

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000799-MR

MICHAEL W. HAYS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 03-CR-001667

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: Michael W. Hays appeals from an order of the Jefferson Circuit Court denying his RCr 11.42 motion to vacate a criminal judgment. Hays contends that the trial court abused its discretion for post-judgment relief without appointing counsel or conducting a hearing. He also argues that he was deprived of substantive due process and effective assistance of counsel when his trial counsel abandoned the case, failed to challenge the removal of jury members based on race, and failed to impeach a prosecution witness. For the reasons stated below, we affirm the order on appeal.

Hays and Tara Cassidy Brown developed a relationship in 2002, and began living together sometime thereafter. On March 7, 2003, Brown was a passenger in a

vehicle driven by Hays in Jefferson County, Kentucky. Brown would later state that Hays was noticeably agitated, but would not tell her why. According to the record, Hays stopped the vehicle several times to “cool off,” and also stopped the vehicle to purchase beer. After purchasing the beer, Hays struck Brown in the face several times, causing injury. Brown then walked to her place of employment. She subsequently sought and obtained an Emergency Protective Order rendered by the Jefferson Circuit Court.

On June 30, 2003, the Jefferson County grand jury indicted Hays on one count each of assault in the fourth-degree, intimidating a participant in the legal process, and with being a persistent felony offender (“PFO”) in the second-degree. The intimidation charge arose in whole or in part from a threatening letter that Hays wrote to Brown on March 17, 2003. The matter proceeded to a jury trial, whereupon Hays was found guilty on all three charges. On March 8, 2004, a judgment was rendered reflecting the verdict and sentencing Hays to five years in prison which was enhanced to ten years by virtue of the PFO conviction. Hays appealed as a matter of right to the Kentucky Court of Appeals, which affirmed the conviction and judgment by way of an opinion rendered on April 29, 2005.

On December 21, 2005, Hays filed an RCr 11.42 motion seeking to vacate the judgment. As a basis for the motion, Hays maintained that he received ineffective assistance of counsel. The motion was denied by way of an order rendered on March 6, 2006. In denying the order, the circuit court determined that Hays had failed to demonstrate that his counsel was ineffective, that a hearing on the motion was not

warranted, and that all of the issues raised by Hays were refuted by the record. This appeal followed.

Hays now argues that the circuit court erred in denying his motion for relief from judgment. He maintains that the court improperly failed to appoint counsel and conduct a hearing on the motion. He also argues that he was deprived of effective assistance of counsel when his attorney abandoned the case during the pre-trial stage, failed to present a *Batson* challenge during the jury selection process, and failed to examine individual jurors. He seeks an order reversing the denial of his RCr 11.42 motion and remanding the matter for further proceedings on the issue.

We have closely studied the record and the written arguments, and find no basis for reversing the order on appeal. The corpus of Hays' claim of error is that he did not receive the effective assistance of counsel to which he was entitled, and that the Jefferson Circuit Court erred in failing to so find. Judge Clayton addressed each of these claims and determined that they were refuted by the record. She found, for example, that - contrary to his assertion - Hays was notified of a Domestic Violence Order, and that the timing of that notification had no bearing on the outcome of his trial. She noted that the record revealed that trial counsel filed a motion to dismiss the PFO charge, and that counsel's participation in *voir dire* uncovered no evidence of possible juror bias.

As to Hays' claim that counsel was ineffective for not making a *Batson* challenge, Judge Clayton ruled that counsel's actions during *voir dire* - and the manner in which he or she chooses to strike (or not strike) a juror - is a matter of trial strategy to which great deference is given.

These findings are supported by the record, and the determination that counsel's actions during *voir dire* are properly characterized as trial strategy is supported by the case law. *See generally, Dupin v. Commonwealth*, 408 S.W.2d 443 (Ky. 1966). In order to prevail on a claim of ineffective assistance of counsel, the movant must show that counsel's performance was deficient to such an extent that the integrity of the trial was impaired. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "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*, 977 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.

Hays has offered nothing to support his assertion that counsel's performance fell below the objective standard of reasonableness, nor that the outcome of the trial would have been different but for the alleged ineffective assistance.

Hays also contends that the circuit court erred in failing to conduct an evidentiary hearing on the motion, and to appoint counsel to appear at that hearing. As the parties are well aware, in examining an RCr 11.42 motion the circuit judge shall first determine whether the allegations in the motion can be resolved on the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). If that inquiry is answered in the affirmative, an evidentiary hearing is not required. *Id.* A hearing is required if there is a

material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved by an examination of the record. *Id.*

Judge Clayton examined the record and expressly determined that the issues raised by Hays were justiciable by reference to the record. Our review of the record leads us to the conclusion that this determination was proper. Pursuant to *Fraser*, no hearing was required. Since no hearing was required, Hays was not entitled to appointed counsel to appear at the hearing. “If an evidentiary hearing is not required, counsel need not be appointed, ‘because appointed counsel would [be] confined to the record.’” *Fraser*, 59 S.W.3d at 453, quoting *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969). Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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