

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000767-MR

RUBEN CATCHING

APPELLANT

v. APPEAL FROM GARRAD CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 01-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: After a jury trial, Ruben Catching was convicted of two counts of first degree trafficking in a controlled substance, cocaine, and sentenced to the maximum of ten years on each count. Those sentences were ordered to run consecutively for a total sentence of twenty years. The convictions were affirmed by the Kentucky Supreme Court in the unpublished case of *Catching v. Commonwealth*, 2002-SC-0799-MR (Ky. December 18, 2003). Catching then filed a motion to vacate his conviction

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<sup>1</sup>Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel. After an evidentiary hearing, the trial court denied relief and this appeal followed.

During the trial a confidential informant, Anthony Estrada, testified that on February 19, 2001, on two separate occasions, he had gone to the home of a person known as Mae-Mae (Latisha Pullins) and purchased cocaine from Catching. The evidence indicated that, in addition to Estrada and Catching, there were several other persons present, including Pullins. Catching's defense was that he did not commit these offenses and that, although Pullins was his girl friend, he had been to her home only once, and on that occasion got a hair cut. None of the persons allegedly present when the alleged drug transactions occurred were interviewed by Catching's trial counsel and none were called as witnesses at his trial. Catching claims that his trial counsel was deficient in her failure to interview and call these witnesses, and that such deficiency demonstrates ineffective assistance of counsel justifying a new trial.

At the RCr 11.42 evidentiary hearing, trial counsel testified that she and Catching discussed potential witnesses at length. She and Catching both agreed that they met many times to prepare for trial. Catching acknowledged that counsel had previously successfully defended him and that she worked hard. Counsel further testified that she concluded an appropriate defense would be to attack the credibility of the confidential informant. Trial counsel admitted that she never interviewed Pullins or any of the other witnesses although it is unclear whether she knew the identity of the other witnesses.

Neither trial counsel nor Catching were able to recall specifically why it was decided not to call Pullins as a witness at the trial. Pullins testified at the RCr 11.42 hearing that although she did not recall Catching and Estrada being at her residence at the same time, she had no recollection of who was present or not present on the night in question.

In order to establish that counsel has provided ineffective assistance, Catching must show that counsel's performance was deficient and that such deficiency resulted in actual prejudice, causing the proceeding to be unfair with a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's assistance was constitutionally sufficient. *See Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). A court must give great deference to counsel's decisions and should avoid second-guessing based on hindsight. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). A defendant is not guaranteed error free counsel but merely counsel reasonably likely to render effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997). The burden is on the defendant to show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002). "Whether an attorney fulfills this test is an issue of fact to be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous." *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky.App. 1983). *See also Commonwealth v. Payton*, 945 S.W. 2d 424 (Ky. 1997). There are sound reasons for this deference. The trial judge presided over the original trial, where he was able to observe

the witnesses and assess their credibility, and had the same opportunity at the RCr 11.42 hearing.

In this case the trial court determined that counsel's failure to interview or call Pullins as a witness was “in all likelihood, tactical” and that “even if transaction witnesses had been called to testify, the outcome of the case would have been the same.” Based on the record before us, we cannot hold that those findings are clearly erroneous. It is also clear from the evidence that Catching failed to surmount the burden of the second prong of the *Strickland* test. The testimony of the confidential informant was sufficient to provide the basis for a finding of guilt. Attacking the credibility of that witness was simply not enough to convince the jury there was reasonable doubt. Just because a strategy fails does not render counsel's aid deficient. *Simmons v. Commonwealth*, 191 S.W.3d 557 (Ky. 2006).

Catching was required to show that, but for the errors of his counsel, the result of the proceeding would have been different. He has not done so. The judgment of the Garrard Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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