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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002242-MR

HENDERSON LEON DAY, JR. — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NOS. 03-CR-00036 & 03-CR-00180

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Henderson Leon Day, Jr. appeals from a Laurel Circuit Court denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. Day claims that his guilty plea was not

[1] Senior Judge Ann O'Malley Shake 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.

knowingly and intelligently entered based upon the following allegations of ineffective assistance of counsel: (1) defense counsel (counsel) misadvised him concerning his sentence; (2) counsel did not sufficiently investigate the case; and (3) counsel failed to advise him that he could enter a conditional plea. Following a review of the parties' briefs, the record, and applicable case law, we affirm the circuit court judgment.

After receiving a complaint about drug activity at Day's residence, Laurel County Sheriff's deputies went to the home to investigate and to execute an arrest warrant on Day. The deputies saw a "Beware of Dog" sign hanging on a fence in the front of the residence. The officers walked to the back yard and found Day and Dennis Saylor, who admitted to making methamphetamine. The deputies executed a protective sweep of the property and the residence for officers' safety and secured the area. Thirty minutes later, Day consented to a search of the property. Day was arrested.

While awaiting the disposition of his narcotics case, Day was charged with one count of solicitation to commit murder for soliciting someone to kill a Laurel Co. Sheriff's deputy.

On February 11, 2004, Day pled guilty to the charges of criminal conspiracy to manufacture methamphetamine while in possession of a firearm and manufacturing methamphetamine while in possession of a firearm, for which he was charged in case number 03-CR-00180. The plea carried a concurrent sentence of twenty-seven years' imprisonment for each count. On the same day, Day pled

guilty to one count of criminal solicitation to commit murder, for which he was charged in case number 03-CR-00036. Pursuant to the plea agreement, Day received twenty years' imprisonment on the solicitation charge to run concurrently with his sentence in case number 03-CR-00180. Day was represented by separate attorneys for each case. Both attorneys were present during the guilty pleas.

On March 25, 2005, Day filed a *pro se* RCr 11.42 motion requesting that the trial court set aside his convictions. Day claimed that his guilty pleas were the product of ineffective assistance of counsel. On June 8, 2008, defense counsel filed a supplemental pleading in support of Day's RCr 11.42 motion. Without holding an evidentiary hearing, the trial court vacated Day's guilty plea with respect to the charge of criminal conspiracy to manufacture methamphetamine while in possession of a firearm under case number 03-CR-00180. The trial court denied Day's request for post-conviction relief on the remaining convictions. This appeal follows.

I. Ineffective Assistance of Counsel

A. Generally

In order to prevail on an ineffective assistance of counsel claim, a movant must show first that his counsel's performance was deficient. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A showing of deficient performance requires a movant to show that counsel made such egregious errors that the movant was effectively denied his right to counsel under the Sixth Amendment. *Id.*

The trial court's review of counsel's performance must be highly deferential. *Id*., 466 U.S. at 689; 104 S.Ct. at 2065. When judging counsel's performance, courts must question whether counsel provided "reasonably effective assistance." *Id.,* 466 U.S. at 687; 104 S.Ct. at 2064. The reasonableness of the representation must be determined in light of the prevailing professional norms. *Id*., 400 U.S. at 688; 104 S.Ct. at 2065.

Second, the movant must demonstrate that counsel's deficient performance prejudiced his case. *Id*., 466 U.S. at 687; 104 S.Ct. at 2064. The movant must show that counsel's errors were so serious that they deprived the defendant of a fair trial. *Id*. With respect to a guilty plea, however, the movant must also show that counsel's performance so seriously affected the case, that, but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59; 106 S.Ct. 366, 370; 88 L.Ed.2d 203 (1985).

A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if there is a material issue of fact that cannot be conclusively determined by a review of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

B. Standard of Review

It is well established that the defendant has the burden to convincingly establish that he was deprived of his right to counsel. RCr 11.42; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). On appeal, we must examine

counsel's performance and any deficiency that existed under a *de novo* standard. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

The *Strickland* test, as detailed above, involves mixed questions of fact and law. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1968). Appellate courts must show deference to the findings of fact and credibility determinations made by the trial court. *Id*. Those findings may only be set aside if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A finding is clearly erroneous if it is not supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964).

C. Grounds for Post-Conviction Relief

First, Day claims that counsel failed to advise him that the Commonwealth recommended a sentence of ten years on the charge of solicitation to commit murder. As described above, Day received a total sentence of 27 years' imprisonment with all charges from both cases running concurrently. Whether he received 10 or 20 years' imprisonment for the solicitation charge did not have an overall effect on his sentence. The total sentence would have been 27 years regardless.

Moreover, our review of the record does not support Day's contention that he was unaware of the recommended sentence during the plea. The following is an excerpt from the plea colloquy between Day and the Court:

> Court: Do you have any complaints about your representation?

Day: No.

Court: Did you want your lawyers to do anything that they have not done?

Day: No.

. . . .

Court: Did you read the motions to enter a guilty plea?

Day: Yes.

Court: After you read them, did you sign them?

Day: Yes.

Court: Did you sign them voluntarily?

Day: Yes.

Court: Do you understand that on the charge of criminal solicitation to commit murder you face 10 to 20 years in the penitentiary and a fine of up to $10,000.00?

Day: Yes.

. . .

Court: Do you understand that on the charge of conspiracy to manufacture methamphetamine while in possession of a firearm you face 20 to 50 years or life?

Day: Yes.

Court: Do you understand that on the charge of manufacturing methamphetamine while in possession of a firearm you face the same penalty?

Day: Yes.

. . . .

> Court: Have you had all the time you need to speak with both of your attorneys concerning the Commonwealth's written recommendation and each of your cases?
>
> Day: Yes.
>
> Court: In return for your guilty pleas, the Commonwealth recommends as follows: On 03-CR-00036, the Commonwealth recommends, on count one, 27 years, and on count three, 27 years. The Commonwealth agrees to dismiss the remaining counts. . . . with counts one and three to run concurrent with each other and 03-CR-00180. It is the Commonwealth's understanding that parole eligibility is 20%. In case number 03-CR-00180 the Commonwealth's recommendation reads as follows: 20 years to serve. The Commonwealth agrees this sentence to run concurrent with 03-CR-00036. It is the Commonwealth's understanding that parole eligibility for the above offense is 20%. Is that your understanding of the agreement that the Commonwealth has agreed to make in each of your cases?
>
> Day: Yes.

Day signed a written plea agreement before the above colloquy. The written agreement and the questions asked by the trial court both indicate that Day clearly understood the Commonwealth's offer and the recommended sentence.

Second, Day claims that counsel did not contact him prior to the date of the plea and failed to sufficiently investigate the charge of solicitation to commit murder. Although Day alleges that counsel failed to investigate the case, Day fails to articulate facts or defenses that counsel should have investigated. In his brief, Day simply states that an investigation had not been conducted; otherwise counsel would have known that, "there was no evidence to support the

charge." However, an RCr 11.42 proceeding is not the time to litigate the sufficiency of the evidence. *Nickell v. Commonwealth*, 451 S.W.2d 651, 652 (Ky. 1970).

Further, the plea colloquy does not support Day's contentions. During his plea, Day agreed that he was satisfied by his attorneys' representation. He claimed that he had sufficient opportunity to discuss his case.

In addition, the solicitation to commit murder charge runs concurrently with the other charge. Under *Hill*, Day must show that he would not have pled guilty and would have insisted on going to trial but for counsel's failure to investigate the case. *Hill*, 474 U.S. at 59; 106 S.Ct. at 370 (1985). In light of the offer of concurrent sentences and the maximum penalties of the other charge, it is unlikely that Day would have insisted on going to trial even if his counsel had fully investigated the charge.

Third, Day argues his attorney failed to advise him that he should only accept a conditional plea in case number 03-CR-00180. Day claims that the police conducted an illegal search of his home. He argues that, without counsel's failure to advise him that he should only enter a conditional plea, he would have gone to trial, appealed if convicted, and then prevailed on appeal.

This claim is a thinly veiled attempt to argue that the trial court erroneously denied his motion to suppress. There is no right to enter a conditional guilty plea. In his motion to enter a guilty plea, Day acknowledged that he

understood that he had the right to appeal his case to a higher court. He also acknowledged that by pleading guilty he waived that right.

Although Day claims that the search of his home was "in fact illegal", this comment is mere speculation. Facts and circumstances existed that could reasonably lead counsel to believe that an appeal of the trial court's denial of Day's motion to suppress would be unsuccessful. Although officers remained on the property for thirty minutes prior to receiving consent to search, the dangerous nature of manufacture of methamphetamine increases the need for a secure premises and the need for a thorough protective sweep. *See Bishop v. Com.*, 237 S.W.3d 567 (Ky. App. 2007) (a strong chemical smell consistent with manufacture of methamphetamine created exigent circumstances based on public safety).

In light of the plea agreement offered by the Commonwealth and the facts surrounding the search, defense counsel's failure to advise Day that he should only accept a conditional guilty plea is not unreasonable.

Accordingly, the Laurel Circuit Court Order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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