

RENDERED: June 25, 1999; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001511-MR

NATHANIEL TAYLOR BARTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN SHAKE, JUDGE  
ACTION NO. 96-CR-00475

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Nathaniel T. Barton (Barton) appeals from an order of the Jefferson Circuit Court entered May 27, 1998, denying his RCr 11.42 motion to vacate judgment. We affirm.

On February 27, 1996, Barton was indicted by a Jefferson County Grand Jury on the following charges:

1. Trafficking in a controlled substance within 1000 yards of a school while in the possession of a firearm, subsequent offender;

2. Complicity to illegal possession of drug paraphernalia while in the possession of a firearm, subsequent offender;
3. Possession of a firearm by a convicted felon; and
4. Persistent Felony Offender in the second degree (PFO II).

On June 17, 1996, Barton's co-defendant Angela Burcham (Burcham) pled guilty to trafficking in marijuana under eight (8) ounces and one count of possession of drug paraphernalia and agreed to testify against Barton.

On July 29, 1996, Barton pled guilty to the trafficking and paraphernalia charges in exchange for dismissal of firearms enhancements of those charges, dismissal of the possession of a firearm by a convicted felon charge and dismissal of the PFO II charge. That same day the trial court accepted Barton's plea after a colloquy on the record. On September 13, 1996, the trial court sentenced Barton to a nine (9) year prison term.

On March 17, 1998, Barton filed a motion to vacate his sentence pursuant to RCr 11.42 alleging that his guilty plea was coerced by his trial counsel's ineffective assistance. Originally, the trial court scheduled an evidentiary hearing on the matter. However, on June 9, 1998, the trial court vacated the order scheduling the evidentiary hearing and issued an opinion and order denying Barton's motion. This appeal followed.

Barton's grounds for appeal in this case are two-fold. First, Barton alleges that his trial counsel ineffectively assisted him by failing to:

1. move to suppress his confession;
2. move to suppress evidence seized during the arrest;
3. move the Commonwealth to identify its informant;
4. secure copies of statements that he and others made at the time of arrest; and
5. discuss with him inconsistencies in the evidence and the possible admissibility thereof.

Second, Barton alleges that his trial counsel's lack of exploration and discovery into the Commonwealth's proof made it impossible for him to intelligently and knowingly waive his rights and enter into a guilty plea.

After thoroughly reviewing the record and evidence before this Court, we adopt the well-reasoned opinion and order of the trial court entered June 9, 1998, and incorporate by reference a portion of said opinion as follows:

...

Petitioner makes a motion to vacate judgment, pursuant to RCr 11.42. The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding provided in RCr 11.42. Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967). It is unnecessary for the Court to order an evidentiary hearing, since the material issues of fact can fairly be determined on the face of the record. Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965).

...

In order to prove ineffective assistance of counsel, the movant must meet a two-part test.

He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.

Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990), citing, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The same standard applies whether the conviction resulted from trial or plea. Id. "In determining whether the degree of skill exercised by the attorney meets the proper standard of care, the attorney's performance is judged by the degree of its departure from the quality of conduct customarily provided by the legal profession." Id., citing, Beasley v. United States, 491 F.2d 697 (6<sup>th</sup> Cir. 1974); Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982). Because even the "best criminal defense attorneys would not defend a particular client in the same way," whatever allegations are made are subject to the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689; 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694-95 (1984). "Effective assistance of counsel does not guarantee error-free representation nor does it deny to counsel freedom of discretion in

determining the means of presenting his client's case." Ramsey v. Commonwealth, Ky., 399 S.W.2d 475, 475 (1966).

There is nothing of an evidentiary nature in the record which indicates that Petitioner was provided ineffective assistance of counsel. The record reveals that Petitioner's trial counsel exercised the proper standard of care during his representation. The petitioner has not shown that, had his trial counsel conducted his representation differently, the outcome would have been more favorable for him. The Petitioner's contentions that this trial counsel failed to challenge the admissibility of the Petitioner's statements, statements by others in the apartment and the physical evidence recovered; that his trial counsel failed to secure the identity of the confidential informant, as well as discovery of the taped statements given by the Petitioner and Mr. Heflin, are without merit. Further, Petitioner's contention that his trial counsel failed to discuss possible defenses with him and coerced him into accepting the Commonwealth's offer is without merit.

The Petitioner responded affirmatively to the Court's inquiry as to whether he was satisfied in all respects with his trial counsel's advice. He also signed before the Court, a statement which asserted that he believed his attorney had done all that anyone could do to counsel and assist him, and that there was nothing about the proceedings in this case against him which he did not fully understand. In Harris v. Commonwealth, Ky. App., 688 S.W.2d 338 (1984), the court ruled that proof of a defendant taking the above actions was enough to preclude the argument that counsel was unprepared to try the case, and deny the RCr 11.42 motion.

The Petitioner has failed to establish convincingly that he was in any way prejudiced by the way in which his trial counsel represented him or that his trial

counsel's representation was deficient in any way. In fact, the Petitioner received a sentence much less severe than that to which he could have been sentenced had this case gone to trial. Accordingly, the Petitioner's assertion that he was provided ineffective assistance of counsel is refuted by the record on its face.

Petitioner also contends that his waiver of rights was premised on the trial counsel's lack of exploration and discovery into the Commonwealth's proof, making it impossible to intelligently and knowingly waive information, and that by not being told the exculpatory facts, he could not have made a voluntary waiver.

A plea's validity is determined from all the facts and circumstances surrounding its entry. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). The facts and circumstances to be considered include "the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The Court may also consider its personal observations of the accused. Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872, 874 (1977). Where the record shows that the trial court conducted a lengthy colloquy with the defendant, ascertained that he had had a sufficient amount of time to confer with his attorney, and that he had no further questions to ask his attorney, a defendant's post-conviction allegations that his counsel failed to properly investigate his case and pursue possible defenses is without merit. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54-55 (1990).

Viewing the record, it is clear that the Petitioner's guilty plea was voluntary and intelligent. The records shows that the Court conducted a thorough colloquy with the Petitioner. The Court informed the Petitioner about the rights he would be giving up by pleading guilty, and inquired as to whether the defendant was making his guilty plea voluntarily, of which he answered

in the affirmative. The Court also inquired as whether the defendant understood and recognized the effect of his guilty plea, to which he also answered in the affirmative. The defendant also stated that he understood the penalties for the offences to which he was pleading guilty, and that he was satisfied with his trial counsel's advice and had no need to discuss it with him further. The defendant also signed to the motion to enter guilty plea, which declares that the guilty plea is "freely, knowingly, intelligently, and voluntarily made" and that the defendant "understand[s] the nature of this proceeding and all matters contained in this document." Accordingly the motion will be denied.

In addition we note that Barton did not enter into a guilty plea until Burcham, his co-defendant, entered into a guilty plea and agreed to testify against him. Further, by pleading guilty Barton faced only five (5) to fifteen (15) years instead of twenty (20) to life, a significant reduction in possible sentencing. These facts provide additional evidence that Barton's guilty plea was strategic in nature as opposed to the result of ineffective assistance of counsel.

"Whether an attorney fulfills [the Strickland] test is an issue of fact to be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous." Ivey v. Commonwealth, Ky., 655 S.W.2d at 506, 509 (1983). Having thoroughly reviewed the reasoning of the trial court, we do not find its decision was erroneous.

For the foregoing reason, the decision of the trial court is affirmed.

ALL CONCUR.

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