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APRIL 16, 2008
(FILE NO. 2007-SC-0882-D)**

**Commonwealth of Kentucky
Court of Appeals**

NO. 2006-CA-001906-MR

DEANGELA STANLEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 01-CR-00843

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: DeAngela Stanley appeals from an opinion and order of the Fayette Circuit Court summarily denying her motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, we affirm.

The pertinent facts of this case were stated by this Court in an unpublished opinion, No. 2002-CA-001598-MR, which affirmed Stanley's conviction on direct

appeal. Because there is no reason to refashion the facts of this case, we will adopt the facts as stated in No. 2002-CA-001598-MR, as follows:

After using a confidential informant to carry out a controlled purchase of crack cocaine from Stanley, the Lexington Metro Police Department procured a search warrant and searched Stanley's residence on July 12, 2001. The officers seized several containers laced with crack cocaine, digital scales with cocaine powder residue, approximately 450 baggies in three 150-count boxes, \$910 in cash, a bank deposit slip in the amount of \$16,126.81, and a 9-mm pistol. Several additional items, including multiple copies of CDs, multiple copies of videotapes, and articles of clothing not in Stanley's size were also located by the police during their search. Each item was still packaged and tagged as it would be in a store. However, none of the items were seized by the police.

As a result of the evidence seized during the search of Stanley's residence, she was charged in an indictment with trafficking in a controlled substance while in possession of a firearm, trafficking in a controlled substance, and possession of drug paraphernalia with a firearm. However, the second charge was dismissed because of the Commonwealth's failure to locate the confidential informant for trial.

After a jury trial, Stanley was found guilty of possession of a controlled substance while in possession of a firearm and possession of drug paraphernalia while in possession of a firearm and was sentenced to six years' imprisonment which was probated for five years conditioned on her service of six months in the county jail.

Thereafter, Stanley filed a motion to vacate her judgment of conviction pursuant to RCr 11.42. In her motion, Stanley alleged that she was deprived of effective assistance of counsel and stated multiple grounds to support her allegation. Without granting a hearing, the trial court denied her motion. This appeal followed.

Stanley alleges that her defense counsel was constitutionally ineffective and raises five grounds for relief: (1) that her defense counsel failed to move to suppress a self-incriminating statement that she made to the police; (2) that her defense counsel failed to move for a directed verdict; (3) that her defense counsel failed to move for a mistrial after inadmissible testimony was given; (4) that her defense counsel failed to challenge the chain of custody regarding the drug evidence; and (5) that the cumulative impact of her defense counsel's numerous errors constituted ineffective assistance of counsel.

Before considering Stanley's five allegations, we address the applicable standard of review. To receive an evidentiary hearing, Stanley contends that she is not required to demonstrate that her counsel's errors prejudiced her case. According to Stanley, under decisions of federal and state courts, there are recognized exceptions in which a defendant need not demonstrate prejudice.

Stanley contends that two of these recognized exceptions are applicable to her case, citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), and *United States v. Cronin*, 466 U.S. 648, 658-59, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, after review of this argument, we conclude that the record is sufficiently adequate to determine the validity of Stanley's allegations.

Therefore, our standard of review for analyzing Stanley's claim is governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must show (1) that counsel

made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense, by so seriously affecting the process, that there is a reasonable likelihood that the outcome of the trial would have been different absent counsel error. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

Stanley first alleges that she was denied effective assistance of counsel when her defense counsel failed to move for the suppression of a self-incriminating statement Stanley made to the police. Responding to questions during police interrogation regarding drug trafficking, Stanley made the statement “well you know” or “you know.” This statement was relayed to the jury during testimony. By failing to move for the suppression of this statement, Stanley alleges that her counsel rendered ineffective assistance.

As previously noted, when a defendant alleges that her counsel was ineffective, she must meet the two-part test outlined in *Strickland*. However, when this ineffectiveness is based on her counsel’s failure to competently litigate a Fourth or Sixth Amendment evidentiary suppression motion, the defendant must also prove that her suppression motion was meritorious. *Kimmelman*, 477 U.S. at 375.

If the defendant meets this burden, she then must prove actual prejudice by demonstrating that there is a reasonable probability that the verdict would have been different absent the questionably admitted evidence. *Id.* Thus, our task is to determine

whether Stanley possessed a meritorious claim to suppress her statement and, if so, was there a reasonable probability that the exclusion of her statement could have changed the verdict in her case.

From a review of the record, Stanley has not met her burden to demonstrate that she has a meritorious claim to suppress her statement. She simply has not articulated any specific reason that would justify the suppression of her statement. In her appellate brief, referencing the circumstances in which her statement was made, Stanley asserts that “whether police followed proper procedures prior to Stanley's statement could not have been definitively determined absent an opportunity to contest the evidence.”

Stanley's assertion amounts to no more than a vague allegation that her statement might have been improperly admitted absent a suppression hearing. Such a vague and general allegation does not meet the evidentiary standard required by RCr 11.42(2). *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002). Moreover, permitting relief for such vague allegations would unwisely permit defendants to engage in fishing expeditions to discover evidence which is not an appropriate utilization of RCr 11.42. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005).

Stanley next alleges that she was denied effective assistance of counsel when her counsel failed to move for a directed verdict. According to Stanley, the Commonwealth failed to establish that crack cocaine was a Schedule II narcotic. She argues that her counsel rendered ineffective assistance by failing to move for a directed verdict on the drug charges. We disagree.

From a review of the record, although the Commonwealth did not establish the schedule classification of the drugs found in Stanley's residence, a chemist testified that the substances found in Stanley's residence tested positive for cocaine. Because the statutory classification of a drug is a question of law for a court, we conclude that the drugs found in Stanley's residence, cocaine, constituted a Schedule II narcotic as provided in KRS 218A.070(1)(d).

While we recognize that the cocaine found in Stanley's residence was not classified during trial, had her defense counsel raised the issue, the trial court would have been obligated to properly classify the cocaine as a Schedule II narcotic as provided for under state law. *See Shavers v. Commonwealth*, 514 S.W.2d 883, 885 (Ky. 1974) (holding harmless the Commonwealth's failure to establish the schedule classification of heroin). Therefore, despite her defense counsel's failure to move for a directed verdict regarding the classification issue, Stanley's defense counsel did not render ineffective assistance.

Stanley next alleges that she was denied effective assistance of counsel when her counsel failed to move for a mistrial. During trial, despite the trial court's previous exclusion of the bank deposit slip in the amount of \$16,126.81, a detective testified about the discovery of the bank deposit slip in Stanley's residence. Although the trial court admonished the jury, Stanley argues that her defense counsel was obligated to move for a mistrial, and counsel's failure to do so constituted ineffective assistance. We disagree.

We first observe that the granting of a mistrial is an extreme remedy and should be utilized only when there appears in the record a manifest necessity for such action. *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). The error must be “of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by granting a mistrial].” *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

From reviewing the record, we conclude that Stanley’s defense counsel’s failure to move for a mistrial did not constitute ineffective assistance. As we stated in Stanley’s direct appeal, while the bank deposit slip could be interpreted as indicating proceeds from drug trafficking, the slip is less indicative of simple possession. Thus, when Stanley was acquitted of the more serious drug trafficking charges and found guilty only of possession, it is clear that the detective’s testimony was not of such character and magnitude that Stanley was denied a fair and impartial trial. *Id.*

Furthermore, when testimony has been improperly introduced to a jury, there is a presumption that a trial court’s admonition can cure the negative effect of such testimony. *Fulcher v. Commonwealth*, 149 S.W.3d 363, 379 (Ky. 2004). In this case, after the detective’s improper testimony and a timely objection, the trial court admonished the jury to disregard the testimony because the deposit slip had been excluded from evidence and could not be considered in determining the outcome of the case.

Because there is nothing in the record that casts doubt on the effectiveness of this admonition, we conclude that it was sufficient to cure the effects of the detective’s

improper testimony. While Stanley alleges that her defense counsel should have moved for a mistrial, defense counsel's failure to do so does not constitute ineffective assistance as Stanley's right to a fair and impartial trial was protected.

Stanley next alleges that she was denied effective assistance of counsel when her defense counsel failed to contest the chain of custody of the drug evidence. Specifically, she alleges that her counsel failed to adequately prepare and meet the standard of a competent practitioner. However, Stanley does not allege any specific facts that impugn the integrity of the drug evidence used against her at trial.

In *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003), the court held that conclusory allegations which are not supported with specific facts do not warrant post-conviction relief. Furthermore, the defendant has the responsibility of identifying specific errors by her defense counsel and demonstrating that those errors were objectively unreasonable under the circumstances existing at the time of the trial. *Id.* at 469.

Stanley has failed to identify what facts would have been determined had her counsel challenged the chain of custody or how these facts would have affected the admissibility of the evidence and the outcome of her case. Put simply, Stanley's allegation that her counsel failed to challenge the chain of custody of the drug evidence fails to satisfy the specificity requirements of RCr 11.42(2). *Hodge*, 116 S.W.3d at 470. Accordingly, we conclude that her defense counsel did not render ineffective assistance.

Stanley's final allegation is that she was denied effective assistance of

counsel due to the cumulative impact of her defense counsel's numerous errors. This argument is without merit. We have extensively reviewed each of her allegations of ineffective assistance and have found no instance of ineffectiveness. Because there were no individual errors, there can be no cumulative error. *Simmons v. Commonwealth*, 191 S.W.3d 557, 568 (Ky. 2006).

For the foregoing reasons, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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