

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001821-MR

THOMAS NEAL JACKSON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 00-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: On August 18, 2000, a Laurel County grand jury returned an indictment charging Thomas Neal Jackson with the murder of Carolyn Smith. Following a trial, the jury found Jackson guilty of the charge and fixed his sentence at thirty-three years' imprisonment. The Supreme Court of Kentucky affirmed that conviction in an unpublished opinion. *Thomas Neal Jackson v. Commonwealth*, No. 2002-SC-0253-MR (August 21, 2003).

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

Thereafter, on August 11, 2004, Jackson filed a *pro se* motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. He later filed a supplemental motion raising additional grounds for relief. He also filed motions to appoint counsel and to proceed *in forma pauperis*. The trial court appointed counsel, who then filed a supplemental RCr 11.42 motion.

After considering the record, the pleadings and the Commonwealth's response, the trial court concluded that the record refuted most of Jackson's claims of ineffective assistance of counsel. However, the court also determined that Jackson was entitled to an evidentiary hearing on his claim that his trial counsel failed to relay a plea offer from the Commonwealth. Following the evidentiary hearing, the trial court found that the Commonwealth had never made any such offer. Consequently, the court denied Jackson's RCr 11.42 motion. This appeal followed.

As an initial matter, the Commonwealth contends that we need not address the issues raised in the supplemental motions because neither Jackson nor his appointed counsel properly verified those pleadings as required by RCr 11.42(2). We agree with the Commonwealth that failure to comply with the verification requirement may warrant a summary dismissal of the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). However, Jackson's original motion was properly verified. Under the circumstances, we cannot find that the deficiencies in the supplemental pleadings deprived the trial court of jurisdiction to consider the motions. Furthermore, the Commonwealth failed to advise the trial court of the deficient pleadings. Because the

Commonwealth failed to raise this issue before the trial court, it is not preserved for review.

On appeal, as before the trial court, Jackson asserts that his counsel's assistance was deficient. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). The standard for assessing counsel's performance 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, 104 S.Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066. In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

Jackson presents four areas in which he alleges that his trial counsel provided ineffective assistance. Specifically, Jackson alleges that his trial counsel: (1) failed to adequately consult with him and seek a plea offer from the Commonwealth; (2) failed to adequately consult with him, to investigate a possible alternative suspect, and to adequately impeach the testimony of other witnesses; (3) failed to request a jury instruction for the lesser-included offense of first-degree manslaughter; and (4) failed to request a new jury pool after a member of the panel made a prejudicial statement.

The trial court conducted an evidentiary hearing on the first issue only. Following that hearing, the trial court found that the Commonwealth had never made a plea offer and, therefore, trial counsel was not ineffective for failing to communicate any such offer to Jackson.

When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. CR 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). Jackson points to no evidence that the Commonwealth ever made a plea offer or that his trial counsel failed to communicate such an offer to him. Rather, Jackson complains that his trial counsel failed to adequately consult with him or explore the possibility of a plea offer with the prosecutor.

We question whether this issue is adequately preserved for review. In his pleadings to the trial court, Jackson complained generally that his trial counsel failed to consult with him prior to trial. But the focus of his argument was that his trial counsel

failed to communicate an offer which the Commonwealth had made. He did not contend that trial counsel failed to adequately explore the possibility of a plea offer. Since Jackson never raised this particular issue in his motion before the trial court, he cannot raise it for the first time on appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002).

Jackson next argues that he was entitled to an evidentiary hearing on his other allegations of ineffective assistance of counsel. He correctly notes that an RCr 11.42 movant whose facially-meritorious allegations are neither refuted nor confirmed by the underlying record is entitled to an evidentiary hearing at which his allegations may be tried. *Fraser*, 59 S.W.3d at 452. But a defendant is not entitled to a hearing unless he raises a material issue of fact which, if true, would satisfy both elements of the *Strickland* test. *Id.* at 456-57. Because the trial court denied Jackson'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." *Id.* at 452. We agree with the trial court that Jackson was not entitled to an evidentiary hearing on any of these issues.

Jackson primarily argues that his trial counsel failed to investigate and present evidence favorable to his case. 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 (internal citations omitted). The focus of the inquiry must be on whether trial counsel’s decision not to pursue evidence or defenses was objectively reasonable under all the circumstances. *Wiggins*, 539 U.S. at 523, 123 S.Ct. at 2535. Moreover, under the second prong of the *Strickland* test, Jackson also has the burden of showing within a reasonable probability that an objectively reasonable investigation would have produced evidence which would have altered the outcome of the trial. *Id.* at 535, 123 S.Ct. at 2542.

Jackson first argues that his trial counsel failed to uncover and emphasize evidence of a possible alternate suspect. However, he offers nothing more than speculation about the existence of an alternate suspect. As the Supreme Court noted in its prior opinion, Jackson relied solely on a “mere presence” defense. He testified that he awoke to the sound of barking dogs and merely came across Smith’s body on the floor of his trailer. He denied ever physically abusing Smith.

The Commonwealth presented evidence of an altercation between Jackson and Smith several days prior to her death. The evidence regarding this altercation demonstrated a contrary pattern of conduct and tended to undermine Jackson’s credibility. Jackson suggests Mike Sasser, who was present during the altercation, was the one who assaulted Smith. However, Jackson offers no other evidence suggesting that Sasser was responsible for Smith’s death.

Similarly, Jackson contends that Mary Bentley, who identified Jackson as the person who assaulted Smith, had motive to lie. He asserts that counsel should have impeached Bentley with evidence that Bentley was involved in dealing drugs and Smith's alleged theft of jewelry from Bentley. But he concedes that he knew about these facts at the time of trial. At trial, however, Jackson testified that Bentley had nothing against him and she had no reason to lie about anything he had done. Under the circumstances, trial counsel's decision not to pursue these issues falls within the range of reasonable trial strategy.

Jackson next asserts that his trial counsel failed to uncover evidence which would have impeached Detective Russell Baker's testimony. He focuses on statements in the medical examiner's report, which conflict with Detective Baker's testimony, that Smith was not wearing a bra or panties when her body was discovered. At trial, the Commonwealth noted that a bra, panties and other items of women's clothing were found in the laundry. Blood was found on the t-shirt, but it could not be tied to Smith or Jackson. But the Commonwealth offered no analysis of the bra or panties. Thus, even if the medical examiner's report did conflict with Detective Baker's testimony, Jackson makes no showing that an inquiry into this discrepancy would have uncovered evidence which would likely have altered the outcome of his trial.

Turning to other aspects of his trial counsel's representation, Jackson next argues that his trial counsel was ineffective for failing to request an instruction on the lesser-included offense of first-degree manslaughter. But as noted above, Jackson's

defense involved a complete denial of any involvement in Smith's death. We agree with Jackson that an instruction for manslaughter would have been appropriate despite his defense. *See Harris v. Commonwealth*, 389 S.W.2d 907 (Ky. 1965). But given Jackson's defense, his trial counsel's decision not to seek the instruction was not unreasonable. *See Garland v. Commonwealth*, 127 S.W.3d 529, 536 (Ky. 2004), *overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005).

Finally, Jackson asserts that his trial counsel was ineffective for failing to request a new jury panel. During *voir dire*, the trial court asked if any potential jurors were acquainted with Jackson. Juror 36 responded that he worked at the detention center and had daily contact with Jackson. During a bench conference, Juror 36 also stated that he knew Jackson was in custody. The trial court excused Juror 36 at that point.

Nevertheless, Jackson contends that Juror 36's statement tainted the remaining jurors and that his trial counsel should have requested a new panel. However, the trial court noted that no other members of the panel expressed any knowledge that Jackson was still in custody. Under these circumstances, Jackson has failed to show that his trial counsel's decision not to request a new panel was deficient or that it resulted in any prejudice to him.

In conclusion, the record clearly refutes Jackson's claims of ineffective assistance of counsel on these issues. Therefore, the trial court properly denied his RCr 11.42 motion without an evidentiary hearing on these issues. Furthermore, the trial court's findings after the evidentiary hearing on the remaining issue were supported by

substantial evidence. Because Jackson has failed to show that his trial counsel's performance was constitutionally deficient or that he prejudiced Jackson's defense, the trial court properly denied Jackson's RCr 11.42 motion.

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

ALL CONCUR.

**BRIEFS FOR APPELLANT:**

Wendy Baldrige Graney  
Assistant Public Advocate  
Frankfort, Kentucky

**BRIEF FOR APPELLEE:**

Gregory D. Stumbo  
Attorney General of Kentucky

James C. Shackelford  
Assistant Attorney General  
Frankfort, Kentucky