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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001367-MR
AND
NO. 2006-CA-000041-MR

JEFFREY CURTIS — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00128

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Jeffrey Curtis, *pro se*, appeals from two orders of the Calloway Circuit Court denying post-conviction relief without holding evidentiary hearings. Finding no error, we affirm.

A Calloway County grand jury indicted Curtis on July 26, 2002, charging him with manufacturing methamphetamine by "possessing equipment and materials for

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

manufacturing methamphetamine with the intent to manufacture methamphetamine;" trafficking in a controlled substance (cocaine), first-degree; possession of drug paraphernalia; and receiving stolen property over $300. On October 28, 2002, Curtis, appearing with counsel, entered into a plea agreement to the offenses specified in the indictment. In exchange for his guilty plea, the Commonwealth recommended that Curtis be sentenced to a total of ten (10) years. In addition, his ten-year sentence would be served concurrently with his sentence in an unrelated case. Following a plea colloquy with Curtis, the trial court accepted the plea after finding that Curtis' guilty plea was made knowingly, intelligently, and voluntarily. On December 9, 2002, pursuant to the plea agreement, the trial court sentenced Curtis to ten years' imprisonment and ordered that the sentence be served concurrent to the unrelated case.

On April 8, 2005, Curtis filed a *pro se* motion for relief pursuant to CR 59.01 alleging that, as a consequence of our Supreme Court's decision in *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003), his conviction should be amended from manufacturing methamphetamine to first-degree possession of a controlled substance. On June 10, 2005, treating Curtis' CR 59.01 motion as a CR 60.02 motion, the trial court denied the motion.

On November 3, 2005, Curtis filed a motion to vacate the judgment pursuant to RCr 11.42. In his motion, Curtis contended that his guilty plea was not intelligently and voluntarily entered because he was deprived of effective assistance of counsel. On November 30, 2005, the Calloway Circuit Court denied Curtis' motion

without an evidentiary hearing. Curtis appeals both orders, and his appeals have been consolidated and will be disposed of by this opinion.

First, Curtis argues that the trial court erred by overruling his CR 60.02 motion to amend his judgment of conviction. Curtis argues that the *Kotila* decision, decided after his conviction, has resulted in his continued imprisonment for actions that do not constitute a crime. In *Kotila*, the court held that a conviction under KRS 218A.1432(1)(b), the manufacturing methamphetamine statute, requires proof that the defendant possessed all of the chemicals or equipment necessary to manufacture methamphetamine. Following a search of his residence, Curtis was found in possession of several items used in the manufacturing of methamphetamine but not enough items to be convicted under *Kotila* (i.e., he did not possess all the chemicals or all the equipment necessary to manufacture methamphetamine). Thus, Curtis seeks an amendment of his judgment of conviction.

However, notwithstanding Curtis' argument, we hold that he is procedurally barred from proceeding with his CR 60.02 motion. In *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983), the Court held that:

> a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall include all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

In this case, Curtis filed a CR 59.02 motion, which was treated as a CR 60.02 motion, on April 8, 2005. He then filed a RCr 11.42 motion on November 3, 2005. Since Curtis had not filed his RCr 11.42 prior to filing his CR 60.02, the trial court did not err in denying his CR 60.02 motion.

In regard to his RCr.11.42 motion, Curtis raises five grounds for relief: (1) he was denied the effective assistance of counsel when his defense counsel gave him deficient advice at the time it was given; (2) his plea was not made intelligently and voluntarily because he did not understand the nature of the charge against him; (3) the trial court erred by ruling that he had waived his right to challenge the sufficiency of the evidence because he had entered into a plea agreement; (4) he was denied the effective assistance of counsel when his defense counsel failed to file a pretrial motion to suppress evidence obtained during the search of his residence; and (5) the trial court failed to conduct an evidentiary hearing. We will address each of the issues in turn.

As an introductory matter, the standard employed on judicial review to measure ineffective assistance of counsel has been set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the *Strickland* test is modified when the ineffective assistance of counsel is alleged to have resulted in the entering of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under the modified test, the movant 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*, 799 S.W.2d 51, 55 (Ky.App. 1990). "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*.

Curtis first alleges that he was denied the effective assistance of counsel when his defense counsel gave him deficient advice concerning his manufacturing methamphetamine charge. More precisely, Curtis alleges that he was hurried and coerced into accepting the plea agreement despite his counsel's awareness of a potentially helpful pending Kentucky Supreme Court case.[2] Curtis alleges that his defense counsel should have petitioned the trial court for a delay pending the outcome of *Kotila*. He alleges that he would not have been found guilty of manufacturing methamphetamine but for defense counsel's failure to petition the trial court for a delay. Notwithstanding this argument, Curtis was indicted on July 26, 2002, and his judgment of conviction was entered on December 10, 2002. *Kotila* would not become final for another ten months.[3] Although

[2] *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003). In *Kotila*, the court held that KRS 218A.1432(1)(b), manufacturing methamphetamine, required the Commonwealth to prove that the defendant possessed either all the chemicals or all the equipment necessary to manufacture methamphetamine. Prior to *Kotila*, the Commonwealth could obtain a conviction against a defendant who possessed either some of the chemicals or some of the equipment necessary to manufacture methamphetamine.

[3] *Kotila* became final after our Supreme Court denied rehearing on September 18, 2003. *Kotila* has since been superseded by statute. In 2005, the legislature amended KRS 218A.1432(1)(b) to

Curtis may contend otherwise, "[f]ailure to anticipate correctly a future ruling of the court does not present an ineffective assistance claim." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998). There are many factors involved in advising a defendant to accept a plea offer; therefore, "[j]udicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate." *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003).

As a subpart to his first allegation, Curtis argues that he was not guilty of manufacturing methamphetamine at the time of his conviction or after *Kotila*. While challenging the sufficiency of the evidence is typically improper under RCr 11.42 as held in *Boles v. Commonwealth*, 406 S.W.2d 853, 854-855 (Ky. 1966), if defense counsel's performance fell outside the range of professionally competent assistance, the defendant maintains the right to argue the sufficiency of the evidence to demonstrate prejudice in an ineffective assistance of counsel claim. *Centers v. Commonwealth, supra*, at 55. However, when he was arrested, Curtis possessed the following: a jar containing ether, a plastic bottle containing suspected sulfuric acid and salt, and a generator. He further was in possession of a plastic bag containing suspected methamphetamine. These are all items used in the manufacturing of methamphetamine. *Fulcher v. Commonwealth*, 149 S.W.3d 363, 369 (Ky. 2004). Under the law at the time, KRS 218A.1432(1), enacted in 1998, provided:

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permit a conviction for manufacturing methamphetamine when an individual possesses either two or more of the chemicals or pieces of equipment necessary to manufacture methamphetamine.

> 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.

From these facts, based on KRS 218A.1432(1) prior to *Kotila's* clarification of the statute, there was a sufficient evidentiary basis to support Curtis' conviction.[4] *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983) (if under the evidence as a whole it would not be clearly unreasonable for the fact finder to find the defendant guilty then the conviction will be upheld). Therefore, Curtis was not deprived of the effective assistance of counsel when his counsel advised him to accept the Commonwealth's plea offer.

Curtis next alleges that his plea was not made intelligently and voluntarily because he did not understand the nature of the charges against him. Curtis asserts that his defense counsel did not explain to him the nature of the charges that constituted his plea agreement. However, during his plea colloquy, Curtis affirmed to the trial court that his defense counsel had explained to him the nature of the charges, penalties, and defenses in connection with his plea agreement. Curtis affirmed that he understood his legal situation and was satisfied with his defense counsel's service. Finally, prior to entering into his plea agreement, Curtis alleges that he informed his defense counsel about the possible ramifications of *Kotila* in regards to his manufacturing of

[4] While *Kotila* has no application to Curtis' appeal, in *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006), the Court overruled *Kotila* to the extent that a conviction under KRS 218A.1432 only requires possession of at least two chemicals or two pieces of equipment necessary to manufacture methamphetamine.

methamphetamine charge. This fact gravely undermines Curtis' claim that his defense counsel did not adequately apprise him of the nature of his charges. From these facts, Curtis' allegation is refuted by the record, *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

Curtis next alleges that the trial court erred by ruling that his guilty plea waived his right to challenge the sufficiency of the evidence supporting his manufacturing of methamphetamine conviction. However, Curtis has not alleged how his constitutional rights were deprived by the trial court's decision. *Commonwealth v. Basnight*, 770 S.W.2d 231, 237 (Ky.App. 1989) The trial court ruled that "[a] guilty plea waives any defenses, including the defense of insufficient evidence, that might be raised." We find this a correct recitation of the law and need not further address Curtis' allegation. *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003).

Curtis next alleges that he was denied the effective assistance of counsel when his defense counsel failed to file a pre-trial motion to suppress evidence obtained during the search of his residence. Curtis alleges that his residence was searched without an arrest warrant or his consent. Curtis alleges that had his defense counsel filed a suppression motion that evidence would have been suppressed and the charges pending against him would have been dismissed.

When a defendant alleges that his counsel was ineffective, he must meet the two-part test outlined in *Strickland v. Washington*, *supra*. If this ineffectiveness is premised on his counsel's failure to competently litigate a Fourth Amendment claim, the

defendant must also prove that his Fourth Amendment claim is meritorious. If this is done, the defendant then has to prove actual prejudice by demonstrating a reasonable probability that the verdict would have been different absent the excludable evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986). Therefore, we must determine whether there was a reasonable probability that the suppression motion would have been granted and if the absence of the excluded evidence would have resulted in a dismissal of the charges.

From a view of the record, Curtis has not met his burden. First, Curtis' wife executed a written consent to the search of their residence. Although Curtis asserts that the written consent was given after the search, the two uniform citations make clear that Curtis' wife's written consent was given prior to the search. In *Commonwealth v. Sebastian*, 500 S.W.2d 417, 419 (Ky. 1973), the court held that a wife's voluntary consent to a search of a home makes the evidence seized against her and her husband admissible against both parties. Although Curtis cites *Georgia v. Randolph*, 547 U.S. ----, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) for the proposition that his wife's consent was not a valid consent as to him, the *Randolph* decision was decided several years after Curtis' sentence became final and is not retroactive as to this collateral appeal.[5]

[5] In *Teague v. Lane*, 489 U.S. 288, 310-13, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in a plurality opinion, the Court held that new constitutional rules of criminal procedure (e.g., evidentiary rules) will not be applicable to cases on collateral review unless they fall within one of the two exceptions to this general rule. The first exception is that a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prohibit it. *Id*. At 311. The application of the third-party consent doctrine does not provide constitutional protection to any primary activity whatsoever. The second exception is that a new rule should be applied retroactively if it requires the observance of procedures that are implicit in the concept of ordered liberty. *Id*. In *Beard v.*

Curtis finally argues that the trial court failed to conduct an evidentiary hearing. Curtis alleges that his defense counsel advised him to plead guilty before receiving the discovery in the case. However, the record demonstrates that the Commonwealth Attorney mailed Curtis' defense counsel its discovery on August 5, 2002, which was over two months before Curtis accepted his guilty plea on October 28, 2002.

Finally, the court concludes that all of Curtis' allegations are without merit and do not constitute sufficient grounds to invalidate his conviction. As explained above, the record refutes every claim that the defendant has alleged. Thus, it was unnecessary to grant an evidentiary hearing. *Harper, supra*.

For the foregoing reasons, the orders of the Calloway Circuit Court denying Curtis' motions for post-conviction relief under CR 60.02 and RCr 11.42 are affirmed.

ALL CONCUR.

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Banks, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004), the Court held that the second *Teague* exception is limited in scope, and consequently, "...it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." Accordingly, we conclude that the alleged infringement that Curtis seeks to remedy by invoking *Randolph* does not destroy the concept of ordered liberty.