RENDERED: MAY 28, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001034-MR

JOSEPH METTEN — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 06-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Joseph Metten appeals from an order of the Breckinridge Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate his sentence of imprisonment. We affirm.

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

Metten was found guilty by a jury in 2007 and was sentenced to serve consecutive sentences totaling twenty-five years on felony charges of manufacturing methamphetamine (twenty years) and wanton endangerment in the first degree (five years). He was also sentenced to twelve months each on misdemeanor charges of possession of marijuana and possession of drug paraphernalia, which sentences were ordered to run concurrently. The final judgment was affirmed on appeal by the Kentucky Supreme Court. *Campbell v. Commonwealth*, 260 S.W.3d 792 (Ky. 2008).

Metten thereafter sought relief from the trial court through an RCr 11.42 motion wherein he alleged ineffective assistance of counsel. Metten alleged that counsel was ineffective by failing to negotiate a potential plea agreement and ineffective by failing to file a motion to suppress evidence. He then argues that the cumulative effect of these failures by counsel warranted relief from the judgment. Metten's RCr 11.42 motion was denied by the trial court, and this appeal followed.

When reviewing a claim of ineffective assistance of counsel, we are guided by the two-prong test in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064.

Metten first argues that counsel was ineffective when he "failed to aggressively negotiate and pursue additional plea options such as a blind plea, an Alford plea, or guilty by RCr 8.05." The Commonwealth offered a plea bargain of ten years' imprisonment to all four defendants in this case, but it conditioned that agreement on all four accepting the offer. Two (including Metten) indicated an interest in the offer, but the other two flatly refused it. Because all four co-defendants did not accept the offer, no plea agreement was reached with any of them. Thus, the four co-defendants were tried jointly.

The Commonwealth is not required to engage in plea negotiations. *Commonwealth v. Corey,* 826 S.W.2d 319, 321 (Ky. 1992). Absent a negotiated plea, a defendant is entitled to either plead guilty as charged or have a jury trial. *Id.* The record does indicate that Metten's counsel unsuccessfully attempted on Metten's behalf to get the Commonwealth to negotiate a plea agreement. We conclude that counsel did not render ineffective assistance by failing to obtain a plea agreement with the Commonwealth when the Commonwealth refused to make a plea offer other than the one it initially made.

Metten further argues in this regard that counsel was ineffective when he failed to recommend that Metten plead guilty without a negotiated plea with the Commonwealth. Metten was originally indicted by the grand jury on a charge of manufacturing methamphetamine, and that charge was enhanced by an allegation of possession of a firearm. If Metten had entered a plea of guilty to that charge, he would have faced a minimum sentence of twenty years with a maximum sentence of life. Through counsel's efforts at trial, the enhancement aspect of the charge based on firearm possession was dismissed.

Clearly, counsel's efforts were beneficial in reducing the maximum sentence Metten faced. As the trial court stated in its order, a blind plea to the original charges would have been "disastrous" to Metten. Counsel did not render ineffective assistance by failing to recommend that Metten enter a blind guilty plea.

Next, Metten argues that counsel failed to meet the minimum standard of effective assistance of counsel when counsel failed to file a motion to suppress the evidence generated from a search of the residence where Metten was first discovered by the police. The record clearly refutes that argument as counsel did file a motion to suppress, and a hearing on that issue was conducted by the trial court. Furthermore, Metten's arguments regarding the "knock and talk" rule and the Jefferson County arrest warrant are clearly without merit and require no discussion. Counsel did not render ineffective assistance in this regard because he did file a suppression motion, and a suppression hearing was held.

Finally, Metten states that based on the two alleged errors previously discussed, the cumulative effect denied him a fair trial. Counsel was not ineffective in either regard; thus, there cannot be cumulative error.

The judgment of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Metten, *pro se*
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BRIEF FOR APPELLEE:

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