Court must rely on the entire record in deciding the merits of his claim.

During the trial, Courtney relied heavily on his defense that he was too intoxicated to form the intent to commit a burglary. In support of this defense, Courtney's sister testified that her brother went out drinking nearly every night for the six-week period preceding the burglary. She testified he would leave at 9 p.m. and not

return until 1 or 3 in the morning. Similarly, Wigglesworth testified on both direct and cross-examination as to Courtney's bizarre behavior following the break-in. On direct examination, he stated Courtney's speech was unintelligible and that he seemed to have been drinking. On cross-examination, Wigglesworth said Courtney was engaged in "weird" behavior, that he was mumbling, he had been drinking, he had a "weird stare," and that he was "wild looking."

The first officer on the scene testified Courtney smelled of alcoholic beverages. Although the officer gave further testimony that he did not believe Courtney was intoxicated, he also admitted on cross-examination he did not know how much Courtney had to drink or for how long he had been drinking. Photos introduced showed Courtney's path of travel between two homes and how he fell over a fence and rolled in the snow. While neither emergency medical technician testified they smelled alcoholic beverages, both said his behavior was erratic. Finally, booking officer Robert McNae ("McNae") testified Courtney seemed to be intoxicated and related his combativeness to his state of intoxication. McNae testified that persons are placed in the isolation cell if they are combative or highly intoxicated. After the first night, McNae described Courtney as a model prisoner. Trial counsel presented evidence to substantiate the defense of voluntary intoxication. The prosecution challenged that defense using other facts and witnesses. Simply because the jury believed some witnesses over others is not ineffective assistance of counsel.

In support of his claim of ineffective assistance of counsel, Courtney advances the affidavits of Kenneth Dean Croy and Bill Keller, which describe their presence during Courtney's night of drinking. Courtney contends that trial counsel failed to adequately investigate his defense and locate these witnesses. However, these affidavits contain no more information than was presented at trial. The fact that defense counsel determined not to present such cumulative testimony does not amount to ineffective assistance. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002).

The circuit court correctly concluded that Courtney was not entitled to an evidentiary hearing to develop the factual basis for his RCr 11.42 claims. He did not present any circumstances which required an evidentiary hearing and the authorities he cites in this respect are unpersuasive. Because the findings of the trial court are not clearly erroneous, its decision should be affirmed. *Commonwealth v. Payton,* 945 S.W.2d 424, 425 (Ky. 1997); *Ivey v. Commonwealth,* 655 S.W.2d 506 (Ky.App. 1983). Further, "[t]he burden is upon the [defendant] to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth,* 433 S.W.2d 117, 118 (Ky. 1968).

Accordingly, the decision of the Kenton Circuit Court denying the RCr 11.42 motion by Courtney without a hearing is hereby affirmed.

ALL CONCUR.

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