

Commonwealth Of Kentucky

Court Of Appeals

No. 97-CA-1850-MR

ROGER WAYNE WHITAKER

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST JASMIN, JUDGE
ACTION NO. 95-CR-0926

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and KNOPF, JUDGES.

GARDNER, JUDGE. Roger Wayne Whitaker (Whitaker) appeals from a Jefferson Circuit Court order denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate sentence. We affirm.

Whitaker was indicted on April 18, 1995, on one count of burglary in the third degree, two counts of receiving stolen property over \$300, and one count of being a persistent felony offender in the first degree (PFO I). Pursuant to an agreement, Whitaker pled guilty on June 6, 1996, in Jefferson Circuit Court to

one count of receiving stolen property over \$300. The Commonwealth recommended three years unsupervised probation on the condition that Whitaker not be arrested for any new crimes prior to sentencing. Under the plea agreement, if Whitaker was arrested prior to sentencing, the Commonwealth would recommend five years imprisonment. Whitaker was arrested two months after the guilty plea and prior to sentencing. On August 20, 1996, the Jefferson Circuit Court held a sentencing hearing at which Whitaker moved to withdraw his guilty plea. The court denied Whitaker's motion and sentenced him to serve five years in prison.

On June 19, 1997, Whitaker filed an RCr 11.42 motion to vacate his sentence alleging ineffective assistance of counsel. Whitaker also sought an evidentiary hearing on the issues raised in his motion. The circuit court denied Whitaker's motion without a hearing, and this appeal followed.

When the trial court denies a motion for an evidentiary hearing, review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

In order to succeed on his ineffectiveness claim, Whitaker must demonstrate that his counsel's performance was deficient and that he was prejudiced by counsel's deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The deficiency prong is satisfied if counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

Id. In the context of a guilty plea, prejudice is shown if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have instead insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106, S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

In support of his RCr 11.42 motion, Whitaker contends that his counsel rendered ineffective assistance for failing: (1) to make any attempt to quash the indictments; (2) to advise the court when the guilty plea was entered that Whitaker was pleading guilty to a charge for which he was innocent; (3) to advise him that he was entering into an unconscionable contract; (4) to inform the sentencing court that the guilty plea order was barren of any language regarding arrest; (5) to move for discovery or a Bill of Particulars prior to advising him to enter into a guilty plea; (6) to correctly advise him of his ability to withdraw his guilty plea; and (7) to move for a continuance.

Whitaker's first argument alleges counsel was ineffective for failing to make any attempt to dismiss the indictments for insufficient evidence. An indictment cannot be quashed or judgment of conviction reversed on the ground of insufficient evidence. See RCr 5.10. Therefore, Whitaker has failed to show counsel was deficient in his performance.

Whitaker's second argument alleges that counsel should have advised the court when the guilty plea was entered that Whitaker was pleading guilty to a charge for which he was innocent. This allegation is refuted by the record. The trial court specifically asked Whitaker whether he was guilty, and he admitted

guilt. Once it is determined that the guilty plea was rendered voluntarily and intelligently, the plea confesses everything charged in the indictment. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223 (1986). The simple fact that counsel advises or permits a defendant to plead "guilty" does not constitute ineffective assistance of counsel. Beecham v. Commonwealth Ky., 657 S.W.2d 234, 237 (1983). The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981), certiorari denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). The record reflects that Whitaker voluntarily, knowingly and intelligently made the decision to plead guilty and was aware of the ramifications. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

Whitaker claims counsel rendered ineffective assistance by failing to advise him that he was entering into an unconscionable contract containing a provision that would impose a five year sentence of imprisonment for an arrest. On the contrary, the plea agreement substantially reduced the charges against Whitaker and counsel's actions were therefore reasonable. A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992). Counsel's decision to allow Whitaker to enter into the agreement was reasonable and within the wide range of professionally competent assistance, because it was speculative at best to assume that

Whitaker would be arrested in the time between the guilty plea and sentencing. Furthermore, Whitaker was not prejudiced by counsel's inaction because the agreement was an attractive offer in light of Whitaker's past record and the sentence he could have received if he had gone to trial.

Whitaker contends that counsel was ineffective for failing to inform the trial judge that the guilty plea order entered on June 17, 1996, did not contain any language mentioning arrest as part of the plea agreement. However, the court order was merely a recitation of the Commonwealth's proposal. Whitaker was fully aware of the conditions to be imposed, and the order made specific references to the plea agreement.

Whitaker next alleges that the trial counsel failed to make any motions for discovery or to request a Bill of Particulars prior to advising him to enter a guilty plea. The record shows that in May 1996, the Commonwealth furnished counsel with pre-trial discovery that included a Bill of Particulars. Therefore, counsel was not deficient for failing to make unnecessary motions.

Whitaker alleges that trial counsel incorrectly advised him that he could withdraw his guilty plea at sentencing. Whitaker claims that if he had been correctly informed he would have maintained his innocence from the beginning and would not have pleaded guilty. Whitaker cannot show prejudice because the trial judge was exhaustive in the taking the guilty plea. Whitaker was asked whether he approved of the assistance provided by his counsel and he replied "very much so." Whitaker was also informed of the rights he was surrendering, and he informed the court that he was

not relying on any promises made by anyone in entering a plea of guilty. Finally, in light of his prior record and the charges present, Whitaker could have received a much longer sentence, and the guilty plea was a reasonable alternative.

Whitaker's final argument in regards to inadequacy of counsel stems from counsel's failure to move for a continuance of the sentencing hearing, until after the dismissal of the charges that stemmed from the arrest of July 2, 1996. Under the plea agreement, Whitaker's arrest was enough to trigger the Commonwealth's recommendation of the five year sentence. "A plea agreement must be strictly construed and enforced according to its terms." Wilson v. Commonwealth, 839 S.W.2d 17, 20 (1992). Therefore, Whitaker was not prejudiced by the actions of his counsel.

Whitaker further alleges that the assistant Commonwealth's attorney participated in prosecutorial misconduct by prosecuting the original case while possessing knowledge of witnesses who would testify as to appellant's innocence. This is not a case of prosecutorial misconduct, but instead misconduct on the part of the accused. The Commonwealth offered a plea bargain in good faith which Whitaker violated.

As the record clearly refutes the allegations in Whitaker's RCr 11.42 motion, we decline to say that the trial court abused its discretion in denying Whitaker's motion for a hearing, or that the court clearly was erroneous in denying his RCr 11.42 motion to vacate sentence. The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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