

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-000575-MR

TIMOTHY JOE WOODARD

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 00-CR-00071-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND KELLER, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant, Timothy Joe Woodard, appeals from an order of the Warren Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In early 2000, Appellant was indicted by a Warren County Grand Jury for first-degree criminal conspiracy to traffic in a controlled substance and for being a

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<sup>1</sup> Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

second-degree persistent offender.<sup>2</sup> The charges followed a drug buy wherein Appellant, along with another individual, Tony Clark, met with and sold two undercover police officers crack cocaine. Following a trial in March 2001, Appellant was convicted of all charges and sentenced to fifteen years' imprisonment. His conviction was affirmed by this Court in an unpublished opinion rendered in 2003. *Woodard v. Commonwealth*, 2001-CA-000900-MR (March 21, 2003). On December 18, 2003, Appellant filed a *pro se* motion pursuant to RCr 11.42, raising various claims of ineffective assistance of counsel. The trial court thereafter appointed counsel and held an evidentiary hearing. On February 23, 2006, the trial court denied Appellant's motion. This appeal ensued.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. The burden of proof on an RCr 11.42 motion lies with the accused who must demonstrate that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). To prove ineffective assistance of counsel, the accused must show that (1) counsel's performance was deficient, in that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.

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<sup>2</sup> On the morning of trial, the trial court permitted the Commonwealth to amend the charge of second-degree PFO to first-degree.

2052, 2064, 80 L.Ed.2d 674 (1984). A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland, supra*, at 694. As the Kentucky Supreme Court noted, “The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of victory.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001).

Appellant's first two allegations concern trial counsel's alleged failure to interview and subpoena witnesses, as well as conduct an independent examination of the facts. We will discuss each of the potential witnesses in turn.

Appellant claims that trial counsel failed to interview Tony Clark, the other individual charged in the conspiracy. However, counsel testified during the evidentiary hearing that, in fact, he could not locate Clark, who apparently had absconded from drug court supervision. Appellant offered no evidence to counter the reasonableness of counsel's efforts. *See Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 1998), *cert. denied* 540 U.S. 838 (2003). Further, Appellant's argument that had counsel investigated Tony Clark's criminal background, he could have adequately impeached him on the stand was not presented to the trial court and will not be considered herein. As this Court held in *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998), “An appellate court will not consider a theory unless it has been raised before the trial court and that court has had the opportunity to consider the merits of the theory.”

Appellant next points out that while trial counsel claimed he interviewed Caprice Smiley, she testified during the evidentiary hearing that she had never met counsel and had not discussed Appellant's case. However, the trial court observed,

Caprice Smiley testified that she never talked to trial counsel about the case, but the Court's observation of her testimony leads it to believe that she is not credible in this regard. . . .

The Court FINDS that he did, in fact, interview Caprice Smiley and that her testimony would have hurt the defendant's case, so he did not call her, with the defendant's consent. The Court will not second guess trial counsel's judgment regarding witness selection. *Holland v. Commonwealth*, Ky. App., 679 S.W.2d 832, 833-834 (1984). Furthermore, two undercover officers presented credible, compelling testimony that the defendant approached them to set up a drug deal, which he subsequently did for them. This is overwhelming evidence of his guilt, and there is no reasonable probability that the result would have been different if Caprice Smiley had testified.

Again, other than claiming that “Ms. Smiley spoke nothing but the truth,” and that the trial court's finding was “totally unfounded,” Appellant offers no evidence to support his argument.

Appellant also argues that trial counsel's failure to call Cedric Donan as a witness amounted to ineffective assistance and “robbed the jury of the opportunity to hear crucial testimony from a key witness . . . .” However, trial counsel testified that he attempted to speak with Donan, who would not cooperate with the defense. Further, since Donan did not testify at the evidentiary hearing, we are unable to discern what “crucial testimony” he would have offered at trial. We are not persuaded by Appellant's claim that counsel should have moved the court to have Donan arrested and brought to

the trial. Forcing an uncooperative witness to testify without counsel first having interviewed him would certainly fall outside the bounds of competent representation.

“A reasonable investigation is not the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct.” *Sanders, supra*, at 386.

Depending on the circumstances, there are many ways a case may be tried. “The test for effective assistance of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial.” *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky. 2000), *cert. denied*, 531 U.S. 1157 (2001). (Citing *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc)).

Appellant offers this Court nothing to demonstrate that trial counsel did not act reasonably by failing to secure the witnesses about whose absence he now complains. Nor is there any evidence as to how these witnesses would have helped. Moreover, we must agree with the trial court that given the overwhelming evidence of Appellant's guilt, even if some of counsel's decisions concerning witness selection were unreasonable, the result would not have been any different. Thus, Appellant cannot satisfy the second-prong set forth in *Strickland, supra*.

Appellant next argues that trial counsel was ineffective for failing to object to the destruction of evidence and request a missing evidence instruction relating to an alleged audio recording of the drug buy. The tape was inadvertently destroyed by police prior to Appellant's case going to the grand jury. The trial court noted in its order,

At the evidentiary hearing, trial counsel admitted that he did not request a missing evidence instruction because, under defendant's theory, there was no missing evidence: the defendant was never near the transaction. Furthermore, the defendant would not have been entitled to a missing evidence instruction because he did not prove that the destruction was intentional and that the exculpatory nature of the evidence was apparent at the time it was destroyed. *Estep v. Commonwealth*, 64 S.W.3d 805 (Ky. 2002).

Although Appellant asserts he has “overwhelming evidence” to support his claim that the destruction of the tape was intentional, he has failed to offer such in this court or the court below. Furthermore, the destruction of evidence and the denial of instructions are issues which are properly addressed on direct appeal. *See Shegog v. Commonwealth*, 142 S.W.3d 101, 108 (Ky. 2004). Notwithstanding, as the trial court observed, “[t]rial counsel used the missing tape to his advantage in every way he could, attempting to attack the credibility of the officers.” Thus, we cannot conclude that counsel acted ineffectively or unreasonably.

Appellant next alleges that trial counsel was ineffective for stipulating to the qualifications of Jason Dearing, the lab technician that testified at trial regarding the crack cocaine that was purchased during the drug buy. First, the issue of an expert's alleged lack of qualifications is an issue that could have been raised on direct appeal. *See McIntire v. Commonwealth*, 192 S.W.3d 690, 694 (Ky. 2006). Further, as the trial court observed, Appellant failed to offer any evidence that Dearing lacked the necessary qualifications to testify.

Appellant also alleges that the crack cocaine should have been suppressed because the Commonwealth failed to establish a proper chain of custody. Appellant claims that while crack cocaine was seized during the buy, the substance that was tested was powder cocaine. Again, Appellant did not raise this issue before the trial court, and thus, has not preserved it for appellate review. *Shelton, supra*. Notwithstanding, the KSP lab report indicates that the evidence received for testing was three plastic bags containing “off-white chunks and powder.” Clearly, the substance tested was, in fact, crack cocaine. Appellant has failed to demonstrate that his counsel was deficient in any manner concerning the evidence in question.

Finally, Appellant claims that his counsel was ineffective for failing to request a continuance when the Commonwealth amended the indictment regarding the PFO charge. We disagree, and note that the issue of the amendment was discussed by this Court on direct appeal:

Appellant alleges that his substantial rights were prejudiced because defense counsel asserted that he would have advised appellant differently during plea bargaining if he had been charged with PFO I rather than PFO II.

The purpose of the indictment is to “fairly inform ... the defendant of the nature of the crime with which he is charged[.]” *Howard v. Commonwealth*, Ky., 554 S.W.2d 375, 377 (1977), citing *Finch v. Commonwealth*, Ky., 419 S.W.2d 146, 147 (1967). We do not agree that defendant's opportunity to productively plea bargain was a substantial right prejudiced by the amendment. We observe that if we reversed, appellant would have no right to make any particular deal with the Commonwealth, since plea bargaining is engaged in at the sole discretion of the Commonwealth. *Commonwealth v. Reyes*, Ky., 764 S.W.2d 62, 64 (1989). Moreover, no

defendant has a constitutional right to plea bargain. *Id.* We are left with the conclusion that appellant was not ensured any plea offer once he was charged with PFO I, rather than PFO II. The Commonwealth could have refused to bargain with him at all at that point. Therefore, we find no prejudice to appellant's substantial rights.

*Woodard, supra.* In light of our holding, we fail to see what more trial counsel could have done or how Appellant would have benefited from a continuance.

A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). Further, as *Strickland* notes, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. 466 U.S. at 691. We conclude, as the trial court did, that Appellant has failed to meet his burden under *Strickland, supra.* There is no evidence in the record to indicate that counsel's conduct was anything other than consistent with the prevailing professional norms. Appellant has not demonstrated that counsel's performance was deficient and that such deficient performance prejudiced his defense. *Id.*

The order of the Warren Circuit Court denying Appellant's motion for relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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