

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002029-MR

CHARLES ALAN DEARMOND

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 09-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, MOORE AND TAYLOR, JUDGES.

MAZE, JUDGE: On January 23, 2009, a Muhlenberg County grand jury returned an indictment charging Charles A. Dearmond with one count each of manufacturing methamphetamine – second or subsequent offense by complicity, first-degree possession of a controlled substance (methamphetamine), and being a persistent felony offender in the first degree (PFO I). After the trial court partially

denied Dearmond's motion to suppress evidence seized at the time of his arrest, he entered a conditional guilty plea to amended charges of manufacturing methamphetamine and being a PFO I. In accord with the Commonwealth's recommendation, the trial court sentenced Dearmond to a total of 24 years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed the trial court's ruling on the suppression motion. *Dearmond v. Commonwealth*, 2010 WL 4156752 (Ky. 2010)(2009-SC-000204-MR).

On October 4, 2011, Dearmond filed a *pro se* motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He also filed a motion seeking appointment of counsel. On October 13, 2011, the trial court entered an order denying both motions without a hearing. This appeal followed.

As an initial matter, the trial court noted that Dearmond failed to sign and verify the contents of his motion, as required by RCr 11.42(2). A party seeking relief under RCr 11.42 must substantially comply with its provisions, including the verification requirement. *Cleaver v. Commonwealth*, 569 S.W.2d 166, 169 (Ky. 1978). Although Dearmond signed his *pro se* motion and included a signed verification statement, neither signature was notarized as required by the rule. Thus, we agree with the trial court that Dearmond's failure to comply with RCr 11.42(2) would warrant summary dismissal of the motion.

Nevertheless, we also agree with the trial court that Dearmond's motion failed to create a material issue of fact that could not be resolved from the

record. In order to prevail on an ineffective assistance of counsel claim, Dearmond must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on a movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

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. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

An evidentiary hearing is necessary only when the record does not conclusively refute the allegations in the motion. *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), *overruled on*

other grounds by Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

Dearmond argues that his trial counsel failed to introduce relevant testimony which would have altered the outcome of his suppression motion. The circumstances surrounding the search which led to Dearmond's arrest are set out in detail in the Supreme Court's opinion on direct appeal. For purposes of this appeal, the following facts are relevant: On January 8, 2009, officers from the Muhlenberg County Sheriff's Office went to the home of Mary Dukes, Dearmond's girlfriend, to serve an arrest warrant on Dukes's son, Jeff Oliver. After conducting surveillance on the home for some time, the officers observed two people emerge from the woods behind the home and enter the house. At that point, the officers went to the door and asked for permission to search the home for Oliver. Mary Dukes gave the officers her consent to search the house. Dearmond was also present in the house at the time.

While searching an upstairs bedroom, Deputy Terry Vick looked into a closet and observed a pile of clothes on the floor. He removed the top layer of clothing and immediately smelled a strong odor of ether. He saw two clear jars containing a white substance, and coffee filters with what appeared to be methamphetamine in them. He also searched a pair of coveralls located in the closet and found lithium batteries in the pocket. In addition, Deputy Vick observed other items in the room which are associated with manufacturing

methamphetamine. Deputy Vick arrested Dearmond, and Dearmond later gave a statement essentially admitting to manufacturing methamphetamine.

In denying Dearmond's motion to suppress, the trial court emphasized that the owners of the house had consented to the search for the purposes of locating Jeff Oliver. Although Deputy Vick's discovery of the lithium batteries in the coveralls exceeded the reasonable scope of the permissive search, the trial court concluded that he reasonably searched the pile of clothes on the closet floor, and that the other items were found in plain view. Dearmond asserts that there were other witnesses who would have testified that Mary Dukes had revoked her consent prior to the discovery of the incriminating evidence. Consequently, he argues that trial counsel was ineffective for failing to call these witnesses.

In its order denying Dearmond's RCr 11.42 motion, the trial court again noted its prior finding that the search of the closet and the clothing on the floor did not exceed the scope of the initial permission given by Mary Dukes. The other admissible items were found in plain view. The individuals giving affidavits in support of Dearmond's current motion each admit that Mary Dukes initially gave consent to the search.

The affiants do state that Mary Dukes objected to the scope of the officers' search downstairs. However, their testimony would not have altered the trial court's findings regarding the conduct of Deputy Vick's search of the upstairs bedroom. As a result, Dearmond failed to show either that his trial counsel provided ineffective assistance by failing to call these witnesses or that the result of

the suppression hearing would have been different had his trial counsel called these witnesses. Therefore, the trial court properly denied Dearmond's motion without an evidentiary hearing.

Accordingly, the order of the Muhlenberg Circuit Court denying Dearmond's RCr 11.42 motion is affirmed.

JUDGE TAYLOR, CONCURS.

JUDGE MOORE, CONCURS IN RESULT ONLY.

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