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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-001165-MR

PHILLIP LICKLITER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 00-CR-01310

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Phillip Lickliter, *pro se*, has appealed from an order entered by the Fayette Circuit Court on May 23, 2006, which, without holding an evidentiary hearing, denied his *pro se* motion to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Having concluded the trial court did not err in denying Lickliter's claims of ineffective assistance of counsel without holding an evidentiary hearing, we affirm.

Because Lickliter directly appealed his 25-year sentence for murder[1] and tampering with physical evidence[2] to the Supreme Court of Kentucky, *Lickliter v. Commonwealth*, 142 S.W.3d 65 (Ky. 2004), we quote the pertinent facts of this case from that opinion as follows:

> Lickliter and the victim were together on an out of state truck-driving job. When Lickliter returned to Kentucky, the victim was no longer with him. About a week later, an individual happened upon the body of the victim in a wooded area near Tazewell, Tennessee. A forensic expert determined that the victim had been dead five to seven days when the body was found. A medical examiner concluded that the cause of death was two gunshot wounds, one to the chest and one to the abdomen. Two bullet holes were found in Lickliter's truck and a projectile was recovered from the cab.
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> Originally, Lickliter denied any wrong-doing, but during his third interview with police, he admitted killing the victim. He was charged with murder and tampering with physical evidence. Among other evidence, the written statement made by Lickliter was read at his trial. In that statement, Lickliter alleged that the victim threatened to kill him and his family. He stated that he was so afraid of the victim that when the victim fell asleep, he reached into the victim's bag, got out a gun and shot the victim. Lickliter stated that he did this between exits 100 and 104 on [I]nterstate 75, and that he threw the gun out of the truck somewhere near exit 63. He admitted leaving the body of the victim in the woods. It was noted that exits 100 and 104 on Interstate 75 are in Fayette County, Kentucky.
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> Testifying for the defense, a psychologist stated that he examined Lickliter and concluded that his extended use of amphetamines caused him to have paranoid and delusional thinking. He told the jury: "I believe that his mental

[1] Kentucky Revised Statutes (KRS) 502.020.

[2] KRS 524.100.

> condition was so severe at one point that he felt that his life and wife and his children were really threatened, that they could be killed and that he lacked what we call the capacity to control his behavior." A licensed clinical psychologist also testified and concluded that: ". . . Lickliter's judgment at that period of time was affected by the symptoms that he had been experiencing including the hallucinations and delusions, and that that may well have had an effect upon his behavior at the time of the incident." The two experts did not give any opinion that the accused suffered from a mental illness as defined by the statute. Lickliter did not testify at trial.
>
> The jury convicted Lickliter of murder and tampering with physical evidence. He was sentenced to twenty-five years and five years on the respective charges, said sentences to run concurrently for a total of twenty-five years in prison.

On April 1, 2005, Lickliter filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence, with a memorandum in support thereof, as well as a motion for appointment of counsel and a request for an evidentiary hearing. The trial court entered an order on April 6, 2005, appointing the Department of Public Advocacy to represent Lickliter. Following several motions for extension of time, counsel filed notice on November 2, 2005, that he would not file a supplement to Lickliter's RCr 11.42 motion. Lickliter was granted additional time to file a *pro se* supplement to his motion, and the Commonwealth filed its response in opposition on February 6, 2006. The trial court denied Lickliter's RCr 11.42 motion on May 23, 2006, without holding an evidentiary hearing. This appeal followed.

On appeal, Lickliter asserts ineffective assistance by trial counsel based on five contentions, including that counsel: (1) failed to procure a guilty plea offer; (2) failed to give an opening statement; (3) failed to object to improper statements made by

the prosecutor during the penalty phase; (4) failed to object to hearsay testimony; and (5) failed to seek a sentence modification. Lickliter also argues that all errors enumerated in his arguments had a cumulative effect, thus requiring reversal.

In addition to challenging the trial court's rejection of his various claims, Lickliter contends that the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion; there must be 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)).

To address Lickliter's claims of ineffective assistance of counsel, we must first set forth the applicable law relating to those claims. To establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland, supra,* 466 U.S. at 689; *Moore v. Commonwealth*,

983 S.W.2d 479, 482 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 912 (Ky. 1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" *Sanborn*, 975 S.W.2d at 991 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997). To establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, *supra*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). Where the movant is convicted at trial, a reasonable probability is one that undermines confidence in the outcome of the proceeding upon consideration of the totality of the evidence before the jury. *Strickland, supra*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884.

Lickliter claims defense counsel was ineffective for failing to procure an offer from the Commonwealth in exchange for a guilty plea. He states he asked counsel

to inquire about a plea offer "in an attempt to avoid the expense, agony and stress of a jury trial for both [the victim's] family and himself," and counsel did not approach the Commonwealth and request an offer.

It is well-established that there is "no constitutional right to plea bargain." *Hoskins v. Maricle*, 150 S.W.3d 1, 21 (Ky. 2004) (citing *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); and *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989)). In rejecting Lickliter's argument, the trial court noted no plea offer was extended by the Commonwealth, and none would have been given even if Lickliter's counsel had so inquired. Even if counsel's action or inaction could be considered deficient under *Strickland*, Lickliter has failed to show how he was prejudiced. He has not demonstrated the prosecution was interested in entering into plea negotiations, or that such a plea would have been acceptable to the trial court. Also, there was no guarantee that Lickliter's sentence would have been any lower as a result of a plea bargain. All Lickliter has offered is speculation, not a reasonable probability that the outcome would have been different, and bare speculation is insufficient to justify RCr 11.42 relief. *See United States v. Boone*, 62 F.3d 323 (10th Cir. 1995).

Next, Lickliter argues trial counsel's failure to offer an opening statement was unreasonable and prejudicial to his case. RCr 9.42 permits defense counsel to either present an opening statement, reserve opening until the conclusion of the Commonwealth's case, or waive opening entirely. The failure to make an opening statement does not automatically establish ineffective assistance of counsel. *See Moss v.*

*Hofbauer*, 286 F.3d 851 (6th Cir. 2002). Counsel here made a professional judgment not to make an opening statement, and we see nothing unreasonable in that decision. Further, Lickliter has failed to articulate specifically how the lack of an opening statement prejudiced his case. Lickliter's conclusory allegations cannot satisfy his burden of proving a different outcome would have been reached in his trial if counsel had, in fact, delivered an opening statement.

Lickliter also argues trial counsel was ineffective in failing to object to and request a mistrial for alleged improper statements made by the prosecutor during the penalty phase of trial. In addressing a claim of prosecutorial misconduct, the court must determine whether the prosecutor's conduct was so egregious as to deny the accused due process of law. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411 (Ky. 1987) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-8, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974)). "The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor." *Id*. at 411-12 (citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). *See also Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002). Whether to grant a mistrial is within the sound discretion of the trial court. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Id*. (quoting *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002)).

During penalty phase closing argument, the prosecutor made numerous comments that Lickliter characterizes as prosecutorial misconduct. Those comments included that Lickliter had been "breaking the law on a regular basis by using drugs," and that it was a "scary thought to think that a large vehicle [was] hurtling down the highway under the control of someone regularly under the control of mind altering drugs."

Reversal for prosecutorial misconduct in a closing argument is mandated "only if the misconduct is 'flagrant' or if each of the following three conditions is satisfied: (1) [p]roof of defendant's guilt is not overwhelming; (2) [d]efense counsel objected; and (3) [t]he trial court failed to cure the error with a sufficient admonishment to the jury." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994); and *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)). Lickliter has not shown any of the three conditions, let alone all three, nor has he shown flagrant misconduct by the prosecutor. Proof of his guilt was overwhelming and defense counsel did not object, making the third condition irrelevant. Thus, there is no need to inquire into these comments unless they amounted to flagrant misconduct, which did not occur here. Counsel is allowed wide latitude during closing argument. *Butcher v. Commonwealth*, 96 S.W.3d 3, 12 (Ky. 2002); *Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001). The Commonwealth's Attorney simply drew his comments from the trial evidence. We cannot say counsel was ineffective for failing to object because the prosecutor's comments did not rise to the level of palpable error requiring reversal.

Lickliter also claims he received ineffective assistance of counsel due to trial counsel's failure to object and request a mistrial when the victim's sister offered hearsay testimony. He also finds fault with counsel's failure to ask the trial court to modify the sentence fixed by the jury and give him a lesser sentence. Neither of these arguments was raised by Lickliter in his direct appeal to the Supreme Court. Both were alleged trial errors known to Lickliter and his counsel at the time of appeal and could have been, and indeed should have been, subjected to direct appellate review. Lickliter's failure to raise these claims before the Supreme Court on direct appeal prevents a collateral attack on the judgment via RCr 11.42. *See Bronston v. Commonwealth*, 481 S.W.2d 666 (Ky. 1972).

Lickliter finally complains that the cumulative effect of the aforementioned errors resulted in a violation of his constitutional rights and as a result his conviction and sentence should be set aside. We find this argument to be without merit. Each of the allegations made by Lickliter has been thoroughly reviewed and discussed in this opinion, and each is refuted by the record or should have been addressed on direct appeal to the Supreme Court. "Repeated and collective reviewing of alleged errors does not increase their validity." *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003). Lickliter has failed to demonstrate any basis for his claims that counsel's performance was deficient. He received a fundamentally fair trial.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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