

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000382-MR

ROBERT WHITTEMORE

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 02-CR-00178

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Robert Whittimore appeals from an order of the Graves Circuit Court denying his motion for RCr 11.42 relief from a criminal judgment.

He argues that he did not receive effective assistance of counsel based on counsel's failure to file a motion to suppress evidence and failure to call witnesses to testify that his wife was addicted to drugs. For the reasons stated below, we affirm the order on appeal.

On May 20, 2002, the Graves County grand jury indicted Whittemore on one count each of murder, first-degree possession of a controlled substance, and possession of marijuana. The charges arose from events occurring on October 12, 2001, when Mayfield police went to Whittemore's residence as a result of a 911 call. According to the record, Whittemore's brother-in-law, Jeff Spraggs, came to Whittemore's residence at Whittemore's request and found Whittemore's wife, Teresa, severely beaten. Spraggs called 911 and requested medical attention for Teresa.

When the police arrived, they found the beaten and murdered body of Teresa.¹ Whittemore fled the residence after Spraggs made the 911 call and was not present when the police arrived. An investigation ensued, whereupon officers conducted a search of the residence. In Whittemore's bedroom, they observed a marijuana cigarette on the bed and two "roaches" on the bedside table. Underneath the bed was found a pill bottle with Whittemore's name on it which contained a quantity of cocaine. Additional marijuana was found under the bed. The parties state that the bedroom door was padlocked, but no testimony to this effect was produced at trial. When questioned at trial, the police officer who found the drugs stated that the bedroom door was wide open and that he did not see any padlock.

¹ Because the murder trial was severed from the drug trial, the appeal record in the instant proceeding reveals little about the circumstances of Teresa's death. It is also apparent from viewing the videotape of the drug trial that the parties had agreed - or the court had ordered - that neither counsel would solicit testimony regarding Teresa's death. Our recitation of the facts relating to Teresa's death is derived solely from the parties' appellate briefs.

The matter proceeded in Graves Circuit Court, where the murder charge was severed from the drug charges. In July, 2003, a trial on the murder charge was conducted. Whittemore was found guilty of second-degree manslaughter and received a sentence of ten years in prison. The drug charges were tried two months later in Graves Circuit Court. At that trial, Whittemore admitted possessing the marijuana, but denied possessing the cocaine. Testimony was adduced from Spraggs and from the police that Teresa moved out of Whittemore's residence several months earlier and no longer resided there. Whittemore was found guilty on both counts, and was sentenced to five years in prison on conviction for first-degree possession of a controlled substance, and one day on the marijuana possession, to be served concurrently for a total of five years in prison. The five-year sentence was ordered to run consecutively with the ten-year sentence for second-degree manslaughter. The convictions were affirmed by this Court by way of unpublished opinion rendered on March 25, 2005. The Kentucky Supreme Court granted discretionary review, subsequently affirming Whittemore's convictions on August 17, 2005.

Whittemore then filed a *pro se* RCr 11.42 motion seeking relief from judgment, a hearing on the motion and appointed counsel. As a basis for the motion, Whittemore argued that he did not receive effective assistance of counsel at trial. Specifically, he maintained that his attorney was not prepared for trial, failed to investigate the case, and failed to move for a suppression hearing as to evidence obtained during an allegedly unlawful seizure. He also claimed that his

wife was a cocaine addict and that evidence should have been adduced at trial to that effect.

After proof on the motion was taken, the circuit court rendered an order on February 5, 2007, denying the RCr 11.42 relief and ordering the appointment of counsel for any additional proceedings. In denying the motion, the court determined that the discovery of the marijuana and cocaine at Whittemore's residence was a natural consequence of the police responding to and investigating Teresa's death. The court also concluded that Whittemore's argument was unpersuasive on his claim that his counsel was ineffective for failing to introduce evidence that Teresa owned the cocaine, since Whittemore was charged with possession and not ownership. This appeal followed.

Whittemore now argues that the circuit court erred in denying his motion for RCr 11.42 relief from judgment. He maintains that he did not receive the effective assistance of counsel to which he was entitled when counsel failed to seek the suppression of the drug evidence found at the residence by the police after Spragg's 911 call. He contends that after discovering Teresa's body, the police should have obtained a search warrant describing the places to be searched and items to be seized. He also maintains that his trial counsel was ineffective in failing to call any defense witnesses, and that but for this failure the outcome of the proceeding would have been different. He seeks an order reversing his conviction for possession of a controlled substance and reducing the five-year sentence to time served.

We have closely examined the record and the law, and find no error arising from the circuit court's denial of Whittemore's RCr 11.42 motion. We are not persuaded by Whittemore's first argument, i.e., that his counsel was ineffective in failing to file a motion to suppress the drug evidence. The standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering an appeal from the denial of a claim of ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). And finally, in determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance and the tendency and temptation to second-guess should be avoided. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998).

Under *Strickland*, Whittemore must show that but for the alleged ineffective assistance, there is a reasonable probability that the outcome of the proceeding would not only have been different, but would have been more favorable to him. *Strickland, supra*. In the matter at bar, nothing in the record

supports Whittemore's claim that but for his trial counsel's failure to seek the suppression of the drug evidence the outcome of the proceeding would have been more favorable to Whittemore. The police searched his residence after finding his dead wife's body at that location. According to the record, since it was clear from observing the body that she had been beaten, and because Spraggs had told the police dispatcher that she had been beaten, there was a sufficient basis at that time to reasonably conclude that Teresa did not die of natural causes. As such, it is apparent that the police were exercising their lawful authority to investigate the crime and search the premises as part of that investigation. In order to prevail on his claim of ineffective assistance, Whittemore would have to demonstrate not only that counsel did not provide effective assistance based on his failure to seek suppression, but that Whittemore would have been found not guilty on the charge or would have received a lighter sentence. Nothing in the record supports such a conclusion, and accordingly we find no error.

Whittemore also contends that counsel's failure to call any defense witnesses also demonstrates counsel's ineffectiveness. Again, the burden rests with Whittemore to prove that this failure not only constitutes ineffective assistance, but also that but for the failure the outcome of the proceeding would have been more favorable to Whittemore. Whittemore does not reveal which witnesses he believes should have been called to testify on his behalf, nor how their testimony would have affected the outcome of the proceeding. He suggests that counsel should have sought to prove that Teresa was addicted to cocaine, thus

demonstrating to the jury that the cocaine found under his bed belonged to Teresa rather than Whittemore. As the Commonwealth properly noted at trial, however, Whittemore was charged with possession and not ownership, and the cocaine was found in his bedroom which according to the police contained no indication that Teresa resided there. Considering the weight of the evidence against Whittemore and his failure to reveal how additional witnesses would have swayed the jury in his favor, we cannot conclude that the circuit court erred in denying his motion for RCr 11.42 relief on this issue.

For the foregoing reasons, we affirm the order of the Graves Circuit Court denying Whittemore's motion for RCr 11.42 relief from judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Whittemore, *pro se*
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