

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000964-MR

MONTY KIM TURNER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CR-00477

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: Monty Kim Turner (“Turner”) appeals, *pro se*, from an order of the McCracken Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42. We affirm.

On November 4, 2003, McCracken County Sheriff’s Deputy Sgt. John Parks (“Sgt. Parks”) responded to a complaint of suspicious activity at Turner’s residence. Upon arrival, Sgt. Parks observed three men carrying duffle bags.

When Sgt. Parks shined his spotlight on the three men, two of the men ran away. Michael Burgess (“Burgess”), the only man who did not flee, identified Turner as one of the individuals who was with him at the scene that night. Pursuant to a search warrant at Turner’s residence, the police recovered evidence leading to the following conviction.

Thereafter, Turner was indicted by a McCracken County grand jury on charges of unlawful possession of a methamphetamine precursor, possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, possession of drug paraphernalia, possession of marijuana, and being a first-degree persistent felony offender. Following a jury trial from which Turner absconded, Turner was convicted of one count each of unlawful possession of a methamphetamine precursor, complicity to possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, possession of drug paraphernalia, and being a first-degree persistent felony offender. Turner was sentenced in accordance with the jury verdict to a total of twenty-five years in prison.

On direct appeal, the Kentucky Supreme Court affirmed his convictions and sentence in an unpublished opinion (2005-SC-0289-MR) rendered April 20, 2006. Thereafter, on April 13, 2007, Turner filed a motion to vacate the judgment and sentence pursuant to RCr 11.42, alleging ineffective assistance of counsel. Specifically, Turner alleged that his trial counsel was ineffective for: 1) failing to investigate available evidence and adequately prepare for trial; 2) failing

to adequately investigate and present an alibi defense; 3) failing to adequately cross-examine Burgess; 4) failing to object to the Commonwealth offering a definition of the statutory term “approved container”; 5) failing to move for suppression of evidence recovered at Turner’s residence; 6) failing to move for suppression of Sgt. Parks’s identification of Turner as being one of the men who fled from Turner’s residence; and 6) the cumulative effect of these errors by counsel. On April 20, 2007, the trial court denied the motion without an evidentiary hearing. This appeal followed.

On appeal, Turner asserts that his counsel’s assistance at trial was deficient and that he was entitled to an evidentiary hearing. In order to prevail on an ineffective assistance of counsel claim, a movant 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. An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively

refuted by the record and which if true would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

First, Turner contends that his trial counsel was ineffective for failing to investigate and present his alibi defense. Turner's sister and her friend testified that Turner was with them in Illinois during the time of the alleged crimes. But Turner specifically points out that his trial counsel did not investigate a news broadcast called *The Fugitive File* which reported that the police were looking for him and a co-defendant. Turner's sister testified that she could not remember what night Turner was with her in Illinois but it was the night before she watched *The Fugitive File* on television and saw the police were looking for Turner. Turner points out that *The Fugitive File* airs on Wednesdays, not Thursdays, as testified to by Captain Hayden at trial. Upon discovering evidence proving *The Fugitive File* actually airs on Wednesdays and not Thursdays, Turner moved for a judgment notwithstanding the verdict, or in the alternative, a new trial. The trial court held a hearing on the matter wherein both Turner and the Commonwealth conceded that while *The Fugitive File* does air on Wednesdays, Turner and York were not featured on the program until at least a week after the crime on November 12, 2003.

However, Turner raised this same issue in his direct appeal arguing that he was entitled to a new trial based on this newly discovered evidence. The Kentucky Supreme Court disagreed and found that Turner was not entitled to a

new trial. Newly discovered evidence “must be of such decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result if a new trial was granted.” *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004). The Kentucky Supreme Court concluded that this evidence did nothing to strengthen the weight of his sister’s testimony and there was no decisive value or force to it.

Moreover, an issue raised and rejected on direct appeal may not be relitigated under RCr 11.42 by claiming that it amounts to ineffective assistance of counsel. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001). Even though Turner now contends that the news story his sister allegedly saw about him was actually the “noon news” and not *The Fugitive File*, the evidence does not change the weight of her testimony. Turner’s sister testified that she and Turner came back to Kentucky from Illinois on November 3, 2003, and then went back to Illinois that same day around 11:30 p.m., prior to Sgt. Parks’s encounter with the three men at Turner’s residence. This is the same testimony Turner asserts his sister would give in his RCr 11.42 motion. Thus, the trial court correctly determined that this allegation was refuted by the record and was not sufficient to invalidate Turner’s conviction.

Turner also makes a number of conclusory allegations that his trial counsel ineffectively cross-examined Burgess at trial. However, Turner fails to cite to any specific examples of counsel’s ineffective assistance in support of his allegations that his counsel did a poor job of cross-examining Burgess.

Furthermore, Burgess's testimony merely placed Turner at his residence along with Burgess the night Sgt. Parks encountered the three men. Turner insists that a video surveillance tape from Wal-Mart would conclusively show that Burgess lied when he testified that he, Turner and a third man, co-defendant Danny York ("York"), went to Wal-Mart together to buy supplies for making methamphetamine because the video does not show the three men leaving together. Turner asserts that his trial counsel did not view the whole tape and therefore could not properly impeach Burgess during cross-examination. However, the record shows that trial counsel sought to contradict Burgess's testimony on cross-examination and presented witnesses to establish an alibi for Turner that refuted Burgess's testimony. Thus, we cannot conclude that Turner's counsel was ineffective in cross-examining Burgess and an evidentiary hearing was not warranted on this issue.

Turner next argues his trial counsel was ineffective for failing to object to the Commonwealth's questioning of Captain Hayden about OSHA regulations regarding approved containers for anhydrous ammonia. Pursuant to Kentucky Revised Statutes ("KRS") 250.489(1), a person is guilty of possession of anhydrous ammonia in an unapproved container when he knowingly possesses anhydrous ammonia in any container other than an approved container. KRS 250.482(4) defines an "approved container" as "a container for anhydrous ammonia which meets or exceeds the requirements of the Federal law or regulation for the storage and handling of anhydrous ammonia."

Captain Hayden testified about a fire extinguisher containing anhydrous ammonia which was recovered from Turner's residence on November 4, 2003. He stated that the fire extinguisher was not an approved container. York's counsel moved to *voir dire* Captain Hayden regarding his expertise to testify about approved containers. Following his testimony, the Commonwealth introduced federal OSHA regulations regarding the proper storage of anhydrous ammonia, and the regulations were introduced into evidence. Turner contends that his trial counsel's failure to object to the introduction of the regulations usurped the trial judge's duty to instruct the jury on the law. This argument is without merit. The regulations were necessarily introduced into evidence because York's counsel challenged Captain Hayden's qualifications to testify as to what constituted an approved container. The regulations introduced were federal laws referred to in the statute and were perfectly admissible for the jury to consider. Thus, we do not find that trial counsel was ineffective for failing to object to admissible evidence.

Next, Turner asserts that his trial counsel was ineffective for failing to seek suppression of evidence recovered from his residence on November 4 and for failing to seek suppression of the identification by Sgt. Parks that Turner was one of the men seen fleeing from the scene. Turner raised the identification issue in his direct appeal to the Kentucky Supreme Court as an unpreserved issue. Although a palpable error review does not preclude an issue from being raised as ineffective assistance of counsel in post-conviction proceedings, *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Supreme Court found not only that there was no

palpable error but also that the identification of Turner was reliable and properly admissible. Again, trial counsel was not ineffective in pursuing measures to suppress evidence that was properly admissible.

Turner further contends that the evidence recovered from his residence should be suppressed because Sgt. Parks impermissibly invaded the curtilage of his property when he encountered the three men on November 4, 2003. However, Sgt. Parks testified that, upon arriving at the area where the suspicious activity was reported, he actually walked behind the trailer next door to Turner's home in order to observe what was going on. He approached them only when it became apparent the three men were going to leave. And when the men figured out he was a police officer, two of the men ran off. Based upon Sgt. Parks's testimony that he was not on Turner's property when he first observed Turner, the trial court was able to determine that Turner did not have a privacy interest in the adjoining property and Sgt. Parks had a right to be there. There is no evidentiary basis to support Turner's contention that his trial counsel was ineffective for failing to seek suppression of the evidence recovered.

Turner's final allegation is that he was denied effective assistance of counsel due to the cumulative impact of his defense counsel's numerous errors. This argument is without merit. We have extensively reviewed each of his 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 order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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