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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-002135-MR

EARL B. KIRBY APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 00-CR-00010

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

VANMETER, JUDGE: Earl Brent Kirby appeals pro se from the Madison Circuit Court's order denying his motion seeking RCr 11.42 relief. Kirby raises multiple allegations of having been afforded ineffective assistance of counsel at trial. For the following reasons, we affirm.

This court previously set forth the facts in this matter as follows:[2]

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[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] *Kirby v. Commonwealth*, No. 2000-CA-002401-MR, slip op. at 2-3 (Ky.App. March 22, 2002).

> The charges arose from an automobile collision which occurred on December 18, 1999. Kirby's vehicle was involved in a collision with a vehicle driven by Franklin Young and occupied by his wife Tonya Young and their daughter Kayla. After the impact, Kirby's vehicle left the road and went over an embankment. It came to rest standing on its front end with the passenger side of the vehicle against the ground. Kirby was found alone in the car. Subsequent tests showed that Kirby had a blood-alcohol content of .10 and he was under the influence of several prescription drugs.
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> Kirby admitted that he was in the car and that he was intoxicated, but he denied that he was the driver of the vehicle. Kirby did not testify at trial. However, several witnesses testified that when they arrived at the scene, they found Kirby in the passenger seat tangled in the seat belt. Kirby also called several other witnesses who reported seeing an unknown person running from the scene of the accident.
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> Nevertheless, the jury found Kirby guilty and fixed his sentence at twelve months and a $500.00 fine for the assault conviction; five years for the DUI conviction; twelve months and a $500.00 fine for operating a motor vehicle while his license was suspended for DUI; and ninety days and a $1,000.00 fine for failure to maintain insurance. The trial court imposed the jury's recommended sentence, and directed that his terms of imprisonment run concurrently.

This court affirmed the trial court's judgment and sentence despite Kirby's contention "that the trial court erred by

denying his motion for a mistrial after the prosecutor attempted to impeach one of his witnesses based upon a stale conviction."[3]

Thereafter, Kirby filed a motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42, which the trial court overruled without an evidentiary hearing on June 23, 2005. This appeal followed.

As all of Kirby's claims are allegations of ineffective assistance of trial counsel, we first note the two-part standard for such claims which was set forth in *Strickland v. Washington*:[4]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

We also note that there is a "strong presumption that counsel's performance was effective."[5]

**I. Failure to Investigate**

Kirby contends that his counsel was ineffective because she failed to investigate blood on the steering column

[3] *Id.* at 2.

[4] 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[5] *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citing *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066).

and driver's window of the vehicle. Kirby maintains that since he sustained a broken collar bone but no lacerations in the accident, analysis of the blood would have proven that he was not driving at the time of the accident. Even if Kirby's counsel was deficient in failing to investigate this physical evidence, we do not believe that had the evidence been investigated and introduced, there would have been a reasonable probability that the result of the trial would have been different.[6] The blood could have easily come from one of Kirby's many rescuers, and we do not believe this evidence would have outweighed the abundance of circumstantial evidence that Kirby was driving the vehicle at the time of the accident.

Kirby also argues that his counsel was ineffective by failing to investigate the passenger seat belt which he maintains was cut by rescuers in the process of removing him from the vehicle. Again, Kirby maintains that this evidence would have proven that he was not driving the vehicle at the time of the accident. Several witnesses were questioned regarding whether a seat belt had been cut in order to remove Kirby from the vehicle, and Kirby's counsel argued in closing that the Commonwealth had not proven that he was driving the vehicle at the time of the accident, in part because he had been extricated from the passenger's seat belt. Given this

[6] *See Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002).

presentation, we cannot say that Kirby's counsel was deficient in failing to further investigate the seat belt issue. Moreover, as it appears from the evidence that part of Kirby's body was simply tangled in the seat belt rather than latched into it, there is nothing to suggest that further investigation would have yielded a different result.

Additionally, Kirby's counsel was not ineffective by failing to question three additional witnesses regarding the identity of the person who cut the seat belt off him. Kirby does not assert what testimony these three would have given in response to further questioning; rather, he merely posits that "maybe one of the witnesses knew who cut the belt or maybe even done [sic] it themselves [sic]." As "RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule[,]"[7] the trial court did not err by rejecting this claim without an evidentiary hearing.

Kirby also argues that his counsel was ineffective because she failed to investigate whether he was legally using the prescription drugs found in his blood system at the time of

[7] *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (footnotes omitted).

the accident. However, under KRS 189A.010(4),[8] the legal use of a substance which impairs one's driving ability is not a defense to a charge of operating a motor vehicle under the influence of that substance:

> The fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.

It follows that Kirby's counsel was not ineffective by failing to investigate whether the drugs found in his system had been prescribed to him.

**II. Failure to Call Nolan Mason as Witness**

Next, Kirby argues that his counsel was ineffective because she did not call Nolan Mason as a witness to challenge Franklin Young's[9] eyewitness testimony that Kirby was driving the vehicle at the time of the accident. More specifically, Kirby asserts that Mason would have testified that prior to the trial, Young approached Mason and asked him if he was driving Kirby's vehicle at the time of the accident.

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[8] The same language was in effect at the time of Kirby's offense and trial as former KRS 189A.010(3).

[9] In his brief, Kirby asserted that Mason would have contradicted Mr. Madden's testimony; however, it is apparent that Kirby meant that Mason would have contradicted Franklin Young's testimony. Kirby interchanged the names Madden and Young and referred to Mr. Madden as "the victim" and "the driver of the other car." Further, we have been unable to find reference to any Mr. Madden anywhere in the record.

The record reveals that during cross-examination Young responded in the negative to defense counsel's inquiry as to whether Young had asked such a question. Defense counsel did not pursue this line of questioning any further. We do not believe that Kirby has shown that had Mason been called as a witness there would have been a reasonable probability that the result of the trial would have been different.[10] Although Young referred to the vehicle as "Kirby's vehicle" and the driver as "he", Young neither was asked nor testified expressly that Kirby was driving the vehicle at the time of the accident. Rather, he testified that prior to the collision he saw only one head in the car and testified on cross-examination that if a second person had been lying down in the car, he would not have seen that person. Given this testimony, and the fact that no eyewitness testified that Kirby was driving the vehicle at the time of the accident, we do not believe that Mason's proffered testimony would have undermined the circumstantial evidence from which the jury inferred that Kirby was driving the vehicle at the time of the accident.

**III. Failure to Let Kirby Testify**

Kirby's next argument is that his counsel was ineffective because she interfered with his right to testify by stating that she would not represent him if he chose to testify.

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[10] *See Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002).

Kirby asserts that he would have testified (1) that his doctor prescribed the drugs found in his system and (2) that he was not driving the vehicle at the time of the accident. This claim is refuted by the record as counsel stated at a bench conference at the close of the defense’s case that she had advised Kirby of his right to testify but that he chose not to do so.

Additionally, as set forth above, the fact that the drugs in Kirby’s system may have been prescribed is not a defense to operating a motor vehicle under the influence of the drugs. Moreover, Kirby’s counsel presented the defense that Kirby was not driving his car at the time of the accident in part by presenting several witnesses who testified that they saw a shadowy figure running from the accident scene.

## IV. Conflict of Interest

Kirby also alleges that when his counsel told him that she believed he was guilty of the charges against him, a conflict of interest arose that resulted in ineffective assistance of counsel. We disagree.

“In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.”[11] The record reveals that

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[11] *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980).

Kirby's counsel zealously represented his interests at trial. Moreover, Kirby has not described any manner in which the alleged conflict of interest adversely affected counsel's performance. He is not entitled to relief on this ground.

**V. Prosecutor's Remarks**

Finally, Kirby asserts that his counsel was ineffective because she failed to object to the prosecutor's initial statement during closing argument which included the quotation: "'Oh what a tangled web we weave when first we practice to deceive.'"[12] We disagree.

We believe that this statement was a proper comment on the integrity of a defense position.[13] As such, it was within the Commonwealth attorney's "great leeway" in conducting his closing argument.[14] Further, we cannot say that this isolated comment affected the outcome of the trial. Therefore, Kirby's counsel was not ineffective by failing to object to the statement.

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[12] Sir Walter Scott, *Marmion,* cto. 6, st. 17 (1808).

[13] *See Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987) ("prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position").

[14] *See Id.*

## VI. Conclusion

Because all of Kirby's arguments could be refuted by the record, the trial court did not err by denying his motion for RCr 11.42 relief without an evidentiary hearing.[15]

The Madison Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Earl B. Kirby, Pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

[15] *See Baze v. Commonwealth*, 23 S.W.3d 619, 628 (Ky. 2000).