

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002620-MR

RAUGHN EUGENE LEWIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 1997-CR-01644

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an order of the Jefferson Circuit Court denying motions to vacate a judgment of conviction pursuant to RCr 11.42 and CR 60.02. We agree with the trial court that the appellant's allegations that his guilty plea was not knowing and voluntarily entered, and that he received ineffective assistance of counsel were refuted by the record. Hence, we affirm.

The appellant, Raughn Eugene Lewis, was indicted by a Jefferson Circuit Court Grand Jury on the charges of trafficking in a controlled substance in the first degree (Schedule II, Cocaine) while possessing a firearm, possession of a firearm by a

convicted felon, tampering with physical evidence, possession of drug paraphernalia while in the possession of a firearm, possession of a controlled substance (marijuana) while in the possession of a firearm, operating a motor vehicle while licence is suspended or revoked for driving under the influence, attempting to elude police, no motor vehicle insurance, and being a persistent felony offender in the second degree (PFO II). Prior to the scheduled trial, Lewis's counsel filed motions to suppress evidence seized as a result of an improper stop and a warrantless search of Lewis's residence. Following a hearing, the trial court denied both motions.

Shortly thereafter, Lewis accepted the Commonwealth's offer on a plea of guilty. The Commonwealth's offer recommended that the trafficking charge be amended to illegal possession of a controlled substance in the first degree (Schedule II, Cocaine) while in the possession of a firearm. The Commonwealth further recommended that the drug paraphernalia and marijuana charges be amended to simple possession without the firearms enhancement. The Commonwealth agreed to drop the PFO II charge against Lewis, and to recommend the minimum sentences and fines on the remaining charges. The trial court accepted Lewis's guilty plea, and imposed the Commonwealth's recommended sentences as follows:

five (5) years for ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE (COCAINE); five (5) years for possession of a Firearm by a Convicted Felon; one (1) year for Tampering with Physical Evidence; twelve (12) months for Illegal Possession of Drug Paraphernalia; thirty (30) days for Illegal Possession of a Controlled Substance (Marijuana); a \$50.00 fine for Operating a Motor Vehicle While Licence is Revoked or Suspended for Driving Under the Influence; a

\$35.00 fine for Attempt to Elude Police; and
a \$500.00 fine for No Motor Vehicle
Insurance, to run concurrently for a total of
FIVE (5) YEARS.

Judgment of Conviction and Sentence, March 13, 1998

In September 1998, Lewis filed a motion to vacate his conviction pursuant to RCr 11.42 and/or CR 60.02. The trial court denied the motions without a hearing. Lewis now appeals.

Lewis alleges that his trial counsel coerced him into pleading guilty. He further asserts that the guilty plea proceedings reflect that he was not properly informed of the facts underlying his guilty plea on the charges of tampering with physical evidence and possession of a firearm by a convicted felon. During the plea proceedings, Lewis stated that he was not aware of the firearm, and that it belonged to another person who lived in the house with him. Furthermore, he did not mention the facts underlying the charge of tampering with physical evidence. In reviewing this motion, the trial court rejected these arguments, stating that each element of the offenses to which Lewis pled was detailed either by Lewis himself or by the Commonwealth. In addition, the trial court noted that Lewis waived any issue regarding sufficiency of the evidence by pleading guilty.

A guilty plea is valid only if it represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). A particular plea's validity is determined from the totality of the circumstances surrounding its making, not by reference to some magic

incantation recited at the time it was taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made. Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872 (1977). The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty. Id. at 874. Solemn declarations in open court carry a strong presumption of verity. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990).

We conclude that Lewis intelligently and knowingly pleaded guilty. First, there was no evidence that Lewis's trial counsel coerced him into accepting the guilty plea. During his guilty plea colloquy, Lewis stated that he was satisfied with the advice of his trial counsel, and that he was voluntarily accepting the guilty plea. Furthermore, the Commonwealth's offer exposed Lewis to a considerably lesser sentence than he might have received had he proceeded to trial and been found guilty. Where a plea of guilty may result in a lighter sentence than otherwise might be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper. Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967). See also, Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998).

Second, there was sufficient evidence in the record to support the trial court's acceptance of Lewis's guilty plea. A

defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 225 (1986). Therefore, Lewis may not challenge the sufficiency of the evidence against him on the charges which he admitted. In addition, during Lewis's guilty plea colloquy, the trial court went over the facts underlying each of the charges. The Commonwealth represented the evidence it would have presented had the case gone to trial. Lewis made no indication that he wanted to dispute this evidence or to withdraw his guilty plea. Finally, our review of the record indicates that Lewis's guilty plea satisfied the requirements of Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969). Consequently, the trial court did not err in finding that Lewis made a knowing and voluntary plea of guilty.

Lewis next contends that his counsel provided ineffective assistance during the suppression hearing. He argues that his trial counsel failed to properly research and argue the suppression issue. He contends that his trial counsel failed to argue that the plain view doctrine was inapplicable, based upon Welsh v. Wisconsin, 466 U.S. 470, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984). Lewis also asserts that his trial counsel failed to adequately cross-examine Officer Coomer regarding inconsistencies in his testimony. For the following reasons, we agree with the trial court that Lewis failed to present sufficient evidence to warrant an inference that his trial counsel was ineffective.

As noted by the trial court, a motion pursuant to RCr 11.42 is not a substitute for an appeal of the suppression ruling. The sole issue before the Court is whether Lewis's trial counsel provided ineffective assistance. To prevail on an ineffective assistance of counsel claim, the appellant must show that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052 (1984); see also, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). The standard to establish ineffective assistance of counsel when a defendant pleads guilty is provided in Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985); see also, Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 226 (1986). Lewis must show there exists a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill, 474 U.S. at 59, 88 L. Ed. 2d. at 210.

Based upon the record, we cannot find that Lewis's trial counsel provided ineffective assistance. Unlike the circumstances in Welsh v. Wisconsin, *supra*, the Commonwealth established that there were exigent circumstances which justified the warrantless search of Lewis's residence. Officer Coomer testified that he pursued Lewis to his home and followed him into the house. He testified that he observed Lewis reach into his waistband and make a movement as if he were discarding contraband. After arresting Lewis, Officer Coomer saw spent baggies on the floor which were consistent with packaging for

cocaine. A further search of the house turned up loose marijuana and cocaine in a bowl and the gun on a cabinet shelf. Although the evidence was conflicting, the evidence supported the trial court's decision to deny the motion to suppress. The result would not have been different had counsel cited Welsh v. Wisconsin to the trial court.

Furthermore, Lewis's trial counsel thoroughly cross-examined Officer Coomer regarding the events leading up to the search. Moreover, there is a presumption that, under the circumstances, the challenged actions of counsel might be considered sound trial strategy. Strickland, 466 U.S. at 689-90, 80 L. Ed. 2d at 694-95. Therefore, in the absence of a showing that some alternative action by counsel would have compelled a different result, ineffective assistance will rarely be shown. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986). The decision to ask particular questions is a matter of trial strategy, and we find no reason in this case to second-guess that choice.

Lewis also argues that his trial counsel misadvised him regarding the elements of the offenses to which he was pleading guilty. As noted above, Lewis presented no evidence supporting this contention. The record reveals that Lewis's guilty plea was knowingly and voluntarily entered. Therefore, the trial court did not err in denying his motion to vacate his conviction.

Finally, Lewis asserts that the cumulative effect of the proceeding errors deprived him of his right to due process of law. In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have

no cumulative effect. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). See also McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986); Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997).

Accordingly, the order of the Jefferson Circuit Court denying Lewis's motions to vacate his conviction pursuant to RCr 11.42 and CR 60.02 is affirmed.

ALL CONCUR.

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