

RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001213-MR

STEVEN EUGENE OVERTURF

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES DANIELS, JUDGE
ACTION NO. 96-CR-0050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, JOHNSON, AND KNOX, JUDGES.

JOHNSON, JUDGE: Steven Overturf (Overturf) appeals pro se from orders of the McCracken Circuit Court entered on May 5, 1998, that denied his motion for an evidentiary hearing and his motion to vacate, set aside or correct sentence made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. As Overturf's allegations were not refuted by the record, we reverse and remand for an evidentiary hearing on his RCr 11.42 motion.

In August 1995, Overturf sold two syringes filled with liquid morphine to an undercover police officer. On February 6, 1996, a McCracken County Grand Jury indicted Overturf for

trafficking in a controlled substance in the first degree (Kentucky Revised Statute (KRS) 218A.1412). Overturf accepted the Commonwealth's offer to plead guilty in return for a recommended prison sentence of six years. The circuit court sentenced Overturf to a six-year prison term to run consecutively with his sentence under 95-CR-00305.

On January 29, 1998, Overturf filed: (1) a motion to vacate sentence under RCr 11.42; (2) a motion requesting specific findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedure (CR) 41.02, CR 52.01, and CR 52.04; (3) a motion for an evidentiary hearing on his RCr 11.42 motion; (4) a motion for appointment of counsel; and (5) a motion to proceed in forma pauperis. On February 23, 1998, the circuit court granted Overturf's motion for appointment of counsel and motion to proceed in forma pauperis. Overturf's appointed counsel moved for an evidentiary hearing and renewed the previous motions. On May 5, 1998, the circuit court denied the motion for an evidentiary hearing and the RCr 11.42 motion. This appeal followed.

On appeal, Overturf argues that (1) he was denied effective assistance of counsel; and (2) the trial court erred when it denied his motion for an evidentiary hearing. Our standard of review is well established and it is limited to determining whether the RCr 11.42 motion sets forth proper grounds for relief that cannot be resolved on the record. If it does, then the trial court must hold an evidentiary hearing to

develop the record. RCr 11.42(5); Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-744 (1993). From our review of the record, we do not see where Overturf's allegations are refuted by the record. Accordingly, we must proceed with an inquiry as to whether Overturf's unrefuted allegations, assuming they are true, establish a right to relief.

In an ineffective assistance of counsel claim, Overturf must first prove that his counsel's performance was deficient, and second, that he was prejudiced by the deficiencies such that there exists a reasonable probability that, but for counsel's errors, he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985); accord Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-728 (1986). Specifically, Overturf alleges that his trial counsel erroneously advised him on the defense of entrapment (KRS 505.010) and failed to prepare a defense. It is fundamental that defense counsel must investigate all apparently substantial defenses available to a defendant. Beasley v. United States, 491 F.2d 687 (6th Cir.1974).

In Overturf's "MEMORANDUM IN SUPPORT" of his RCr 11.42 motion, he states: ". . . but counsel also informed Movant, that Movant's suggestion to mount an "Entrapment" defense was not available to him, because Kentucky does not have an Entrapment defense law." The record does not refute Overturf's allegations of his trial counsel's errant advice as to the non-availability of an entrapment defense in his case. See KRS 505.010. The

allegations, if true, would form a proper basis for relief under an RCr 11.42 claim of ineffective assistance of counsel.

The Commonwealth argues that Overturf waived his claim of ineffective assistance of counsel when he entered a guilty plea. The Commonwealth incorrectly relies on Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970). Quarles, supra, is often cited for the rule of law that "the effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense." Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 55 (1990). The Commonwealth focuses on the effect of a guilty plea without first determining whether the plea is valid. A guilty plea is valid if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). It logically follows that a defendant must receive effective assistance of counsel in order to evaluate and choose among the available courses of action.

For the reasons stated above, we reverse the orders of the McCracken Circuit Court denying Overturf's motion for an evidentiary hearing and his RCr 11.42 motion and remand for an evidentiary hearing on the RCr 11.42 motion.

BUCKINGHAM, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING. I respectfully dissent.

Appellant, in his brief, maintains if his trial counsel had acted

more diligently, appellant "could have very well had a possible entrapment defense." Appellant then argues if his trial counsel had investigated his case and interviewed witnesses, he would have learned that appellant "was nothing more than a drug addict and not a drug dealer." Appellant admits that he sold drugs to a confidential informant. As observed in Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967), concerning RCr 11.42 proceedings:

There is a "heavy burden" on the movant in such a proceeding. He must do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this postconviction proceeding.

Id. at 616. (Citations omitted).

I do not believe appellant's contention that he was deprived of a "possible" entrapment defense is sufficient to justify an evidentiary hearing in this matter, particularly where he has entered a guilty plea to the charges. See Gregory G. Sarno, Annotation, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense, 8 A.L.R.4th 1160 (1981).

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