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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000674-MR

DARYL McINTOSH — APPELLANT

V.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
INDICTMENT NO. 02-CR-00148

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Daryl McIntosh pled guilty to two counts of first-degree trafficking in a controlled substance and one count of possession of drug paraphernalia. The circuit court sentenced him to seven and a half years in prison for the charges. Approximately one year later, McIntosh filed a motion to alter, amend, or vacate his sentence under RCr 11.42; the motion was summarily denied by the circuit court. We agree with the circuit court's decision and affirm.

On October 14, 2002, Agent Roger Humphrey of the Northern Kentucky Drug Strike Force (NKDSF) received an anonymous tip that McIntosh was manufacturing methamphetamine on a regular basis in the garage of his home. After confirming the location of the residence and the fact that McIntosh lived there, Agent Humphrey began doing periodic surveillance to verify the allegations made by the informant. On the night of November 4, 2002, Agent Humphrey was doing a "drive-by" of McIntosh's residence when he noticed several individuals in the garage; he also noted a "very strong odor of ether." Upon closer inspection, Agent Humphrey confirmed that the ether was emanating from the garage.

Armed with his observations and the information garnered from the anonymous tip, Agent Humphrey obtained a search warrant. The warrant was reviewed and signed by Judge Thomas Funk. Other agents from the NKDSF were called to the Grant County Sheriff's Office and briefed on the situation; shortly, the search warrant was executed.

Upon arriving at McIntosh's residence, the agents noted that the smell of ether was still present. And, upon executing the warrant, the agents located items indicative of methamphetamine manufacture. According to Agent Humphrey's report, "[i]n the garage it appeared that a methamphetamine cook had just occurred prior to our arrival due to the type of items

located." Some of the items noted by Agent Humphrey included quart mason jars, an electric hotplate, cookware, a pump garden sprayer with salt inside, lithium batteries, an electric food grinder containing white residue, and a .380 caliber pistol. Inside the residence, the agents found further evidence of methamphetamine manufacture, including "cooking dishes with what appeared to be pseudoephedrine pills soaking in a solution to break them down" and "mason jars with unknown liquids." The agents also located numerous firearms and other narcotics contraband. All of the agents' findings were recorded in an evidence recovery log.

As the agents were concluding their search of the residence, McIntosh was spotted driving toward his home. McIntosh was stopped by the police and arrested. The officers searched his vehicle incident to arrest and uncovered a metal tin containing plastic tubes, a razor blade, metal foil, and "4 small plastic bags each containing an off white powder which field tested for the presence of methamphetamine."

On November 13, 2002, the grand jury indicted McIntosh on one count of first-degree manufacture of methamphetamine,[1] one count of first-degree trafficking in a controlled substance,[2] and

[1] Kentucky Revised Statutes (KRS) 218A.1432.

[2] KRS 218A.1412.

one count of possession of drug paraphernalia.[3] All of the charges were enhanced by McIntosh's possession of firearms.[4]

McIntosh eventually entered a plea of guilty. The agreement with the Commonwealth amended his charges to two counts of first-degree trafficking in a controlled substance and one count of misdemeanor possession of drug paraphernalia. The manufacturing charge and the firearms enhancements were dropped. McIntosh was sentenced in accord with the plea agreement to seven and a half years in prison and a $1,000 fine. Later, his motion for shock probation was denied.

McIntosh eventually filed an RCr 11.42 motion to alter, amend, or vacate his judgment and sentence. Specifically, McIntosh's motion alleged that his trial counsel was ineffective because he failed to request a suppression hearing; failed to investigate and interview an alibi witness; and advised McIntosh he had no choice but to plead guilty. After conducting oral arguments on the issue, the circuit court denied the motion. The court's denial was based on its belief that McIntosh's arguments were "clearly refuted by the face of the record." This appeal follows.

[3] KRS 218A.500 and KRS 218A.510.

[4] KRS 218A.992.

McIntosh's claims on appeal repeat his claims raised before the circuit court. We will address each argument separately.

STANDARD OF REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The presumption on appeal is that counsel was effective.[5] The United States Supreme Court outlined the requirements for sustaining a claim of ineffective counsel in Strickland v. Washington.[6] The test requires a movant to prove two prongs: first, he must "show that counsel's performance was deficient" and, second, "that the deficient performance prejudiced the defense."[7] This test was deemed applicable to claims of ineffective assistance of counsel arising from guilty pleas in Hill v. Lockhart.[8]

To establish ineffective assistance of counsel, the evidence must be sufficient to prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[9] This test

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[5] Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord* Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

[6] Strickland, 466 U.S. at 690.

[7] *Id.*

[8] 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[9] Strickland, 466 U.S. at 687.

does not require that a defendant be provided with "errorless counsel."[10] Rather, counsel should be "reasonably likely to render and rendering reasonably effective assistance."[11] When a court reviews a claim of ineffective assistance of counsel, the proper inquiry is "whether counsel's performance was below professional standards and 'caused the defendant to lose what he otherwise would probably have won' and 'whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.'"[12]

COUNSEL'S FAILURE TO REQUEST A SUPPRESSION HEARING

McIntosh first argues counsel was ineffective for failing to request a suppression hearing. He alleges that a suppression hearing was necessary because: first, the search warrant was invalid; second, the warrant did not accurately describe the place to be searched; third, the warrant included false and misleading information; and, fourth, the search of his vehicle was illegal. We disagree.

McIntosh first argues the search warrant was invalid because it was based on an anonymous tip. The requirements for the issuance of a search warrant are clear:

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[10] McQueen v. Commonwealth, 949 S.W.2d 70, 71 (Ky. 1997).

[11] *Id.*

[12] Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001).

> 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 the '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.[13]

Probable cause itself is a "'fluid concept'" that turns "'on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'"[14]

The information regarding McIntosh's illegal activities was initially supplied to the NKDSF by an anonymous informant; however, that information was later corroborated by Agent Humphrey's observations. We believe this evidence—including the tip that McIntosh was manufacturing methamphetamine on a regular basis and Agent Humphrey's detection of ether coming from the garage area—was sufficient to allow the judge in this case to make a "practical, common-sense

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[13] Brown v. Commonwealth, 711 S.W.2d 488, 489 (Ky. 1986), *quoting*, Beemer v. Commonwealth, 665 S.W.2d 912, 914-915 (Ky. 1984).

[14] Brown, 711 S.W.2d at 489, *quoting*, Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, reh. den. 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983).

decision" that contraband or evidence of a crime would be found at McIntosh's residence. The judge clearly had a "substantial basis . . . for conclud(ing)" there was probable cause to search. Therefore, the warrant was valid and McIntosh's claim is without merit.

Second, McIntosh argues that the search warrant did not provide an accurate description of the place to be searched. Specifically, McIntosh argues "[t]he warrant authorized the search of a residence between two and three miles down Humes Ridge Road. It did not provide an address or identify the residence as being McIntosh's residence."

Precedent establishes that a search warrant must accurately describe the place to be searched.[15] Under the Fourth Amendment, "a search warrant is sufficient if the officer charged with making the search is able with reasonable effort to identify and ascertain the place intended to be searched with certainty."[16]

The anonymous tip received by the NKDSF stated that McIntosh's residence was "between two and three miles down Humes Ridge Road, on the right." Further independent investigation by Agent Humphrey established that the residence in question was located at 2825 Humes Ridge Road and that McIntosh was a

[15] *See* Commonwealth v. Smith, 898 S.W.2d 496, 500 (Ky.App. 1995).

[16] *Id.*

resident at that address. The search warrant incorporated Agent Humphrey's findings, stating:

> [Y]ou are commanded to make immediate search of the premises known and numbered as
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> 2825 HUMES RIDGE ROAD
>
> and more particularly described as follows:
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> BEGINNING AT THE INTERSECTION OF US HIGHWAY 25 AND HUMES RIDGE ROAD, DRIVE ALONG AND OVER HUMES RIDGE ROAD A DISTANCE OF 2.6 MILES TO A SINGLE STORY RESIDENCE WITH ATTACHED GARAGE ON THE RIGHT HAND SIDE OF THE ROADWAY, SAID RESIDENCE BEING BLUISH-GREY IN COLOR AND BEING OCCUPIED AS A RESIDENCE BY DARRELL McINTOSH.

We fail to see how this description is anything but accurate. The initial information provided by the informant may have been somewhat vague; however, the description provided in the search warrant clearly identified McIntosh's residence. The agents charged with executing the warrant could, with any effort, "identify and ascertain the place intended to be searched with certainty."[17] Therefore, McIntosh's argument is, again, without value.

Third, McIntosh argues the warrant contained false and misleading information. He claims "he was not at his residence on November 4, 2002," and that "he has a witness to that effect." McIntosh also argues that "when the police searched [his] residence, they failed to find any evidence of

[17] *Id.*

[m]ethamphetamine manufacturing. The police found one can of starting fluid that can emit an odor of ether." And, McIntosh contends, "[i]t is probable cross-examination would establish the officer was not telling the truth."

These arguments are baseless. The search warrant states that Agent Humphrey "saw numerous individuals in the garage of the residence." There is no mention of whether McIntosh was present at his residence on the night of November 4, 2002. Moreover, a search warrant need only be based on a "fair probability that contraband or evidence of a crime will be found in a particular place";[18] whether contraband or evidence is actually found does nothing to prove or disprove the validity of a warrant. Further, there is nothing in the record that indicates Agent Humphrey was not telling the truth. McIntosh's claims do not prove that the search warrant contained false or misleading information. So we reject this argument.

Finally, McIntosh argues the search of his vehicle was illegal. Specifically, he claims "there was no allegation he had committed a traffic offense." He further argues that "[s]ince no evidence of [m]ethamphetamine manufacturing or [m]ethamphetamine trafficking was found at [his] residence, the officers did not have reasonable suspicion or probable cause to stop [him]."

[18] *Id.* at 504.

We agree there was no allegation of a traffic offense. But there was obviously sufficient evidence of methamphetamine manufacturing and trafficking for the police to stop and arrest McIntosh. Agent Humphrey noted that "it appeared that a methamphetamine cook had just occurred prior" to the agents' arrival. He also noted significant evidence of methamphetamine manufacture at McIntosh's residence, including quart mason jars, an electric cookplate, cookware, a pump garden sprayer with salt inside, lithium batteries, an electric food grinder containing white residue, and pseudoephedrine pills "soaking" inside the house.

Based on this evidence, there was sufficient reason for the agents to arrest McIntosh; and because McIntosh was legally arrested, the search of his vehicle was proper as a search incident to arrest.[19] So, again, we reject his argument. McIntosh has failed to offer any proof that counsel was ineffective for failing to request a suppression hearing.

COUNSEL'S FAILURE TO INTERVIEW AND INVESTIGATE ALIBI WITNESS

McIntosh next argues his counsel was ineffective because he failed to interview and investigate an alibi witness. McIntosh claims he was at his girlfriend's house when the agents executed the search warrant at his residence; and because he was

[19] Stewart v. Commonwealth, 44 S.W.3d 376, 379 (Ky.App. 2000).

not at home, McIntosh argues he could not have been charged with methamphetamine manufacturing.

KRS 218A.1432 states that a person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: "(a) Manufactures methamphetamine; or (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine."

McIntosh does not deny that he lived at 2825 Humes Ridge Road; nor does he deny that the equipment and chemicals found at the home belonged to him. KRS 218A.1432 does not require that a person be present at the scene of the methamphetamine manufacture in order to be charged with the crime. Rather, all that is required is evidence of actual manufacturing or possession of the necessary equipment and chemicals. Therefore, whether or not McIntosh was at his home on the night of November 4, 2002, is irrelevant. Counsel's decision not to interview or investigate the alibi witness was sound trial strategy since the witness would not have provided McIntosh with a defense.

COUNSEL'S ADVICE TO PLEAD GUILTY

Finally, McIntosh argues counsel was ineffective for advising him to plead guilty. We disagree.

McIntosh contends "he was advised to plead guilty without drug results." He argues the advice to plead guilty "was not sound strategy because there was no evidence of guilt." And, he argues, but for counsel's flawed advice, he would not have pled guilty.

The record reflects the results of the crime lab tests on the materials found in McIntosh's residence were available over a month before McIntosh pled guilty. There is nothing to indicate that McIntosh and his counsel were not privy to this information; moreover, there is nothing that establishes McIntosh was unaware of the test results prior to entering his guilty plea.

The record also reflects that the equipment and chemicals seized from the residence were sufficient to establish methamphetamine manufacture. In Kotila v. Commonwealth, the Kentucky Supreme Court held that "KRS 218A.1432(1)(b) applies only when a defendant possesses *all* of the chemicals *or all* of the equipment necessary to manufacture methamphetamine."[20] McIntosh argues that under Kotila, there was insufficient

[20] 114 S.W.3d 226, 240-241 (Ky. 2003) (emphasis in original). We note that in 2005, the General Assembly amended KRS 218A.1432(1)(b) to read that a person is guilty of manufacturing methamphetamine when he knowingly and lawfully "(b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine." However, because McIntosh was indicted in 2002, the older version of KRS 218A.1432(1)(b) requiring possession of all chemicals or all equipment necessary to manufacture methamphetamine applies.

evidence to convict him under KRS 218A.1432 because "the police found no [m]ethamphetamine"; and "they found no [m]ethamphetamine precursors or anhydrous ammonia chemicals required to manufacture [m]ethamphetamine."

McIntosh's argument here is clearly flawed. It is true that the NKDSF agents did not find anhydrous ammonia in the residence. But they did find all of the equipment and some of the chemicals necessary to manufacture methamphetamine through the "ephedrine reduction" method. As stated in Kotila, examples of equipment necessary to manufacture methamphetamine by the ephedrine reduction method include, "spoons, dishes, glassware, filtering material (*e.g.,* cotton balls), funnels, hoses, and other household items."[21] The evidence log reveals that all of these items, along with an electric grinder, a box of aluminum foil, a hot plate, plastic bags, a turkey baster, gloves, an electric scale, mason jars, and tubing were found in McIntosh's residence. The log and test results also reveal that lithium batteries, starting fluid, drain cleaner, ephedrine, and pseudoephedrine were found in the house. Based on this evidence, we believe there was sufficient evidence for a jury to convict McIntosh of manufacturing methamphetamine.

Finally, the record proves there was sufficient evidence to convict McIntosh of trafficking in methamphetamine.

[21] *Id.* at 236-237.

KRS 218A.1412(1) states, "[a] person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in . . . a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers." Field tests proved the "white powder" found in the truck McIntosh was driving at the time of his arrest was methamphetamine. Specifically, the four plastic bags found on McIntosh's person yielded almost 1.5 grams of methamphetamine. This, combined with the fact that McIntosh was in possession of an electric scale, plastic bags, a razor blade, and $175 in cash, was sufficient evidence to convict McIntosh under KRS 218A.1412.

Had McIntosh gone to trial, he would have faced the possibility of a life sentence on the manufacturing charges and a minimum of ten years on the trafficking charges. We do not believe counsel's decision to advise McIntosh to plead guilty and accept a seven and a half year sentence amounts to ineffective assistance. Rather, we believe this was sound trial strategy to protect McIntosh from the exposure to the potential for much longer imprisonment. Moreover, upon reviewing McIntosh's plea colloquy, it is clear that McIntosh knowingly and willfully pled guilty to the charges and acknowledged his guilt to the court.

We do not believe McIntosh has proved his trial counsel "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."[22] Counsel clearly rendered "reasonably effective assistance"[23] and did not cause McIntosh "to lose what he otherwise would probably have won."[24] Without conclusive proof that counsel's performance was below professional standards, we are not compelled to second-guess his trial strategy.

For these reasons, the decision of the Grant Circuit Court denying McIntosh's RCr 11.42 motion is affirmed.

ALL CONCUR.

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[22] Strickland, 466 U.S. at 690.

[23] McQueen, 949 S.W.2d at 71.

[24] Bronk, 58 S.W.3d at 487.