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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002076-MR

JERRY FELKER

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 97-CR-00215

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

JOHNSON, JUDGE: Jerry Felker has appealed from an order of the Hopkins Circuit Court entered on August 21, 2001, denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Felker contends that he received ineffective assistance of counsel when he entered a plea of guilty to two charges of trafficking in marijuana and one charge of possession of drug paraphernalia, which resulted in a total prison sentence of ten years, probated for five years. Felker contends that trial counsel should have

¹ Kentucky Rules of Criminal Procedure.

advised him to withdraw his guilty plea and, additionally, that trial counsel should have investigated as a defense the possibility that his son was the owner of the marijuana and the firearms seized from Felker's residence which resulted in his indictment. Having concluded that trial counsel's representation of Felker was not outside of the wide range of professionally competent assistance, we affirm.

In July 1997 Felker was living in a mobile home with his son, Steve Felker, on David Fitzsimmons Road in Dawson Springs, Hopkins County, Kentucky. On July 30, 1997, in a controlled drug-buy, a confidential informant purchased one-fourth ounce of marijuana from Steve Felker at the residence. On July 31, 1997, the police executed a search warrant of the mobile home. Among other things, police confiscated 16 one-fourth-ounce bags of marijuana and three firearms.

In August 1997 Felker was indicted on one count of trafficking in less than eight ounces of marijuana, second-offense;² one count of possession of drug paraphernalia;³ and one count of trafficking in less than eight ounces of marijuana, second-offense, weapon-enhanced.⁴

² Kentucky Revised Statutes (KRS) 218A.1421(2)(b).

³ KRS 218A.500.

⁴ KRS 218A.1421(2)(b) and KRS 218A.992(1)(a).

During the plea negotiations, it appears that the Commonwealth initially offered to amend the weapon-enhanced, second-offense trafficking to simple second-offense trafficking and to recommend two-year sentences on the two trafficking charges, to run concurrently, and twelve months on the paraphernalia charge, to run concurrently, for a total of two years to serve. Felker sought a recommendation from the Commonwealth that probation be granted; however, the Commonwealth would not commit to a recommendation of probation on a two-year sentence. The Commonwealth then indicated to Felker that if he would agree to a five-year sentence on the trafficking charges, to run concurrently, it would recommend probation. Felker accepted this offer.

However, at the hearing on Felker's guilty plea, the trial court informed Felker that under the concurrent sentencing agreement for the two five-year sentences with a total of five years to serve, probation would not be granted. The trial court, however, informed Felker that if he accepted a five-year sentence on each of the trafficking convictions, to run consecutively, and 12 months on the paraphernalia conviction, to run concurrently, for a total prison sentence of ten years, probation would be granted. Felker accepted this offer, and on April 3, 1998, he was sentenced to a total prison sentence of

ten years and was placed on probation for a period of five years.

On March 15, 1999, the Commonwealth moved to revoke Felker's probation because of his admission that he had violated a condition of probation by using marijuana. Following a hearing, the trial court determined that Felker had violated the terms of his probation by using marijuana, his probation was revoked, and the original ten-year total sentence was imposed.

On December 11, 2000, Felker filed a motion to vacate his sentence pursuant to RCr 11.42 and RCr 10.26. In his motion, Felker alleged that he had received ineffective assistance when trial counsel advised him to accept the plea agreement imposing a total sentence of ten years' imprisonment; that he received ineffective assistance when trial counsel advised him to accept a punishment much greater than expected in exchange for his plea, that the guilty plea should be set aside because he received no benefit from the plea; that he received ineffective assistance when trial counsel failed to request that evidence seized under a search warrant be suppressed; and that he received ineffective assistance when trial counsel failed to pursue as a defense his claim that the marijuana and firearms seized at the residence belonged to his son, and not him.

Following the Commonwealth's response to Felker's motion and Felker's reply to the Commonwealth's response, on

March 28, 2001, the trial court entered an order denying Felker's motion on the issues of ineffective assistance of counsel concerning the plea agreement. The order stated that Felker had made his decision with regard to the plea agreement with "full understanding of the situation." The trial court, however, granted a hearing on the issue of ineffective assistance of counsel concerning the search warrant because of discrepancies in the time-stamps on the warrant and affidavit in comparison with the time the warrant and affidavit were signed by the district judge. A hearing was also granted concerning whether the district judge's signature was genuine.

The trial court subsequently appointed counsel to represent Felker at the hearing. On July 23, 2001, appointed counsel filed a supplement to the original RCr 11.42 motion in which counsel sought to withdraw the allegation of error concerning the warrant on the basis that there was no question regarding the authenticity of the signature of the district judge, and that the time discrepancies were due to a malfunction in the Hopkins District Court time-stamp machine. In the supplement, counsel stated that at the hearing he would instead seek the equitable relief of prerelease probation or the amendment of Felker's sentences to run concurrently. On July 31, 2001, Felker filed a motion to withdraw the supplement and for the withdrawal of appointed counsel.

On August 14, 2001, a hearing was held on the time-stamp and signature issues. On August 21, 2001, the trial court entered an order adopting and ratifying its March 20, 2001, order and denying Felker's motion concerning the issues addressed at the hearing. This appeal followed.

Felker contends that he received ineffective assistance when trial counsel failed to advise him to withdraw his guilty plea when it became apparent that the trial court was going to impose a ten-year total prison term instead of a five-year total prison term which he claims he had been led to believe he would receive in exchange for his guilty plea. Felker also alleges that he received ineffective assistance because his trial counsel failed to adequately investigate as a defense his claim that the drugs and firearms seized from the residence belonged to his son.

The two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense.⁵ In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct

⁵ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

falls within the wide range of reasonable professional assistance [.]"⁶

Where a defendant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,⁷ and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial.⁸

Felker argues that trial counsel was ineffective because he failed to advise Felker to withdraw his guilty plea when it became apparent that the trial court was going to impose a total prison sentence of ten years rather than the five-year sentence that he had been led to expect. Since Felker was convicted of two Class D felonies, he alleges that he received no benefit from the plea agreement because he received the maximum prison term for two Class D felonies - five years' imprisonment on each conviction to run consecutively.

⁶ Strickland, 466 U.S. at 688.

⁷ McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

⁸ Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986).

Felker's claim that he received no benefit from his plea agreement is not supported by the record. First, as a result of the plea agreement the charge for trafficking in marijuana, second-offense, weapon-enhanced, a Class C felony, was reduced to simple second-offense trafficking, a Class D felony. As a result, Felker's maximum potential sentence was reduced from 15 years to ten years. Additionally, as a result of the agreement, Felker received the benefit of probation, which he had actively sought.

Although Felker was entitled to withdraw his guilty plea pursuant to RCr 8.10 once the trial court refused to accept the Commonwealth's initial recommendation, he chose not to do so, and instead readily accepted the trial court's consecutive-sentencing precondition for probation. The record from the hearing on his plea of guilty reflects that Felker understood that he was agreeing to a higher total sentence - ten years instead of five - in return for probation, and that his decision to plead guilty was knowingly, willingly, and voluntarily entered.

A court deciding an ineffectiveness assistance claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of

counsel's conduct.⁹ Advising a defendant to plead guilty does not, in and of itself, constitute ineffective assistance of counsel.¹⁰ A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second-guess should be avoided.¹¹ The reviewing court must look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance.¹²

In consideration of the benefits received under the modified plea agreement - a reduction in one of the charges from a Class C felony to a Class D felony and an assurance of probation - trial counsel's conduct did not fall outside of the wide range of reasonable professional assistance, either by advising Felker to accept the plea, or by failing to advise him to withdraw his guilty plea.

Felker also argues that trial counsel failed to adequately investigate as a defense the possibility that the marijuana and firearms which were seized at his residence belonged to his son. This argument, however, lacks the

⁹ Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), overruled on other grounds, St. Clair v. Roark, Ky., 10 S.W.3d 482, 487 (1999).

¹⁰ Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983).

¹¹ Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998).

¹² Id.

specificity required under RCr 11.42(2). In order to prevail in an RCr 11.42 proceeding, the movant must first allege in the motion specific facts that if true would entitle him to relief.¹³

In both his original RCr 11.42 motion and on appeal Felker fails to specify supporting facts concerning the allegation that trial counsel failed to adequately investigate the possibility of identifying his son as the sole culprit which, if true, would warrant relief. To the contrary, Felker merely raises the vague allegation that trial counsel should have undertaken an investigation with the objective of proving that the marijuana and firearms located in his residence belonged to his son. The allegation does not specify the evidence which trial counsel, through investigation, could have discovered, the nature of the evidence, or the strength of the evidence. There is no statement about the facts which would support Felker's motion. His vague assertions do not rise to the standards required by RCr 11.42(2). Due to his failure to provide factual support as required by RCr 11.42, summary dismissal of that part of his claim was proper.¹⁴

Further, Felker advised the trial court when the guilty plea was entered that he was guilty of the allegations against him. The trial court specifically asked Felker whether

¹³ RCr 11.42(2).

¹⁴ Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 390 (2002).

he was guilty of the allegations charged in the indictment, and he admitted guilt. Once it is determined that a guilty plea was rendered voluntarily and intelligently, the plea confesses everything charged in the indictment.¹⁵ The record discloses that Felker voluntarily, knowingly and intelligently made the decision to plead guilty and was aware of the ramifications.¹⁶

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry Felker, Pro Se
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BRIEF FOR APPELLEE:

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¹⁵ Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223 (1986).

¹⁶ Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).