APPENDIX A

A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: December 26, 2019

Mr. Allan Widdifield
Green River Correctional Complex
P.O. Box 9300
Central City, KY 42330

Re: Case No. 19-6147, *Allan Widdifield v. Kevin Mazza*
Originating Case No.: 4:19-cv-00009

Dear Mr. Widdifield,

The Court issued the enclosed Order today in this case.

Sincerely,

s/Antoinette Macon
Case Manager
Direct Dial No. 513-564-7015

cc: Ms. Vanessa L. Armstrong
Mr. Matthew Robert Krygiel

Enclosure

No mandate to issue

No. 19-6147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLAN WIDDIFIELD, aka Alan Widdifield, aka Allan Widdlefield,

Petitioner-Appellant,

v.

KEVIN MAZZA, Warden,

Respondent-Appellee.

ORDER

Before: GUY, GRIFFIN, and KETHLEDGE, Circuit Judges.

"Every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . . ." *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 564 (6th Cir. 2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). Generally, in a civil case where the United States, a United States agency, or a United States officer or employee is not a party, a notice of appeal must be filed within thirty days after the judgment or order from which the party appeals is entered. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). The time periods prescribed for filing a notice of appeal are mandatory and jurisdictional; this court may neither waive nor extend them. *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

On August 7, 2019, the district court entered a judgment dismissing Allan Widdifield's petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Any notice of appeal was due to be filed on or before September 6, 2019. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). The notice of appeal, dated September 29, 2019, and filed in the district court on October 7, 2019, is late.

In response to this court's jurisdictional show-cause order, Widdifield asserts the following: his former counsel advised him to file a petition for a writ of certiorari with the United States Supreme Court; he believed he had ninety days to file the petition for a writ of certiorari; "[w]hile seeking advice and assistance from a fellow inmate on September 3, 2019, [he] learned that [he] must first file an Application for Certificate of Appealability before a Writ of Certiorari to the United States Supreme Court and contrary to the misinformation provided to [him] by [his] former attorney"; on September 4, 2019, a "violent disturbance erupted" between inmates in the prison yard, and the prison was placed on lockdown; during the lockdown, "[a]ccess to legal library facilities, to the mailroom (and even the mailbox) was terminated and [prisoners] were only allowed to move to-and-from the dining area for meals only under escourt [sic] and tight security"; after the lockdown ended on September 9, 2019, and normal operations resumed, he "immediately sought the advice and assistance of an inmate legal aide to assist [him] in preparing [his] documents"; and, on September 23, 2019, the prison was on lockdown again, "and access to areas necessary to generate any legal pleading was cut-off during that time." Widdifield asserts that all of the above events "cost [him] several days of precious time to prepare the papers [before this court]."

Widdifield is asking this court to find excusable neglect and to extend the time for filing his notice of appeal. We have no authority to do so. *See* 28 U.S.C. § 2107; Fed. R. App. P. 26(b)(1). Only the district court may do so, and only under limited circumstances and for a limited time. 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5); *see also Martin v. Sullivan*, 876 F.3d 235, 236-37 (6th Cir. 2017) (per curiam). Because the time to file a motion for an extension of time in the district court has passed, Widdifield has no recourse to save this late appeal. *See* 28 U.S.C. § 2107(c). Compliance with § 2107 is a mandatory jurisdictional prerequisite that this court may neither waive nor extend. *Bowles*, 551 U.S at 214. We therefore lack jurisdiction over this appeal.

Accordingly, it is ordered that the appeal is **DISMISSED.**

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:19-CV-00009-JHM-HBB

ALAN WIDDIFIELD **MOVANT/DEFENDANT**

VS.

KEVIN MAZZA, Warden **RESPONDENT/PLAINTIFF**

JUDGMENT

In accordance with the order of the Court, it is hereby **ORDERED AND ADJUDGED** as follows:

(1) The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) is **DISMISSED WITH PREJUDICE**, and judgment is entered in favor of Respondent.

(2) The issuance of a Certificate of Appealability pursuant to U.S.C. § 2253(c)(1) and Fed. R. App. P. 22(b)(1) is **DENIED** as to all claims; and

(3) This is a **FINAL** judgment and the matter is **STRICKEN** from the active docket of the Court.

Joseph H. McKinley Jr., Senior Judge
United States District Court

August 7, 2019

Copies: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:19-CV-00009-JHM-HBB

ALAN WIDDIFIELD **MOVANT/DEFENDANT**

VS.

KEVIN MAZZA, Warden **RESPONDENT/PLAINTIFF**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed thereto, and the Court having considered the same:

IT IS HEREBY ORDERED that the Movant's objections are overruled and the Court adopts the Findings of Fact, Conclusions of Law, and Recommendation as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus (DN 1) is **DISMISSED.**

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED.**

Joseph H. McKinley Jr., Senior Judge
United States District Court

August 7, 2019

Copies to: Counsel

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:19-CV-00009-JHM-HBB

ALAN WIDDIFIELD — MOVANT/DEFENDANT

VS.

KEVIN MAZZA, Warden — RESPONDENT/PLAINTIFF

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

BACKGROUND

The movant/defendant, Alan Widdifield, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("petition") (DN 1). Respondent/Plaintiff, Kevin Mazza, has filed a response in opposition (DN 9). Widdifield filed a reply (DN 12). The District Judge referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B) (DN 4).

The undersigned concludes the record is adequately developed. An evidentiary hearing is not necessary to address the claims raised in the petition. This matter is ripe for determination. For the reasons set forth below, the undersigned recommends that the Court deny Widdifield's petition and not issue a Certificate of Appealability as to the petition. The petition is time barred.

FINDINGS OF FACT

On May 12, 2012, law enforcement officers approached Widdifield's residence to execute a warrant related to a theft case in Hancock Circuit Court. Upon encountering Widdifield, officers served the warrant and placed him under arrest. The officers claim that at that time Widdifield

consented to a search of the property and led the officers on a walk-through of the curtilage surrounding his house. The search disclosed firearms and evidence of methamphetamine manufacturing. After the search of the curtilage was complete, officers attempted to continue the search inside Widdifield's home, but his wife, Jacqueline Widdifield refused. Officers obtained a search warrant based on the items discovered during the search of the curtilage and eventually searched the house, finding methamphetamine and more firearms. Widdifield v. Commonwealth, No. 2013-SC-000664-MR, 2014 Ky. Unpub. LEXIS 64 (Aug. 21, 2014)

Widdifield was subsequently indicted on several drug and firearm related charges. He moved to suppress the evidence discovered on the property surrounding his house, denying he consented to the search. Widdifield added that the evidence found within his home should be suppressed because the warrant justifying the search was obtained using illegally acquired evidence—or the fruit of a poisonous tree. Widdifield's motion to suppress was denied and the evidence was introduced at trial. Widdifield was found guilty of Manufacturing Methamphetamine (firearm enhanced), Trafficking in a Controlled Substance in the First Degree (firearm enhanced), Unlawful Possession of Anhydrous Ammonia in Container Other that Approved Container with Intent to Manufacture Methamphetamine, and Possession of Drug Paraphernalia (firearm enhanced). Id.

Widdifield collaterally attacked his conviction and petitioned the court for a new trial via an RCr 11.42 motion. The motion alleged a faulty waiver of dual representation[1] and three instances of ineffective assistance of counsel: 1) for failing to investigate and call expert witnesses; 2) failing to call expert witness at the suppression hearing; and 4) failing to notify the defendants about an offer to settle the case. The 11.42 motion was denied by the trial court and subsequently

[1] Jacqueline Widdifield was tried with Alan Widdifield and both were represented by Bill Barber.

appealed by Widdifield, dropping the faulty waiver of dual representation argument and ineffective assistance of counsel for failure to notify Widdifield of an offer to settle the case. The Kentucky Court of Appeals affirmed the trial court and affirmed Widdifield's sentence. Id. The Supreme Court of Kentucky denied review. Widdifield v. Commonwealth, No. 2018-SC-000072-D, 2018 Ky. LEXIS 148 (Apr. 18, 2018). Widdifield has now filed this § 2254 petition for federal habeas relief from his conviction by the Commonwealth of Kentucky.

DISCUSSION

Mazza argues that Widdifield's petition is time barred. In his reply, Widdifield offers a bare assertion that his petition is timely filed (DN 12 PageID # 303). Under AEDPA there is a one-year statute of limitations that applies to a petition for writ of habeas corpus filed by a state prisoner. 28 U.S.C. § 2244(d)(1). The statute of limitations reads as follows:

> (1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
>
> (C) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The Supreme Court of the United States has ruled that if a state prisoner files a petition for writ of certiorari then the conclusion of direct appeal contemplated by § 2244(d)(1) occurs when the petition is denied, or the conviction affirmed on the merits. Jimenez v. Quarterman, 55 U.S. 113, 119 (2009). Widdifield did not file a writ. Therefore, the conviction became final when the time for filing a writ of certiorari expired. Jimenez, 555 U.S. at 119; Bronaugh v. Ohio, 235 F.3d 280, 283 (6th Cir. 2000) (one-year period of limitation in § 2244(d)(1)(A) does not begin to run until the time expires for filing a petition for writ of certiorari). Rule 13(1) of the Rules of the Supreme Court of the United States states that a petition for writ of certiorari to review a state court judgment "is timely when it is filed with the Clerk of the Court within 90 days of entry of the judgment." Rule 13(3) directs that "the time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." The Sixth Circuit has held that "the date of the entry of the judgment or order" in Supreme Court Rule 13(3) refers to the date on which the Kentucky Supreme Court issued its opinion and order affirming a defendant's conviction, not 21 days later when the opinion becomes final under Ky. R. Civ. Pr. 76.30(2)(a). Giles v. Beckstom, 826 F. 3d 321, 323-24 (6th Cir. 2016).

Here, the Kentucky Supreme Court denied Widdifield's direct appeal on August 21, 2014. Widdifield v. Kentucky, 2014 WL 4160228. The decision became final on that date. See Giles, 826 F. 3d 321. Under § 2244(d)(1) the conclusion of the direct appeal occurred 90 days later on November 20, 2014 after the window for filing for a writ of certiorari closed. Therefore, the one-year statute of limitations for §2254 petitions expired November 21, 2015. But Widdifield did not file the subject petition until January 30, 2019 (DN 1), more than three years after the statute of limitations expired.

Notably, the time during which a properly filed application for collateral review of a state conviction is pending will not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2). But this does not solve Widdifield's timeliness problem because he did not file his RCr 11.42 motion for collateral review until 18 months after the § 2244(d)(1) statute of limitations expired. This delay foreclosed his opportunity to file a timely federal habeas petition. Widdifield first filed a *pro se* §2254 petition on July 19, 2018. See DN 1, Widdifield v. Commonwealth, 4:18-CV-116-JHM. Widdifield offers nothing but a bare assertion that his petition was timely filed. This assertion is unsupported by the record.

In Slack v. McDaniel, the Supreme Court established a two-pronged test that is used to determine whether a Certificate of Appealability should issue on a habeas claim denied on procedural grounds. 529 U.S. 473, 484-485 (2000). To satisfy the first prong of the Slack test, Widdifield must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 484. To satisfy the second prong, Widdifield must show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[2] Id. The Court need not conduct the two-pronged inquiry in the order identified or even address both parts if Widdifield makes an insufficient showing on one part. The undersigned determines that no jurists of reason would find it debatable whether jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. Therefore, no Certificate of Appealability should be issued.

[2] "Where a plain procedural bar is present, and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

RECOMMENDATION

For the foregoing reasons, it is recommended that Widdifield's § 2254 petition (DN 1) be **DENIED** as time barred and that a Certificate of Appealability be **DENIED**.

H. Brent Brennenstuhl

H. Brent Brennenstuhl
United States Magistrate Judge

July 2, 2019

Copies: Counsel

APPENDIX D

D

Supreme Court of Kentucky

2018-SC-000072-D
(2016-CA-001514 & 2016-CA-001515)

ALLAN WIDDIFIELD, ET AL. — MOVANTS

V. — HANCOCK CIRCUIT COURT
2012-CR-00040 & 2012-CR-00041

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: April 18, 2018.

CHIEF JUSTICE

Widdifield v. Commonwealth, 2018 Ky. LEXIS 148

Copy Citation

Supreme Court of Kentucky

April 18, 2018, Decided

2018-SC-000072-D

Reporter
2018 Ky. LEXIS 148 *

ALLAN **WIDDIFIELD**, ET AL. v. COMMONWEALTH OF KENTUCKY

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: **[*1]** HANCOCK.
Widdifield v. Commonwealth, 2018 Ky. App. Unpub. LEXIS 20 (Ky. Ct. App., Jan. 12, 2018)

Opinion

DISCRETIONARY REVIEW DENIED.

APPENDIX E

RENDERED: JANUARY 12, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001514-MR

ALLAN WIDDIFIELD — APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 12-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2016-CA-001515-MR

JACQUELINE WIDDIFIELD — APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 12-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

DIXON, JUDGE: Allan Widdifield and his wife, Jacqueline Widdifield, each appeal from separate orders of the Hancock Circuit Court denying their motions for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

In May 2012, law enforcement officers executed a search warrant on Appellants' property. The search revealed methamphetamine, evidence of methamphetamine manufacturing, and numerous firearms. As a result, Appellants were indicted, and they retained attorney Bill Barber to represent them. At a pretrial suppression hearing, the investigating officers asserted Allan had walked with them around the perimeter of the property, where the officers observed evidence of methamphetamine manufacturing. Allan testified, vehemently denying he allowed officers to walk around the property. Allan presented a video recording from his home surveillance camera to establish the officers immediately detained him after arriving at the property. The Commonwealth objected to the admissibility of the video, noting it was not a continuous recording of the events because the camera was motion-activated. The court denied the motion to suppress, but allowed Appellants to present their video surveillance recording to

the jury during trial. At their joint trial, Allan and Jacqueline both testified and presented a defense implying law enforcement officers had manipulated or planted the drug-related evidence found on their property. On direct examination, Allan testified at length regarding his version of events and demonstrated his theory of the case utilizing still photos captured from the surveillance video. Allan addressed each item of evidence seized, and he repeatedly disputed the veracity of the evidence, contending a methamphetamine lab was not on his property.[1]

The jury found Allan guilty of manufacturing methamphetamine (firearm enhanced), first-degree trafficking in a controlled substance (firearm enhanced), unlawful possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, and possession of drug paraphernalia (firearm enhanced). Jacqueline was convicted of the same offenses based on complicity. Allan and Jacqueline were both sentenced to twenty years' imprisonment. The Kentucky Supreme Court affirmed both convictions on direct appeal in separate unpublished opinions.[2]

In May 2016, Appellants, represented by new attorneys, each filed a motion to vacate their conviction due to ineffective assistance of counsel. The trial

[1] Jacqueline also testified and denied the drug-related evidence belonged to them.

[2] *A. Widdifield v. Commonwealth*, 2013-SC-000664-MR, 2014 WL 4160228 (Ky. Aug. 21, 2014) and *J. Widdifield v. Commonwealth*, 2013-SC-000663-MR, 2014 WL 4656840 (Ky. Sept. 18, 2014).

court held an evidentiary hearing and heard testimony from Appellants and Barber. The court rendered an order denying RCr 11.42 relief, and this appeal followed.

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id.* at 687. The standard for reviewing counsel's performance is whether the alleged conduct fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id.* at 688. To establish actual prejudice, a movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

We are mindful that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). There is a strong presumption that counsel performed competently; consequently, it is the movant's burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

On appeal, Appellants contend Barber rendered ineffective assistance by failing to review discovery with them prior to trial, failing to retain a video surveillance expert, and failing to investigate the identity of law enforcement officers on the surveillance video.

First, Appellants argue Barber never reviewed discovery with them or prepared them for trial. Barber testified he was involved with Appellants' case for two years. He explained Appellants were not interested in negotiating a plea agreement because it would involve forfeiture of their property. According to Barber, he met with Appellants numerous times and thoroughly discussed every aspect of the evidence with them. Furthermore, Appellants' trial testimony contradicts their allegation of ineffective assistance. Allan testified exhaustively on direct examination as to each piece of evidence introduced by the Commonwealth. Depending on the piece of evidence at issue, he either vehemently denied ownership, or he attempted to provide an explanation for owning household items that could also be used to manufacture methamphetamine. We are mindful that, where an evidentiary hearing was conducted on a motion for post-conviction relief, "a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). In this case, the trial court found

Barber's testimony to be the most credible, and the record clearly supports the court's finding. The Appellants failed to establish Barber rendered ineffective assistance on this issue.

Appellants next assert Barber failed to retain an expert witness to explain the functionality and accuracy of the video surveillance system. They contend Allan was not capable of explaining to the jury how the system worked, and they speculate an expert witness could have explained the evidence more thoroughly than Allan. At the evidentiary hearing, Allan testified that he was "pretty ignorant" as to how the camera recording worked. In contrast, Barber testified he did not consider retaining an expert because Allan understood how the camera worked and testified about it at trial. Further, the record shows Allan clearly testified at trial that the camera only recorded when it sensed motion, and he explained he downloaded the digital video from the camera and transferred the video to a DVD for the purpose of trial. Appellants' argument that an expert, rather than Allan, should have presented the evidence is speculative and without merit. "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." *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) *overruled on other grounds by*

Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009). There was no ineffective assistance of counsel on this issue.

Appellants also contend counsel was ineffective for failing to investigate their theory the surveillance video showed two unknown police officers allegedly carrying a bag of methamphetamine into the residence during the search. In their post-conviction motions, Appellants failed to identify the officers, and, aside from their own self-serving testimony, they did not present any evidence supporting this allegation at the hearing. In his testimony, Barber did recall that Allan, at one point, believed an unknown officer was visible on the video. Barber asserted he considered the matter, but he was unable to determine the identity of the unknown person Allan thought was on the video. It is well-settled trial counsel "has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances[.]" *Haight*, 41 S.W.3d at 446, *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Under the circumstances presented here, Barber's decision was reasonable and did not constitute ineffective assistance.

Finally, Appellants allege Barber failed to present their defense theory and "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing[.]" *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984).

Our review of the record refutes Appellants' claims. Barber clearly presented to the jury Appellants' theory they were framed, and he effectively cross-examined the Commonwealth's witnesses. Further, Barber conducted an extremely thorough direct examination of Allan, whose testimony conveyed his belief the police had planted incriminating evidence at his residence. Although Appellants are now dissatisfied with Barber's performance, the record clearly reflects Barber rendered effective assistance at trial. The trial court properly denied Appellants' RCr 11.42 motions.

For the reasons stated herein, the orders of the Hancock Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT
Allan Widdifield:

Rick Hardin
Hardinsburg, Kentucky

BRIEF FOR APPELLANT
Jacqueline Widdifield:

J. Anthony Cash
Shepherdsville, Kentucky

BRIEFS FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky

Widdifield v. Commonwealth, 2018 Ky. App. Unpub. LEXIS 20

Copy Citation

Court of Appeals of Kentucky

January 12, 2018, Rendered

NO. 2016-CA-001514-MR AND NO. 2016-CA-001515-MR

Reporter

2018 Ky. App. Unpub. LEXIS 20 * | 2018 WL 385540

ALLAN **WIDDIFIELD**, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE AND JACQUELINE **WIDDIFIELD**, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Subsequent History: Review denied by **Widdifield** v. Commonwealth, 2018 Ky. LEXIS

the camera was motion-activated. The court denied the motion to suppress, but allowed Appellants to present their video surveillance recording to the jury during trial. At their joint trial, Allan and Jacqueline both testified and presented a defense implying law enforcement officers had manipulated or planted the drug-related evidence found on their property. On direct examination, Allan testified at length regarding his version of events and demonstrated his theory of the case utilizing still photos captured from the surveillance video. Allan addressed each item of evidence seized, and he repeatedly disputed the veracity of the evidence, contending a methamphetamine lab was not on his property.[1]

The jury found Allan guilty of manufacturing methamphetamine (firearm enhanced), **[*3]** first-degree trafficking in a controlled substance (firearm enhanced), unlawful possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, and possession of drug paraphernalia (firearm enhanced). Jacqueline was convicted of the same offenses based on complicity. Allan and Jacqueline were both sentenced to twenty years' imprisonment. The Kentucky Supreme Court affirmed both convictions on direct appeal in separate unpublished opinions.[2]

In May 2016, Appellants, represented by new attorneys, each filed a motion to vacate their conviction due to ineffective assistance of counsel. The trial court held an evidentiary hearing and heard testimony from Appellants and Barber. The court rendered an order denying RCr 11.42 relief, and this appeal followed.

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id.* at 687. The standard for reviewing counsel's performance is whether the alleged conduct **[*4]** fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id.* at 688. To establish actual prejudice, a movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

We are mindful that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). There is a strong presumption that counsel performed competently; consequently, it is the movant's burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

On appeal, Appellants contend Barber rendered ineffective assistance by failing to review discovery with them prior to trial, failing to retain a video surveillance expert, and failing to investigate the identity of law enforcement officers on the surveillance video.

First, Appellants argue Barber never reviewed discovery with them or prepared them for trial. Barber testified he was involved with Appellants' case for two years. **[*5]** He explained Appellants were not interested in negotiating a plea agreement because it would involve forfeiture of their property. According to Barber, he met with Appellants numerous times and thoroughly discussed every aspect of the evidence with them. Furthermore,

Our review of the record refutes Appellants' claims. Barber clearly presented to the jury Appellants' theory they were framed, and he effectively cross-examined the Commonwealth's witnesses. Further, Barber conducted an extremely thorough direct examination of Allan, whose testimony conveyed his belief the police had planted incriminating evidence at his residence. Although Appellants are now dissatisfied with Barber's performance, the record clearly reflects Barber rendered effective assistance at trial. The trial court properly denied Appellants' RCr 11.42 motions.

For the reasons stated herein, the orders of the Hancock Circuit Court are affirmed.

ALL CONCUR.

Footnotes

1 Jacqueline also testified and denied the drug-related evidence belonged to them.

2 *A. **Widdifield** v. Commonwealth*, 2013-SC-000664-MR, 2014 Ky. Unpub. LEXIS 64, 2014 WL 4160228 (Ky. Aug. 21, 2014) and *J. **Widdifield** v. Commonwealth*, 2013-SC-000663-MR, 2014 Ky. Unpub. LEXIS 83, 2014 WL 4656840 (Ky. Sept. 18, 2014).

APPENDIX F

64

Copy Citation

Supreme Court of Kentucky

August 21, 2014, Rendered

2013-SC-000664-MR

Reporter

2014 Ky. Unpub. LEXIS 64 * | 2014 WL 4160228

ALLAN **WIDDIFIELD**, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Subsequent History: Related proceeding at **Widdifield** v. Commonwealth, 2014 Ky. Unpub. LEXIS 83 (Ky., Sept. 18, 2014)
Post-conviction relief denied at **Widdifield** v. Commonwealth, 2018 Ky. App. Unpub. LEXIS 20 (Ky. Ct. App., Jan. 12, 2018)

Prior History: **[*1]** ON APPEAL FROM HANCOCK CIRCUIT COURT. HONORABLE RONNIE C. DORTCH, JUDGE. NO. 12-CR-00040.

Core Terms

search warrant, trial court, firearm, curtilage, enhanced, consented, manufacture methamphetamine, methamphetamine, suppress, ammonia, fruit of the poisonous tree, controlled substance, suppression hearing, motion to suppress, warrantless search, consent to search, anhydrous, searched, cruiser, arrest

Counsel: COUNSEL FOR APPELLANT: Albert William Barber, III.

COUNSEL FOR APPELLEE: Jack Conway, Matthew Robert Krygiel.

he advised Appellant that he had received information about drug activity on Appellant's property from the Owensboro Police Department.

Emmick further testified that, after being read his *Miranda* rights, Appellant acknowledged that there was drug contraband on the premises. According to Emmick, Appellant led the officers to a shed where a loaded shotgun and a tub containing sludge residue, a by-product of the manufacture of methamphetamine, were found. Emmick also stated that Appellant showed the officers to the rear of the shed where a stove and other items (camping fuel, coffee filters, ether, and liquid drain cleaner) used to manufacture methamphetamine were found. At this point, Appellant allegedly told Emmick that another person, whom he would not name, had been manufacturing methamphetamine on his property. Thereafter, Emmick asked Appellant if any anhydrous ammonia was on the property, and **[*5]** Appellant admitted that some ammonia had been on the property but that it was no longer present. Appellant walked Emmick near a tree line and showed him where anhydrous ammonia had once been buried but was no longer located.

Continuing with Emmick's account of the search, he testified that he asked for and received permission from Appellant to search the house. However, Jacqueline refused to allow the officers to enter the house. Appellant allegedly informed Emmick that Jacqueline was probably refusing entry because there may have been some marijuana in the house. Eventually, Appellant withdrew his consent to search the residence, and Emmick proceeded to obtain a search warrant. It took a couple of hours for the officers to obtain the search warrant but, after some time, they were able to enter the residence. Once inside, law enforcement officers found numerous firearms and a lockbox containing methamphetamine.

Appellant's recounting of the circumstances surrounding the search of his house and the surrounding property differed greatly from Emmick's testimony. At the suppression hearing, Appellant testified that he never gave the officers consent to search his property. According to Appellant, **[*6]** the officers immediately arrested him on the unrelated theft warrant, and he was placed in the back of Emmick's cruiser. Appellant further testified that he did not exit Emmick's cruiser until he was placed in Trooper Gaither's cruiser while Emmick left the scene to obtain a search warrant. Appellant claimed that he never consented to any type of search and that he never took Emmick on a walk-through of the property. Appellant also attempted to use motion-sensored video from his property surveillance system to corroborate his claim. However, the video did not contain any audio, was short in duration, and had multiple gaps in time.

Jacqueline **Widdifield** also testified at the suppression hearing. She stated that she witnessed Appellant get arrested and placed in Emmick's car. She indicated that Appellant was in the back of a cruiser the entire evening and that he never led the officers on a walk-through of the property.

to Appellant, the competing witness testimony equally offsets, thus, the Commonwealth failed to prove consent by a preponderance of the evidence. We disagree.

It is the province of the trial court to weigh the credibility of witnesses and draw reasonable inferences and factual findings from their testimony. *See* RCr 9.78; *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). The discretion of the trial court is not diminished when testimony at an evidentiary hearing is conflicting or inconsistent. As this Court noted in *Hampton v. Commonwealth*, a case concerning competing versions of whether a search was consented to,

> While the court was ultimately required to choose between various competing and inconsistent versions of the events, that does not undermine the decision. In fact, that is the essential function of the trial court as the trier of fact when presented with preliminary questions such as whether consent was voluntarily given.

231 S.W.3d at 749.

In this case, the trial court heard competing, contradictory stories from Deputy Emmick and the Widdifields as to **[*10]** the circumstances surrounding the search of the curtilage of the Widdifields' house. The trial court ultimately determined that Emmick's version of the facts was more credible. There was substantial evidence to support the trial court's decision. Emmick was able to recall in detail various statements made by Appellant during the walk-through of his property. The trial court also found that Appellant's surveillance camera evidence lacked probative value. Because Emmick's testimony amounted to substantial evidence, we conclude that the trial court's finding that Appellant consented to the search was not clearly erroneous. *See, e.g.*, *Turley*, 399 S.W.3d at 418; *Diehl*, 673 S.W.2d at 712. Thus, the trial court correctly denied Appellant's motion to suppress the evidence discovered in the officers' search of the curtilage of Appellant's home.

2. Fruit of the Poisonous Tree

Since the officers' search of the curtilage was legally proper, the search warrant for Appellant's home, which was obtained on the basis of the firearms and methamphetamine ingredients found on the curtilage, was valid, and the items recovered in the Widdifields' home pursuant to the search warrant were not "fruit of the poisonous tree." Therefore, the trial court did not **[*11]** err by denying Appellant's request to suppress the evidence discovered in the Widdifields's home.

B. The Search Warrant Issued was Constitutionally Sufficient

3 Two search warrants were issued **[*13]** in this case. Appellant's brief only challenges the constitutionality of the first search warrant obtained May 10, 2012, which was the subject of Appellant's first motion to suppress. Appellant filed an amended motion to suppress relating to the second warrant, which Appellant admits is not the subject of this appeal. Thus, our consideration of Appellant's arguments on appeal is limited to the first search warrant. Nonetheless, we note that nothing in the second warrant authorizes a blanket search of all individuals located on Appellant's property.

Additional material from this filing is available in the Clerk's Office.