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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000168-MR

KENNETH H. MATTINGLY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 05-CR-00017

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Kenneth Houston Mattingly appeals from a Grayson Circuit Court order which denied his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Mattingly claims he was denied effective assistance of counsel in considering a plea offer. He further argues that his trial

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

counsel was ineffective for failing to object to the introduction of incriminating evidence and for failing to prepare an adequate defense. We affirm.

Mattingly was convicted by a jury of manufacturing methamphetamine, possession of anhydrous ammonia in an unapproved container for the purpose of manufacturing methamphetamine, and being a persistent felony offender in the first degree. He received concurrent enhanced sentences of twenty-five years on the manufacturing and possession charges. His conviction was affirmed by the Kentucky Supreme Court on direct appeal. *Mattingly v. Commonwealth*, 2007 WL 2404481(Ky. 2007) (2005-SC-001919-MR).

Mattingly thereafter filed his RCr 11.42 motion alleging ineffective assistance of counsel. The trial court ordered the appointment of counsel for Mattingly and conducted an evidentiary hearing on the motion on June 26, 2009. On December 22, 2009, the trial court denied the motion in a lengthy order containing findings of fact and conclusions of law. This appeal followed.

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-part test 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.

Under the second prong of the test,

> The 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 undermine confidence in the outcome.

Id., 466 U.S. at 694, 104 S.Ct. at 2068.

We begin by setting forth the facts that are pertinent to Mattingly's arguments on appeal. Mattingly was arrested in 2004 after police discovered a disassembled methamphetamine lab in an uninhabited farmhouse owned by Mattingly's uncle. Upon seeing the items recovered from the lab, one of the police officers, Pat Payton, recognized certain key components as being identical to items discovered in an unrelated search of Mattingly's vehicle in 2000. The items which the officer recognized included identical nylon bags or satchels, identical brass fittings and a valve on a propane tank and identical brand chemicals and supplies neatly packed in satchels.[2] Officer Payton's testimony about the items recovered from the vehicle in 2000 was introduced by the Commonwealth to connect Mattingly to the evidence found in his uncle's farmhouse. On direct appeal, Mattingly challenged the admissibility of this evidence under Kentucky Rules of

[2] Mattingly was not charged with any methamphetamine-related offenses related to the discovery of these items.

Evidence (KRE) 404(b). The Kentucky Supreme Court held that the trial court did not abuse its discretion in admitting the evidence.

Mattingly's first argument is that he was denied effective assistance of counsel by the actions of the Commonwealth and the trial court, specifically, that he was not given sufficient time to consult with his attorney about a plea offer of a ten-year sentence from the Commonwealth. Accordingly to Mattingly, he first learned of the plea offer at a pre-trial conference on Tuesday, July 19, 2005. At that hearing, the prosecutor and the trial court informed Mattingly that if he wanted to accept the plea offer, he would have to do so on that day. Mattingly did not accept the offer. On the next day, Wednesday, July 20, Mattingly's attorney received notification from the Commonwealth that it would seek to admit as evidence the testimony of Officer Payton about the items found in Mattingly's car in 2000. At that point, Mattingly decided to accept the plea offer but the trial court refused to accept it. On the next day, trial proceedings began with a suppression hearing on the admissibility of Officer Payton's testimony.

Mattingly argues that there is a reasonable probability that if he had been properly informed and advised he would have accepted the plea offer on Tuesday. Mattingly argues that he did not know until Wednesday that the Commonwealth was going to use Officer Payton's testimony and that, had he known, he would have accepted the plea. He asserts that he was placed in a situation in which competent counsel could not render assistance due to the actions of the Commonwealth in placing a time limitation on how long the plea offer was

open and that his attorney should have objected to the "today only" aspect of the offer.

In its order denying Mattingly's RCr 11.42 motion, the trial court found, based on the testimony at the evidentiary hearing, that Mattingly's trial counsel had communicated the plea offer to Mattingly in a timely fashion on the Sunday before the pre-trial conference. Mattingly argues that the testimony relied upon by the trial court is contradicted by statements made by his attorney at the suppression hearing, at which he urged the court to allow Mattingly to take up the plea offer. At that time, Mattingly's attorney stated that the plea offer had not been on the table for long, that he had discussed the offer with the Commonwealth for only "the last few days," that there had not been adequate time to discuss it, that there had been no written offer and that it was "not the easiest process to talk to some guy in jail."

"A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *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). The testimony of Mattingly's trial counsel at the RCr 11.42 hearing is not contradicted in any significant way by his earlier comments at the suppression hearing. At the suppression hearing, he was trying to persuade the court to give his client another chance to accept the plea offer. The trial court was under no obligation to do so. *See* RCr 8.08.

Furthermore, Mattingly had no constitutional right to a plea offer and the conditions attached to the offer by the Commonwealth and the trial court were not unreasonable.

> There is, of course, no constitutional right to plea bargain. While a defendant may have the right to hold the prosecution to its bargain in certain circumstances, this right does not attain constitutional significance until the plea agreement is executed. A plea bargain standing alone is without constitutional significance; in itself, it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.

*Hoskins v. Maricle,*150 S.W.3d 1, 21 -22 (Ky. 2004) (internal citations and quotation marks omitted).

Mattingly's second argument is that his counsel was ineffective for failing to object to the introduction of Officer Payton's testimony. Mattingly argues that his counsel failed to render effective assistance by not informing the court that the evidence was "fruit of the poisonous tree," and that if the evidence had not been introduced the outcome of the trial would have been different. This argument is clearly refuted by the record, which shows that Mattingly's counsel did object to the admission of this evidence. As we have already noted, the trial court held an evidentiary hearing to consider Mattingly's attorney's objection to the Commonwealth's motion to admit the evidence. Mattingly's counsel's lack of success in persuading the trial court to exclude the evidence is not indicative of deficient performance.

Finally, Mattingly argues that his counsel was ineffective for failing to prepare a defense that would have explained his presence at the farmhouse where the meth lab was found. One of the incriminating pieces of evidence found at the farmhouse was a drinking glass with Mattingly's finger prints on it. Mattingly contends that, as a means of explaining the presence of the fingerprints, his attorney should have informed the jury that Mattingly's uncle owned the farmhouse. According to the testimony of Mattingly's counsel at the RCr 11.42 hearing, he thought it was not in his client's best interest to show that he had access to the farmhouse. Mattingly himself admitted that any evidence showing he had keys to the farmhouse would make it seem more likely that the disassembled meth lab belonged to him. Furthermore, the record shows that the Commonwealth had evidence that Mattingly was not welcome at the farm, which would have further undermined Mattingly's defense theory. Mattingly has failed to meet the first prong of the *Strickland* test which places the burden on the defendant to overcome the presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (internal citations and quotation marks omitted).

The order of the Grayson Circuit Court denying Mattingly's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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