RENDERED: JANUARY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000205-MR

MARK ANTHONY PRICE — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 01-CR-00367

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Mark Anthony Price, appeals *pro se* from an order of the Campbell Circuit Court denying his motion for post-conviction relief pursuant to RCr[1] 11.42. Finding no error, we affirm.

In September 2001, Appellant was indicted for receiving stolen property over $300, first-degree fleeing and evading police, first-degree wanton endangerment, and for being a first-degree persistent felony offender. Following a jury trial, Appellant

[1] Kentucky Rules of Criminal Procedure.

was found guilty of receiving stolen property over $300, first-degree fleeing and evading police and second-degree wanton endangerment. The Commonwealth moved to dismiss the misdemeanor wanton endangerment charge and Appellant pled guilty to the PFO I charge upon an agreed sentence of fifteen years' imprisonment. On appeal, this Court affirmed Appellant's convictions and sentence. *Price v. Commonwealth*, 2002-CA-000406-MR (May 30, 2003). The Kentucky Supreme Court denied discretionary review on March 10, 2004. *Price v. Commonwealth*, 2003-SC-0490-D (March 10, 2004).

On May 15, 2006, Appellant filed a *pro se* RCr 11.42 motion. In June 2005, the trial court entered an order summarily dismissing all of Appellant's claims except for an allegation that defense counsel advised Appellant not to disclose that he was on medication at the time he entered his guilty plea. The trial court appointed counsel and scheduled an evidentiary hearing as to that issue.

Following a hearing on October 12, 2006, the trial court entered Findings of Fact and Conclusions of Law holding that the evidence showed Appellant was lucid during his plea and that such was knowingly, intelligently and voluntarily entered. The trial court further determined that defense counsel had not provided ineffective assistance, and that even if such had occurred, there was no reasonable probability that the outcome would have been different. Appellant thereafter appealed to this Court.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. The burden of proof on an RCr 11.42 motion

lies with the accused who must demonstrate that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). To prove ineffective assistance of counsel, the accused must show that (1) counsel's performance was deficient, in that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, at 694. As the Kentucky Supreme Court noted, "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of victory." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001).

Appellant first claims that his trial counsel was ineffective for failing to investigate and raise KRS 514.100, unauthorized use of an automobile, as a defense to the receiving stolen property charge. In a related argument, Appellant similarly argues that trial counsel was ineffective for failing to request an instruction under KRS 514.100 as a lesser-included offense. The trial court summarily dismissed both claims and we likewise find both to be wholly without merit.

The applicability of KRS 514.100 was addressed on direct appeal, wherein a panel of this Court held,

> Price further argues that the trial court erred in failing to instruct the jury on the lesser included offense of unauthorized use of a motor vehicle pursuant to KRS 514.100.
>
> . . .
>
> Price claimed that he borrowed the truck from a friend, and that he had no idea that it had been stolen. While it is questionable whether the offense of unauthorized use of a motor vehicle is a lesser included offense of receiving stolen property, the evidence clearly did not support the instruction.

Price, 2002-CA-000406-MR (Slip op. at p. 6-7).

Clearly if the evidence did not support the defense, then Appellant can show neither deficient performance nor resulting prejudice with regard to the possible use of KRS 514.100 as a defense to receiving stolen property. Moreover, an issue raised and rejected on direct appeal may not be relitigated in RCr 11.42 proceedings simply by claiming that it amounts to ineffective assistance of counsel. *Haight, supra* at 441.

Appellant next complains, as he did in the trial court, that he was prejudiced when the jury observed him in the hallway of the courthouse while in handcuffs and shackles. The trial court ruled that this was an issue that should have been raised on direct appeal. We agree. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by

this court." *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990) (*citing Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972)). Thus, the trial court did not err in dismissing this claim.

Appellant also challenges the trial court's finding that defense counsel was not ineffective with regard to Appellant's guilty plea. Appellant claims that his trial counsel advised him not to inform the trial court that he was on medications that he alleges prevented him from understanding the nature and consequences of his plea. Appellant further contends that defense counsel stated that because Appellant had already been sentenced to seventeen years' imprisonment in another case, he would only have to serve three of the fifteen years on the current charges pursuant to the PFO statutes. The trial court concluded that there was no merit to Appellant's claims and we agree.

During the evidentiary hearing on this issue, the trial court heard the testimony of Appellant's trial counsel as well as viewed the videotape of Appellant's plea. In its Findings of Fact and Conclusions of Law, the court noted,

> Judge Wehr did not ask the Defendant if he was under the influence of drugs. Judge Wehr did ask the Defendant if he read the motion to enter a guilty plea form. Defendant advised that he did. The plea form represents that his judgment is not impaired by alcohol or drugs. At the 11.42 hearing, [trial counsel] testified that he did not recall ever advising the Defendant not to tell Judge Wehr that he was taking prescribed medication. When Judge Wehr asked if he read the plea form he did not lean over and ask counsel any questions.
>
> 4. During the 11.42 hearing the Defendant testified that the medication he was taking on January 8, 2002, prevented him

> from making informed decisions. The videotape of Defendant during his plea and the plea form does not support his testimony. Defendant appears lucid. He even asked questions of Judge Wehr.
>
> 3. (sic) Defendant testified that his attorney . . . advised him that the maximum amount of time he would be required to serve in this case was 3 years. Defendant had been convicted in 01-CR-095 and sentenced to serve 17 years. At the hearing, [trial counsel] testified that he did not believe that was the law and did not believe he would have given that advice to Defendant.
>
> 4. During the plea colloquy with Judge Wehr the Defendant, Mark Price, asked Judge Wehr if the Department of Corrections would consider his sentence in this case as 17 years (2 years on the underlying offense and 15 years on the persistent felony offender). Judge Wehr told him it would be 17 years.
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> . . .
>
> The Defendant, Mark Price, has not met his burden to prove that his attorney was ineffective. Defendant, Mark Price appeared lucid during his plea and knew at the time he entered his plea that the Department of Corrections would view his sentence as 17 years. Even if his attorney had been ineffective, Defendant has not proven to this Court that there is a reasonable probability that the outcome would have been different.

After reviewing the record, we conclude that the evidence presented during the evidentiary hearing refutes any claim that Appellant was impaired at the time he entered his plea or that he did not fully understand the consequences or term of such. There is simply no evidence to support his claim of ineffective assistance of counsel in this respect.

Finally, Appellant argues that the prior felonies used to support his PFO conviction in Campbell County Indictment No. 01-CR-00095 could not also be used to support the PFO charge in the instant case, and that defense counsel was ineffective for failing to raise this argument. Again, Appellant's underlying argument is a direct appeal issue and not properly raised in a post-conviction action. *Brown, supra.*

Notwithstanding, this Court has held that the habitual criminality encompassed by the PFO statute is a status as opposed to an independent crime. Thus, double jeopardy does not attach and prior convictions may be used more than once to support PFO charges. *Smith v. Commonwealth*, 610 S.W.2d 939 (Ky.App. 1980). As a result, defense counsel cannot be deemed to have rendered ineffective assistance in this regard.

A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied,* 521 U.S. 1130 (1997). Further, as *Strickland* notes, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. 466 U.S. at 691. We conclude, as the trial court did, that Appellant has failed to meet his burden under *Strickland, supra*. There is no evidence in the record to indicate that counsel's conduct was anything other than consistent with the prevailing professional norms. Appellant has not demonstrated that counsel's performance was deficient and that such deficient performance prejudiced his defense. *Id.*

The decision of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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