RENDERED: MAY 25, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002239-MR

ROY E. DIXON — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00219

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Roy E. Dixon, pro se, has appealed from an order entered by the Henderson Circuit Court on September 30, 2005, which denied his pro se Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment without holding an evidentiary

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

hearing. Having concluded that the trial court did not err in denying Dixon's claims of ineffective assistance of counsel, we affirm.

Because Dixon directly appealed his 20-year sentence to the Supreme Court of Kentucky, *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004), we quote the pertinent facts of this case from its Opinion as follows:

> On October 17, 2001, Detective Jamie Duvall and Officer Todd Seibert of the Henderson Police Department were conversing while sitting in their separate police vehicles on a public street when they observed [Dixon] operating a motor vehicle. Because Duvall knew that [Dixon's] operator's license had been suspended, he and Seibert proceeded in separate directions with the intention of stopping and detaining [Dixon] for an apparent violation of KRS 186.620(2). Seibert sighted [Dixon's] vehicle and pulled his marked police cruiser in behind [Dixon's] vehicle in the parking lot of an apartment complex. As [Dixon] exited his vehicle, Seibert saw him throw a plastic sandwich baggie to the ground. Detective Duvall then arrived, handcuffed [Dixon] and placed him in the rear of Seibert's cruiser. The two officers retrieved the plastic baggie and observed that it contained several off-white colored rocks later determined to be crack cocaine. Duvall searched [Dixon's] automobile and found a small piece of paper in the glove compartment containing the following markings:
>
> V -- 300
> A -- 125
> B -- 100
> G -- 200
> G -- 100
> M -- 50
> D-S -- 25
> 900
>
> Because Duvall believed that the paper reflected "transactions" and "money amounts" the officers took the

> piece of paper into custody. . . . The piece of paper was introduced at trial as evidence that [Dixon] possessed the cocaine for the purpose of sale.

The Supreme Court Opinion became final on December 9, 2004.

On August 12, 2005, Dixon filed a pro se RCr 11.42 motion to vacate, set aside, or correct his sentence, with a memorandum in support, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. The Commonwealth did not file any response to the motions. The trial court denied Dixon's RCr 11.42 motion and his motion for appointment of counsel on September 30, 2005, without holding an evidentiary hearing. On October 11, 2005, Dixon filed a motion requesting that the trial court enter additional findings of facts and conclusions of law addressing its denial of his RCr 11.42 motion. Dixon also filed a motion requesting appointment of counsel and a motion to direct the Henderson Circuit Clerk to prepare a video and/or transcript of the jury trial. The trial court entered an order on October 12, 2005, denying all of Dixon's motions. Dixon filed this appeal from the September 30, 2005, order denying his RCr 11.42 motion.

Dixon argues on appeal that (1) trial counsel was ineffective for failing to file a motion to suppress evidence relating to the stop of his vehicle and the piece of paper obtained from the search of his vehicle; (2) trial counsel was ineffective for failing to adequately prepare for trial and present a defense to the charges; and (3) all errors enumerated in his arguments had the effect of reversible cumulative error. In addition to

challenging the trial court's rejection of his various claims, Dixon contends 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 unless there is 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)). As the following discussion of each of Dixon's claims demonstrates, each allegation is refuted on the face of the record. Thus, Dixon was not entitled to an evidentiary hearing.

To establish ineffective assistance of counsel, a movant 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 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000). The burden is on the movant 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*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905 (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 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311 (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 (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 911 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)).

In order 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*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002). Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. *Strickland*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884.

Dixon first argues that defense counsel was ineffective for failing to file a pretrial motion to suppress evidence. Specifically, he alleges that there was no probable cause for the officers to stop him and subsequently search his vehicle.

The record reveals that Det. Duvall and Officer Seibert observed Dixon driving a motor vehicle and knew that Dixon's driver's license had been suspended.[2] The officers followed Dixon and Officer Seibert observed Dixon's vehicle when it stopped in the parking lot of an apartment complex. Because the officers had observed Dixon operating a motor vehicle on a suspended driver's license, they had probable cause to stop Dixon's vehicle based upon his commission of a traffic violation. *United States v. Akram*, 165 F.3d 452 (6th Cir. 1999). The happenstance that Dixon had already parked and exited his vehicle is of no consequence. A police officer may make a warrantless misdemeanor arrest when he can reasonably conclude from the facts that a misdemeanor is being committed in his presence. *Commonwealth v. Mobley*, 160 S.W.3d 783 (Ky. 2005).

When Officer Seibert pulled his marked police cruiser behind Dixon's parked vehicle, he observed Dixon drop a small baggie onto the ground. Officer Seibert approached Dixon and arrested him for operating a motor vehicle with a suspended drivers license. When Det. Duvall arrived, Dixon was handcuffed and placed in the back of Officer Seibert's police cruiser. Officer Seibert and Det. Duvall retrieved the baggie from the ground, which appeared to contain crack cocaine, and they then proceeded to search Dixon's vehicle without a warrant incident to his arrest. The officers thereupon discovered the piece of paper believed to be evidence of drug trafficking.

The law of search and seizure under the Fourth Amendment to the United States Constitution establishes that "[a]ll searches without a valid search warrant are

[2] Operating a motor vehicle without a license (KRS 186.620(2)) is a Class B misdemeanor.

unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception." *Gallman v. Commonwealth*, 578 S.W.2d 47 (Ky. 1979). The exception relevant to this appeal, search incident to arrest, establishes that, in relation to automobiles where there is probable cause to make an arrest, the probable cause carries over to justify a search of the entire passenger compartment of the automobile. *Commonwealth v. Ramsey*, 744 S.W.2d 418 (Ky. 1987) (citing *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)). In *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the United States Supreme Court stated police officers are allowed to search the passenger compartment of a vehicle after making a lawful custodial arrest of a recent occupant of that vehicle. The Supreme Court created this standard in order to have an enforceable and clear rule for law enforcement officers to follow. *Id*.

In this case, Dixon had already exited his vehicle when Officer Seibert approached him and arrested him for the observed traffic violation. Further, Officer Seibert had observed Dixon drop a baggie onto the ground in close proximity to the vehicle he had just exited. Even though he was not in reach of the passenger compartment of the vehicle at any point after the arrest, the subsequent search was valid as incident to the lawful arrest. Therefore, we cannot say that counsel was ineffective for not requesting suppression of the piece of paper located within the glove compartment of the vehicle. As stated by the trial court, "[i]t was reasonable for [counsel] to believe that

a motion to suppress based on lack of probable cause would be futile. It is not necessary for an attorney to make motions he believes will be futile. *Relford v. Commonwealth*, 558 S.W.2d 175 (Ky.App. 1977)."

Dixon also argues that trial counsel was ineffective in failing to adequately prepare a defense for trial. Dixon states that during the trial in this matter his counsel attempted to introduce a transcript into evidence of the preliminary hearing held in the district court. The transcript was based on counsel's own audiotape of the proceeding that had been transcribed by counsel's secretary. The Commonwealth objected to the transcript based on lack of authentication. The trial court sustained the objection and refused to allow counsel to utilize the transcript. Dixon alleges that "counsel should have known that he was going to have Evidentiary Rule problems" with the transcript, and that counsel's failure to prepare himself for trial prohibited Dixon from receiving a fundamentally fair trial. We believe this claim is without merit.

In *Haight*, 41 S.W.3d at 446, our Supreme Court stated:

> [C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. 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.

In this case, simply because trial counsel's defense (i.e., attempted use of the unauthenticated transcript) was not acceptable to the trial court, did not signify that

counsel failed to investigate all possible defenses, or that he was inadequately prepared for trial. Dixon's argument is based on speculation, and he has failed to prove prejudice on this claim. There is no indication that Dixon was denied due process under either the federal or state constitutions.

Dixon's argument relating to counsel's attempt to introduce certain photographs into evidence was not raised within his RCr 11.42 motion Dixon's failure to raise this issue before the trial court precludes review of the issue on appeal. *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976).

Finally, Dixon asserts 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 meritless. Each of the allegations made by Dixon has been thoroughly reviewed and discussed herein, and each has been either refuted by the record or addressed and rejected. "Repeated and collective reviewing of alleged errors does not increase their validity." *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003). Dixon has failed to demonstrate any basis for his claims that counsel's performance was deficient. He received a fundamentally fair trial and was not entitled to an evidentiary hearing or appointment of counsel on his RCr 11.42 motion.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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