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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002336-MR
AND
NO. 2002-CA-002367-MR

RODNEY L. NEWCOMB — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NOS. 99-CR-00066 & 99-CR-00077

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

VANMETER, JUDGE: These are related *pro se* appeals from orders of the Carroll Circuit Court denying Rodney Newcomb's motions seeking court records and RCr 11.42 relief.

Newcomb contends in Appeal No. 2002-CA-002336 that he received ineffective assistance of counsel in connection with

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

his plea of guilty to multiple drug-related charges in Action No. 99-CR-66, and in connection with his plea of guilty to second-degree escape and other drug-related charges in Action No. 99-CR-77. Additionally, he contends that the trial court abused its discretion by denying him an evidentiary hearing and appointed counsel on his motion for RCr 11.42 relief, and that the court erred by failing to supplement its order with written findings of fact and conclusions of law. In Appeal No. 2002-CA-002367, Newcomb contends that the trial court erred by denying his motion seeking copies of the court records upon which Appeal No. 2002-CA-002336 is based. We find no merit to Newcomb's contentions and thus affirm the circuit court's orders.

With the assistance of a confidential informant (CI), a Kentucky State Police (KSP) detective conducted a controlled drug buy from Newcomb on August 6, 1999, in Carrollton. A post-arrest search of Newcomb and his vehicle yielded marijuana, crack cocaine, pills, $617 in cash, drug paraphernalia, and a cellular telephone.

Newcomb was at the Carroll County Courthouse, awaiting the return of the indictment relating to the first arrest, when he was arrested on a probation and parole detainer issued by his parole officer. While in the custody of the Carroll County Sheriff, Newcomb asked and was permitted to use the restroom

after emptying the contents of his pockets, which included a bottle of a liquid substance which later was analyzed and determined to be cocaine. Newcomb then escaped, was chased out of the courthouse, and was seized blocks away. Newcomb's vehicle was impounded and a search warrant was issued for its search, resulting in the discovery of the marijuana, pills, and drug paraphernalia which served as the basis for the second indictment against him. On December 13, 1999, Newcomb entered guilty pleas to charges listed in both indictments, and he was sentenced to a total of twenty-five years' imprisonment.

On August 5, 2002, Newcomb filed an RCr 11.42 motion alleging that he received ineffective assistance of counsel. The circuit court denied the motion, stating that on the face of the record, Newcomb's motion "raises no material issues of fact which require a hearing." Appeal No. 2002-CA-002336 followed. The trial court subsequently denied Newcomb's motion seeking court records, and Appeal No. 2002-CA-002367 followed.

In *Strickland v. Washington*,[2] the United States Supreme Court set out the standards by which to consider whether counsel was ineffective in that '[t]he defendant 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

[2] 466 U.S. 668, 689, 104 S.Ct. 2052, 2054, 80 L.Ed.2d 674 (1984).

undermine confidence in the outcome." A successful claim of ineffective assistance of counsel requires a defendant to show both that the counsel's performance was deficient, and that the deficient performance so prejudiced the defense that in the absence of counsel's errors a different result was reasonably probable.[3] If a defendant has entered a guilty plea, a reviewing court must apply *Strickland* by determining whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[4]

Newcomb contends that he was afforded ineffective assistance because counsel allegedly failed to investigate and properly prepare a defense. Newcomb first asserts that an illegal search and seizure occurred when the KSP took telephone recording devices across state lines,[5] and used those devices when the CI permitted his telephone call to Newcomb to be taped. However, Newcomb is not entitled to relief on this ground, as this scenario fits squarely within the facts of *Carrier v. Commonwealth*,[6] in which a panel of this court rejected a claim that the Fourth Amendment was violated when a government agent

[3] 466 U.S. at 689, 104 S.Ct. at 2054.

[4] *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

[5] The KSP entered Indiana where the CI placed a call from either his residence or the residence of his girlfriend.

[6] 607 S.W.2d 115, 117 (Ky.App. 1980).

recorded the defendant's conversation with a government informant who consented to the recording.

Newcomb also contends that trial counsel provided ineffective assistance by failing to seek suppression of the taped evidence on the ground that the KSP violated 18 U.S.C. §2512(1)(a) by carrying a recording device across state lines and thus into interstate commerce. However, as noted by the Commonwealth, the KSP acted within an exception provided by 18 U.S.C §2512(2)(b), which permits

> an officer, agent, or employee of. . . a State, or a political subdivision thereof, in the normal course of the activities of . . . a State, or a political subdivision thereof, to . . . send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

Given this exception, grounds did not exist to support suppression of the evidence under 18 U.S.C. §2512, and counsel did not provide ineffective assistance by failing to seek suppression on this ground.

Next, Newcomb contends counsel provided ineffective assistance by advising him to plead guilty to second-degree escape, which occurs when a person who is "charged with or

convicted of a felony, . . . escapes from custody."[7] However, since a paroled defendant continues to be held on the felony charge(s) which underlies the parole[8] and Newcomb escaped from custody while on parole for a felony conviction, it follows that the escape charge against him was not inappropriate. Further, since Newcomb was facing ten to twenty years' imprisonment upon conviction of the remaining counts, the negotiated plea of five years' imprisonment clearly worked to his advantage and does not support his claim that he was afforded ineffective assistance of counsel.

Newcomb next contends that counsel provided ineffective assistance by failing to seek suppression of the fruits of the search of his impounded vehicle because insufficient evidence existed for the issuance of a search warrant. Newcomb also claims that because the warrant was issued by the trial judge who presided over other pending drug charges against him, the warrant was not issued by a neutral party. We disagree.

In *Illinois v. Gates*,[9] the United States Supreme Court described the totality of the circumstances test as follows:

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[7] KRS 520.030.

[8] *Brown v. Department of Welfare, Division of Probation and Parole*, 351 S.W.2d 183, 184-85 (Ky. 1961).

[9] 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Probable cause was defined by the United States Supreme Court in *Texas v. Brown*[10] as involving:

> a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Newcomb's contention that the underlying affidavit did not set out substantial evidence upon which a neutral party could issue the search warrant is not supported by the record. The affidavit was prepared by the sheriff who took Newcomb into custody and took possession of the liquid removed from Newcomb's pocket. Once the liquid was determined to be cocaine, the sheriff prepared an affidavit to support the issuance of a search warrant for Newcomb's impounded vehicle. The sheriff's

[10] 460 U.S. 730, 742, 103 S.Ct. 1535, 1542, 75 L.Ed.2d 502 (1983).

belief that the vehicle might contain other contraband met the standard of common sense reasoning described in *Brown.*

Further, nothing in the record supports Newcomb's assertion that the trial judge who issued the warrant was nothing more than a "rubber stamp" for the sheriff. Contrary to Newcomb's contention, the mere fact that the issuing judge also presided over another drug trafficking case against Newcomb does not indicate that the judge was anything other than impartial and unbiased. More specifically, no evidence existed of judicial partiality such as that resulting from a judge's involvement in police or prosecutorial activities,[11] or emanating "from some 'extrajudicial source' rather than from participation in judicial proceedings."[12] Newcomb is not entitled to relief on this ground.

Next, we are not persuaded by Newcomb's claims that the circuit court erred during the RCr 11.42 proceeding by denying him an evidentiary hearing, by failing to appoint counsel, by failing to make written findings of fact in

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[11] See *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (the issuing magistrate was a state attorney general who was personally in charge of investigating a murder, and who later acted as chief prosecutor at trial); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) (the issuing magistrate was a town justice who accompanied the investigating officers to the scene of the crime to help in enforcing the warrant).

[12] *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985).

accordance with RCr 52.01, or by denying his motion seeking copies of particular court records.

RCr 11.42(5) states:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing ***and***, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant ***in the proceeding***, including appeal.

(Emphasis added.) Moreover, in *Sanders v. Commonwealth*[13] the Kentucky Supreme Court declared:

> [A] RCr 11.42 movant is not automatically entitled to an evidentiary hearing. An evidentiary hearing is not required concerning issues refuted by the record of the trial court. Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.

(Internal citations omitted.)

Here, the record supports the circuit court's determination that Newcomb's claims were refuted by the record, and that he therefore was not entitled to an evidentiary hearing. Further, as "[i]t has been settled that a movant under RCr 11.42 is not entitled to appointed counsel or to a hearing

[13] 89 S.W.3d 380, 385 (Ky. 2002).

if his motion on its face does not allege facts which, if true, render the judgment void,"[14] it follows that the circuit court did not err by failing to appoint counsel to represent Newcomb during the RCr 11.42 proceeding below.

Newcomb contends that the trial court erred by failing to provide written findings of fact. Although the court's initial denial of Newcomb's motion for RCr 11.42 relief stated no grounds, the court's supplemental order of denial stated:

> IT IS FURTHER ORDERED AND ADJUDGED that the Defendant's Motion for RCr 11.42 relief is hereby DENIED. Defendant's Motion for an evidentiary hearing on said Motion is also hereby DENIED as the allegations in Defendant's Motion are determined on the face of the record, and Defendant's Motion raises no material issues of fact which require a hearing.

While it is true that the court's written findings of fact were not extensive, we are not persuaded that in this case expanded findings were necessary. If the record is sufficiently clear to answer any questions raised, a reviewing court may waive the requirement of findings of fact and conclusions of law without prejudicing the appellant.[15] The court below determined, and we agree, that all issues could be determined from the record and

[14] *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965).

[15] *Clark Mechanical Contractors, Inc. v. KST Equipment Co.*, 514 S.W.2d 680, 682 (Ky. 1974).

that Newcomb's motion raised no material issues of fact which required determination. No further findings were necessary.

Next, we are not persuaded by Newcomb's contention that the circuit court erred by failing to grant his request for copies of court records relating to both the October 1999 suppression hearing and the hearing regarding his RCr 11.42 motion. Although the court's initial order denying Newcomb's RCr 11.42 motion erroneously stated that a hearing had been held, the court subsequently entered another order correcting the misstatement. As no hearing on the RCr 11.42 motion occurred, the court did not err by failing to order the production of records pertaining to such a hearing.

Further, Newcomb has provided this court with no authority to support his request for copies of court records relating to the suppression hearing. In the case of *Gilliam v. Commonwealth*[16] the Kentucky Supreme Court held that an indigent defendant is entitled to a copy of court records only if his RCr 11.42 motion establishes a valid basis for relief. Here, the record supports the trial judge's determination that the grounds for relief described in Newcomb's motion could be conclusively resolved on the face of the record. The judge, therefore, did not err by denying Newcomb's request for records relating to his suppression hearing.

[16] 652 S.W.2d 856, 859 (Ky. 1983).

Newcomb next claims that he was afforded ineffective assistance when trial counsel failed to seek consolidation of drug possession and drug trafficking charges against him in Action No. 99-CR-66, because possession is a lesser included offense of trafficking. The record discloses that the possession charge was dismissed prior to Newcomb's guilty plea. Thus, Newcomb's claim has no merit.

Similarly, we are not persuaded by Newcomb's argument that the two counts of possession of a controlled substance in the first degree under indictment number 99-CR-77 violated the double jeopardy clause of the Fifth Amendment. Any double jeopardy concerns were resolved by dismissal of one of the possession charges prior to Newcomb's guilty plea.

Finally, Newcomb claims that counsel provided ineffective assistance by failing to seek suppression of his courthouse arrest because the sheriff had no written statement from his parole officer authorizing his arrest. However, as the record in fact shows that a probation and parole detainer was issued for Newcomb's arrest before the courthouse arrest occurred, Newcomb's contention is without merit.

The circuit court's orders are affirmed.

ALL CONCUR.

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