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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000972-MR

EDWARD CARTER IRVIN — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CR-00674

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: Edward Carter Irvin appeals from an order of the Boone Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appellant pled guilty to first-degree possession of a controlled substance and a misdemeanor charge of possession of drug paraphernalia, but he now contends that his guilty plea was the result of ineffective assistance of counsel. For reasons that follow, we do not believe that the trial court erred in denying Appellant's RCr 11.42 motion. Thus, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

On August 22, 2008, at approximately 9:15 p.m., two Boone County Sheriff's Deputies were dispatched to an apartment complex in response to a complaint of a strong smell of marijuana. Upon their arrival, they met the complainant and could smell marijuana "as soon as he opened the door to his apartment complex." At approximately 9:32 p.m., the officers went to the apartment of Bradley Eagan and cited him for possession of marijuana. According to Mr. Eagan, the officers were at his residence until 11 p.m.

The officers then approached Appellant's apartment, which was in the same building. According to the summary of facts provided with their police

[2] The underlying facts of this case are taken from testimony given at the RCr 11.42 evidentiary hearing and from the summary of facts attached to the police report in this matter. The summary of facts was attached as an exhibit to one of Appellant's pleadings below in order to demonstrate the conduct of police in this matter, and it is therefore relevant here.

report, the odor of marijuana was the strongest at the door to this apartment. The officers knocked on Appellant's door three times before it was answered by Celina Mullen, Appellant's girlfriend at the time. When the door was opened, "the smell of marijuana was overwhelming." The officers asked Ms. Mullen if anyone else was in the apartment, and Mullen called for Appellant, who came to the door. The officers asked both individuals to step outside and then informed them that a scent of marijuana was emanating from the apartment. The officers told Appellant that they knew he had been smoking. According to the summary of facts, Appellant smelled like marijuana and his eyes were red.

Ms. Mullen testified that the officers then asked Appellant for his identification. The summary of facts indicates that the officers asked Appellant if he had any marijuana on his person or inside his apartment. The summary notes that Appellant was "hesitant," but when he was told that if he had marijuana only for personal use he would be cited and released, Appellant "took [one of the officers] into his back bedroom and handed [him] a glass jar full of marijuana." However, according to Ms. Mullen, the officer followed Appellant into the apartment without any invitation or other explicit granting of permission. She did not attempt to stop the officer because she did not know that she had this right.

According to the summary, the officer then asked Appellant if this was all the marijuana he had, and Appellant eventually acknowledged that he had some marijuana plants in a bedroom. The summary then reflects that Appellant was advised of his rights and that he indicated that he understood them. Appellant also noted that "he was willing to cooperate." Appellant and Ms. Mullen were then asked to sit on a couch, and the officers asked Appellant for consent to search the residence. According to the summary, both individuals gave permission and signed a "consent-to-search" form. Appellant testified that this form was not signed until after the officers had been in his apartment for an hour.

The ensuing search uncovered an "elaborate indoor … three stage grow." This included several small plants placed under a fluorescent light inside two aquariums and multiple other plants found in two black tubs containing water filtration systems and more fluorescent lights. Appellant was arrested and charged with a variety of offenses, while Ms. Mullen was cited and released.

The Boone County Grand Jury charged Appellant with one count each of marijuana cultivation, five or more plants; trafficking in marijuana, more than five pounds; and possession of drug paraphernalia. On the same date, the case was assigned to Hon. James R. Schrand as the presiding judge. Appellant was subsequently arraigned before Judge Schrand and entered a plea of "not guilty" to

the charges. Both Appellant and Ms. Mullen retained Hon. Paul Dickman to represent them.

On February 12, 2009, Mr. Dickman filed a motion to suppress the evidence seized by police during the search of Appellant's apartment. In support of the motion, Mr. Dickman argued that none of the exceptions allowing a search to be conducted without a warrant were applicable here and that questions existed regarding the chain of custody of the subject evidence. A suppression hearing was ultimately set for April 8, 2009.

However, before the hearing could be conducted, Appellant filed a motion to enter a guilty plea after receiving a plea offer from the Commonwealth. Pursuant to this offer, the Commonwealth agreed to amend the marijuana cultivation charge to a charge of first-degree possession of a controlled substance and to dismiss the marijuana trafficking charge. The misdemeanor charge of possession of drug paraphernalia remained unchanged. In exchange for Appellant's guilty plea to the amended charges, the Commonwealth agreed to recommend: (1) a sentence of five years' imprisonment and a $1,000 fine on the charge of first-degree possession of a controlled substance; and (2) a sentence of twelve months' imprisonment and a $500 fine on the charge of possession of drug paraphernalia. The Commonwealth also agreed not to oppose a sentence placing

Appellant on five years' probation and ordering him to serve 365 days on home incarceration with work release. Finally, the Commonwealth agreed not to oppose expunging Appellant's convictions pursuant to KRS 218A.275.

On this same day, Senior Judge David Melcher was in another courtroom taking guilty pleas on behalf of Judge Anthony W. Frohlich, who had a felony docket containing 104 cases. The record reflects that Appellant and Mr. Dickman entered the courtroom and made a request that Senior Judge Melcher handle Appellant's motion to enter a guilty plea. Senior Judge Melcher agreed and conducted a lengthy colloquy during which he addressed Appellant's constitutional rights (and the fact that he would be waiving them by pleading guilty) and the terms of the plea agreement. Appellant affirmed that he was the person charged in the indictment and that Mr. Dickman had gone over the charges with him, the penalties the charges carried, his Constitutional rights, and any possible defenses he might have to the charges. Appellant acknowledged that he was completely satisfied with his attorney's services and advice and that his guilty plea was being entered freely and voluntarily. He also noted that he had reviewed the guilty plea documents with his attorney and that he fully understood them and had signed them of his own free will. During these proceedings, Mr. Dickman advised the

court that the Commonwealth had a "real problem" with both chain of custody and the lawfulness of the search and that this had led to the plea agreement.

Senior Judge Melcher ultimately accepted Appellant's guilty plea and found him guilty of the aforementioned charges. The case was then mistakenly put on Judge Frohlich's docket for sentencing. However, rather than continuing the sentencing hearing and having Appellant placed back on Judge Schrand's sentencing docket, Judge Frohlich sentenced Appellant in accordance with the Commonwealth's recommendation. Thus, Appellant was placed on probation for five years, and he was ordered to serve 365 days on home incarceration with work release. During the sentencing hearing, Mr. Dickman again suggested that his client was offered a favorable deal because the Commonwealth had evidentiary problems with the case.

Following sentencing, Appellant continued to retain Mr. Dickman as his attorney. During the next few months, Mr. Dickman filed several motions to adjust Appellant's work-release hours. Additionally, Mr. Dickman had several meetings with Appellant to address his needs and concerns about his probation. However, Appellant and Mr. Dickman's attorney-client relationship ended after a meeting in which Mr. Dickman informed Appellant that he could file a motion for

post-conviction relief on the basis of ineffective assistance of counsel if he was dissatisfied with Mr. Dickman's services.

On November 18, 2009, Appellant filed a *pro se* motion to vacate judgment pursuant to RCr 11.42. In the motion, Appellant alleged that his trial counsel was ineffective for failing to: (1) seek suppression of the evidence seized in the search of his residence; (2) seek suppression of Appellant's consent to search; (3) challenge the evidence regarding the number of marijuana plants seized and their weight; and (4) challenge the chain of custody of the items seized. Appellant argued that had suppression been fully pursued, it would have ultimately proven successful and the Commonwealth's case against him would have collapsed. Appellant also contended that Mr. Dickman told him that "evidence in drug cases is never suppressed, especially with Judge Anthony W. Frohlich in Boone County[.]" Appellant's RCr 11.42 motion was initially denied, but following the filing of a motion to reconsider, the trial court ordered an evidentiary hearing to be held on the matter.

At the evidentiary hearing, Mr. Dickman testified that he was retained by Appellant on August 25, 2008, and that he was licensed to practice law in 1993. He indicated that he had defended twenty or thirty drug cases in Boone County. Mr. Dickman stated that he met with Appellant numerous times during the course

of their attorney-client relationship and that they had discussed the issues in the case and any defenses to the charges in great detail. As a result, Appellant was fully apprised of the circumstances of his case.

When asked about the issues surrounding the search of Appellant's apartment, Mr. Dickman testified that there were "all kinds of problems with the case" from the Commonwealth's perspective and that he believed there was a chance that the trial court may have suppressed the evidence obtained in the search. These concerns were reflected in the motion to suppress filed by Mr. Dickman and were also raised, along with other matters such as chain-of-custody discrepancies, in multiple conversations Mr. Dickman had with the Commonwealth. Mr. Dickman admitted that he did not interview any of Appellant's neighbors (with the exception of Mr. Eagan) about whether they could smell marijuana and that he did not contact the manufacturer of Appellant's filtration unit. However, he believed that his work in the case had been significant and effective because the Commonwealth ultimately moved from a plea offer of five years' imprisonment to a recommendation of probation throughout the course of the parties' plea negotiations.

When asked about the circumstances surrounding Appellant's decision to plead guilty, Mr. Dickman indicated that he presented Appellant with

the "pluses and minuses" of pleading guilty but that the ultimate decision was left up to Appellant. Mr. Dickman also noted his belief that the prospective cost of his continued representation was a concern to Appellant at this point and that Appellant's primary concern throughout the proceedings was not losing his job. Mr. Dickman testified that the plea offer presented a way to avoid that possibility since it allowed for probation and home incarceration. He also testified that the Commonwealth told him that the plea offer eventually accepted would be withdrawn if the suppression hearing was held. Ultimately, Mr. Dickman believed that Appellant was "thoroughly aware of what he was signing" and that he alone had made up his mind to plead guilty.

Appellant testified that he and Mr. Dickman discussed multiple issues regarding the legality of the search of his residence and other grounds on which the evidence might be suppressed or challenged. Appellant acknowledges in his brief that the two:

> … discussed the fact that the police did not have a right to enter his home, that it would have been impossible for the police to smell any odor of marijuana coming from his apartment,[3] that the timeline presented by the police was inconsistent with the timeline presented by them and Mr. Eagan, and that the consent was signed after an hour had passed since the officers had entered his house, and after they had already found the evidence.

[3] Appellant testified that he owned a complex filtration system that was designed to hide the odor of marijuana.

Appellant noted that he presented Mr. Dickman with significant amounts of research that he had conducted on the Fourth Amendment and indicated that he was familiar with this area of the law. Appellant indicated that it was his understanding based on his conversations with Mr. Dickman that the police conduct in this case would result in the evidence being suppressed and his case ultimately dismissed.

However, Appellant testified that Mr. Dickman subsequently advised him that the suppression motion would prove futile because "the Fourth Amendment does not exist in Judge Frohlich's courtroom." Mr. Dickman denied saying this to Appellant. Additionally, Appellant testified that Mr. Dickman pushed him toward taking the deal offered by the Commonwealth rather than pursuing the suppression motion by reminding him that he did not stand a chance in Judge Frohlich's courtroom. As noted above, Judge Frohlich was not actually the presiding judge in Appellant's case, but Appellant testified that Mr. Dickman told him that the case had been reassigned to Judge Frohlich.[4] He also testified that he pled guilty before Judge Frohlich.[5] Appellant indicated that he was also told that the suppression evidence would essentially boil down to "your word versus a

[4] There is no evidence of such a reassignment in the record.

[5] As noted above, this was not the case.

cop" and that this usually bodes poorly for a defendant. Finally, Appellant testified that he was "relieved" to get the plea offer and sentence that he ultimately received; however, he was not satisfied with the agreement in hindsight.

On May 13, 2010, the trial court entered an order denying Appellant's RCr 11.42 motion. The order provided, in relevant part, as follows:

> The essence of the Defendant's argument can be characterized as two (2) fold. The first is that the services of Paul [Dickman] were deficient in that he failed to follow through with the hearing on the motion to suppress the evidence. The second is that he coerced the Defendant into pleading guilty by causing the Defendant to believe that he would not get a fair hearing before Judge Frohlich on his motion to suppress. In effect, his plea of guilty was not voluntarily, knowingly and intelligently made.
>
> The evidence shows that Counsel Paul Dickman is an attorney who has practiced over fifteen (15) years primarily in the area of criminal defense. He has never tried a case before Judge Frohlich nor [handled] a suppression hearing in front of him. He was hired by the Defendant on August 25, 2008. He conducted an interview of Brad Egan. He challenged the chain of custody and filed a motion to suppress the search. He felt they had a chance to suppress the search on legal grounds even though the Defendant had executed a written consent to search. He testified all this information was explained to his client and thoroughly discussed before his client made the decision to enter into a plea agreement.
>
> One thing all the parties agreed upon was that the Defendant is a man of intellect. His presentence report

> shows that he graduated from Wright State University in 1999. His pro se motions were well written and researched. When he initially hired Paul [Dickman] the Defendant brought extensive research on the 4th Amendment to attorney Dickman.
>
> At the evidentiary hearing the Defendant testified that attorney Paul Dickman advised him that he would lose his suppression hearing before Judge Frohlich because he was a former prosecutor and the 4th Amendment does not exist in his courtroom. Paul Dickman testified such a conversation never occurred. Defendant Irvin testified upon questioning by the Court that it did take place and that Judge Frohlich was his Judge and it was Judge Frohlich who took his guilty plea. The record does not support the Defendant's testimony as Judge Frohlich never handled the file until the sentencing hearing of May 20, 2009, when the same was placed on his docket for sentencing in error.
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> ***
>
> This Court cannot say that Attorney Dickman's performance was so deficient as to have undermined the proper function of the adversarial process. Therefore, the Court being in all ways sufficiently advised[:]
>
> IT IS HEREBY ORDERED AND ADJUDGED THAT [] the Defendant's Motion to Set Aside his conviction under RCr 11.42 is OVERRULED[.]

This appeal followed.

ANALYSIS

On appeal, Appellant alleges that his trial counsel was ineffective for failing to follow up on the issues presented in his motion to suppress via a

suppression hearing. Appellant also alleges that counsel failed to properly bring issues regarding evidentiary chain of custody or the weight of the marijuana seized in the search to the trial court's attention. Appellant argues that had counsel thoroughly explored these issues, a substantial likelihood existed that the evidence taken from his apartment would have been suppressed and the charges against him dismissed.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-pronged analysis to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction.

> 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.

Id., 466 U.S. at 687, 104 S. Ct. at 2064. The U.S. Supreme Court further held 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." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* The standard set out in *Strickland* was recognized and adopted by our own Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

In order for a defendant to prove ineffective assistance of counsel in those instances when a guilty plea has been entered, he must meet a modified *Strickland* standard and show:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986); *see also Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370, 88 L.Ed.2d 203 (1985). To be valid, a guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Sparks*, 721 S.W.2d at 727.

Where a defendant enters a guilty plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56, 106 S. Ct. at 369, *quoting McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The voluntariness of the plea is determined from the "totality of the circumstances." *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009), *quoting Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10-11 (Ky. 2002). In making such a determination "the presumption of voluntariness inherent in a proper plea colloquy" is juxtaposed "with a *Strickland v. Washington* inquiry into the performance of counsel." *Id.*, *quoting Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Ultimately, "the trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." *Bronk*, 58 S.W.3d at 487. That being said, "[i]t is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

When reviewing a motion for ineffective assistance, the court must focus on "the totality of evidence before the judge or jury and assess the overall

performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We further note that "[a] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard*, *supra*. Thus, in conducting our analysis, we must be highly deferential to counsel's performance, and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *see also Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *overruled on other grounds by Leonard*, *supra*. We must also "defer to the determination of facts and witness credibility made by the circuit judge." *Simmons*, 191 S.W.3d at 561.

Appellant first alleges that his trial counsel improperly abandoned his efforts to suppress the evidence taken from Appellant's apartment even though there was a strong likelihood that those efforts would have ultimately proven successful. Appellant contends that the search of his residence was clearly unconstitutional

and, therefore, all the evidence seized as a result of this search would have been suppressed. Appellant also argues that the consent-to-search form that he signed was invalid and would not have been enforced. In light of these assertions, Appellant argues that Mr. Dickman provided ineffective assistance by not moving forward with the suppression hearing.

The record reflects that Appellant – who by all appearances is well-educated and intelligent – had a full grasp of the legal and factual issues involved in his case and extensively discussed these issues with Mr. Dickman. Both individuals believed that there were questions regarding the legality of the search of Appellant's residence and that these questions created a strong possibility that any evidence taken in that search would be suppressed. Because of this, Mr. Dickman filed a motion to suppress and engaged in a dialogue with the Commonwealth about these concerns.

Mr. Dickman's efforts ultimately produced a plea offer in which the trafficking charge against Appellant was dismissed and the Commonwealth agreed not to oppose a sentence placing Appellant on five years' probation and ordering him to serve 365 days on home incarceration with work release. The Commonwealth also agreed not to oppose expunging Appellant's convictions pursuant to KRS 218A.275. Mr. Dickman indicated that this offer would have

been withdrawn had Appellant gone through with the suppression hearing. While Appellant testified that he did not explicitly ask Mr. Dickman to abandon the suppression issue, he accepted this plea deal. Appellant testified that he was "relieved" by this plea offer at the time he agreed to it, but that his opinion had changed since then. These facts are undisputed.

Appellant now essentially contends that Mr. Dickman should have ignored the plea offer proposed by the Commonwealth and proceeded with the suppression hearing. In considering Appellant's argument, we are reminded of the adage that "hindsight is 20/20." Looking at the record as a whole, it is apparent that Appellant fully discussed the suppression matter with his counsel and had an unquestionably clear understanding of the issues at hand yet chose to plead guilty nonetheless. However, he now essentially wants a "do over" because he believes he chose wrongly and would have prevailed on his suppression motion. RCr 11.42 is not intended to provide relief under these circumstances.

Mr. Dickman testified that he advised Appellant of the "pluses and minuses" of pleading guilty given the circumstances at hand and that Appellant chose to plead guilty of his own accord. Appellant maintains that he was coerced to plead guilty, however, because Mr. Dickman pushed him to accept the plea offer on the basis that "the Fourth Amendment does not exist in Judge Frohlich's courtroom"

and he would not stand a chance of winning as a result. This testimony is rendered questionable, though, in light of the fact that Judge Frohlich was not the presiding judge and, therefore, would not have decided the suppression issue. Moreover, Mr. Dickman testified that this conversation did not take place. Consequently, the trial court was free to reject this argument as a basis for finding ineffective assistance of counsel.

Appellant also ignores the fact that had a suppression hearing been held, the Commonwealth almost certainly would have called as witnesses the police officers involved in the subject search. Had this occurred, there is a possibility – if not probability – that the testimony of these officers on the consent-to-enter and consent-to-search issues would have differed from the accounts given by Appellant and his ex-girlfriend. As a general rule, we see nothing misleading about an attorney telling a defendant that a suppression hearing will be determined by a credibility battle between the client and a police officer. Indeed, this is frequently the case and often does not bode well for the defendant. Thus, there was no guarantee that Appellant would have prevailed had the suppression hearing been held.

In effect, Appellant was presented with a choice of: (1) taking a highly-favorable plea deal and ending his prosecution; or (2) proceeding with a

potentially-successful suppression hearing that would pit his credibility against that of law enforcement officials and having the plea offer withdrawn as a result. Had Appellant's motion to suppress been denied, he faced a potential fifteen-year sentence. The fact that Appellant is now unhappy with the decision that he made because he believes he would have won does not mean that his counsel was ineffective. Appellant fully understood the legal concerns regarding the Fourth Amendment and the search of his apartment that he relies upon now before he pled guilty.

As noted above, in considering an RCr 11.42 motion in cases where a guilty plea has been entered, "the trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." *Bronk*, 58 S.W.3d at 487. It is unclear what "errors" Appellant believes Mr. Dickman committed with respect to his decision to plead guilty with the exception of Appellant's questionable (and rebutted) assertions regarding statements Mr. Dickman made about Judge Frohlich. The fact that Mr. Dickman may have simply advised Appellant to accept the Commonwealth's plea offer does not constitute ineffective assistance of counsel. *Beecham*, 657 S.W.2d at 236-37. Indeed, it is well-established that "a defendant's plea of guilty motivated by the

desire to escape possible greater punishment is not a basis for vacating the judgment and that it is not improper for an attorney to influence a client to reach such a decision." *Glass v. Commonwealth*, 474 S.W.2d 400, 401 (Ky. 1971).

Consequently, viewing the facts with deference to counsel's performance and with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, we agree with the trial court that Appellant's trial counsel was not ineffective in failing to pursue the suppression issue further. The trial court had ample grounds to conclude that Appellant's guilty plea was entered intelligently, voluntarily, and with a full understanding of the facts. Accordingly, Appellant has failed to show that counsel committed serious errors or that there was a reasonable probability that he would have elected to proceed to trial rather than accept the Commonwealth's offer on a plea of guilty. *Hill*, 474 U.S. at 58-59, 106 S. Ct. at 370; *Sparks*, 721 S.W.2d at 727-28. Because of this, Appellant has failed to satisfy the requirements of RCr 11.42.

Appellant next alleges that his trial counsel was ineffective for failing to challenge the seized evidence on chain-of-custody grounds because it was allegedly mislabeled with the wrong case number by law enforcement personnel. He asserts that this incorrect labeling would have made the evidence difficult to

introduce by the Commonwealth and that by not pursuing this issue, his trial counsel failed to provide effective assistance.

This argument ultimately fails for the same reasons set forth above. Appellant and Mr. Dickman were fully aware of the chain-of-custody issues raised herein and discussed those matters thoroughly. Nonetheless, Appellant chose to plead guilty. Moreover, Mr. Dickman brought this issue to the attention of the Commonwealth. We further note that the chain of custody of evidence need not be absolute or perfect in order to establish proper foundation for its admission "so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.' " *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998), *quoting United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989); *see also Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004). Any "[g]aps in the chain normally go to the weight of the evidence rather than to its admissibility." *Rabovsky*, 973 S.W.2d at 8. Thus, any claim that evidence would have been necessarily excluded at trial on chain-of-custody grounds is far too speculative and, therefore, unavailing.

Appellant next complains that his trial counsel rendered ineffective assistance by failing to independently weigh the marijuana seized in the search of his apartment. However, the basis for Appellant's claim is somewhat unclear since

the trafficking charge for which the weight of the marijuana was an issue was dismissed via the plea agreement. Therefore, we fail to see how Mr. Dickman was ineffective in this regard. We also note that Mr. Dickman testified at the evidentiary hearing that he had an appointment scheduled with an evidence technician to have the marijuana weighed if the suppression motion was unsuccessful. Accordingly, this claim must also fail.

Appellant finally argues that the trial court erred in denying his motion for post-conviction relief because of the cumulative effect of trial counsel's errors. However, since we have found no individual error in this case, we certainly cannot find any cumulative error. *Furnish v. Commonwealth*, 267 S.W.3d 656, 668 (Ky. 2007). In a related vein, Appellant argues that counsel's failure to visit the scene, interview Appellant's other neighbors, or contact the manufacturer of the filtration unit constituted ineffective assistance of counsel because these acts would have buttressed his suppression argument. Again, however, these arguments ignore the fact that Appellant made an informed and voluntary decision to plead guilty even though he was fully aware that the search of his residence was constitutionally questionable. Thus, we must also reject this argument.

CONCLUSION

Appellant has failed to meet the heavy burden of showing that he is entitled to post-conviction relief pursuant to *Strickland* and its progeny, as well as RCr 11.42. In deciding to plead guilty, Appellant appears to have been well-informed as the issues of his case and the pros and cons of accepting the Commonwealth's plea offer. Moreover, he has failed to establish that the performance of his trial counsel was deficient in any way. The fact that Appellant is now unhappy about his decision in hindsight does not negate the voluntary and intelligent nature of his plea.

For the foregoing reasons, the order of the Boone Circuit Court denying Appellant's RCr 11.42 motion for post-conviction relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell A. Cox
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BRIEF FOR APPELLEE:

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