RENDERED: June 9, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003129-MR

EARNIE RAY COUCH — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 95-CR-00117

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND TACKETT, JUDGES.

TACKETT, JUDGE: This is an appeal by Earnie Ray Couch (Couch) from an order of the Marion Circuit Court denying his motion to alter, amend, or vacate his sentence pursuant to Rule of Criminal Procedure (RCr) 11.42. We affirm.

On November 20, 1995, Couch was indicted for two counts of second-degree burglary, theft by unlawful taking over $300.00, and first-degree persistent felony offender. The charges resulted from two break-ins into the residence of Alan Deverney. On April 15, 1996, Couch entered into a plea agreement with the Commonwealth. Under the terms of the agreement, Couch agreed to plead guilty to one count of second-degree burglary, one count of

theft by unlawful taking over $300.00, and to being a second-degree persistent felony offender. The agreement provided that Couch would receive a sentence of fifteen years' imprisonment on the second-degree burglary charge as enhanced by the persistent felony offender count, and ten years' imprisonment on the theft by unlawful taking charge, to run concurrent with the enhanced burglary sentence for a total of a fifteen year sentence. On April 17, 1996, judgment was entered pursuant to the plea agreement, and on June 3, 1996, Couch was sentenced in accordance with the agreement.

On August 12, 1998, Couch filed a motion to vacate, set aside, or correct judgment pursuant to RCr 11.42. On September 18, 1998, the trial court issued an order denying the motion without a hearing. This appeal followed.

Couch contends that he is entitled to have his guilty plea vacated because he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct.

1441, 1449, 25 L.Ed.2d 763 (1970), and 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 pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986).

First, Couch contends that he received ineffective assistance because "trial counsel never discussed the facts of the case with Appellant, never informed him of any wittnesses [sic] against him, never discussed any possible defense nor made any Motions before the Court, as Appellant had requested." Trial counsel should, of course, communicate with a defendant regarding the facts of the case, inform the defendant of any witnesses the Commonwealth may call to the stand, examine potential defenses available to the defendant, and perhaps also discuss possible motions. However, the allegations of ineffective assistance of counsel raised by Couch in this motion are either refuted by the record, or Couch has failed to demonstrate prejudice as required by Strickland.

Couch's contention that trial counsel never discussed the facts of the case with him is refuted by the record. In the April 15, 1996, plea agreement, Couch stated that he had "received a copy of the Indictment . . . before being called upon to plead, and [had] discussed it with my attorney and fully [understood] every charge made against me in this case." In addition, Couch stated "I have told my attorney all the facts and

surrounding circumstances as known to me concerning the matters mentioned in the Indictment . . . and believe that my attorney is fully informed as to all such matters."

Couch further failed to demonstrate prejudice in trial counsel's "failure to inform him of any witnesses against him." Couch did not identify any witnesses he was aware of at the time of his plea, nor what those witnesses' testimony would have been. Furthermore, Couch failed to specify why the testimony of any witness would have compelled him to go to trial. An evidentiary hearing is not a forum to investigate whether any such witnesses may exist. "[T]he purpose of an RCr 11.42 motion is to provide a forum for known grievances and not an opportunity to conduct a fishing expedition for potential grievances." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 910 (1998).

Couch's allegation that trial counsel failed to discuss any defenses with him is refuted by the record. In his plea agreement, Couch stated that, "[m]y attorney has . . . informed me and has counseled and advised me at length as to the nature and cause of each accusation against me as set forth in the Indictment . . . and as to any possible defenses I might have in this case." In addition, Couch never identified any defense which have compelled him to go to trial. Consequently, there is no evidence of prejudice with regard to this issue.

Couch's allegation that trial counsel failed to file motions fails both prongs of the Strickland test. Counsel is not per se ineffective merely by failing to file pretrial motions. Couch has failed to identify the motions trial counsel should

have filed and how, by trial counsel's failure to file those motions, he was prejudiced. The burden of proof is upon Couch to demonstrate that both prongs of Strickland have been met. Osborne v.Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998). There is no evidence that either prong has been met in this argument.

Next, Couch argues that he received ineffective assistance because trial counsel failed to seek to have his charges reduced to a "lower class of crime." It is apparently Couch's theory that his criminal activity did not satisfy the elements for second-degree burglary conviction, but, rather, may have warranted only a conviction for first-degree criminal trespass.

Trial counsel did not render deficient performance by not seeking to have Couch's burglary indictment amended to first-degree criminal trespass. First, the trial court is generally without authority to amend an indictment prior to trial, so any motion would have been futile. See Coleman v. Commonwealth, Ky., 501 S.W.2d 583 (1973) cert. denied, 94 S.Ct. 1615, 416 U.S. 908, 40 L. Ed. 2d 113 (1974) (A trial court has no authority to amend an indictment to charge an additional or different offense). Second, based upon Couch's own oral statements, he in fact broke into the home of Alan Deverney on two occasions. Following the break-ins, Couch did not merely remain unlawfully in the dwelling so as to be guilty of only first-degree criminal trespass; rather, upon breaking into the dwelling he committed theft, as evidenced by the numerous items he took and concealed at his

sister's residence. Thus, there was no deficient performance of trial counsel in failing to file a motion to reduce the burglary charge.

Finally, Couch contends that he received ineffective assistance because trial counsel "failed to present any mitigating evidence and witnesses during [the] penalty phase of his court proceedings." Specifically, Couch alleges that trial counsel failed to present evidence at sentencing of his "desire to withdraw his involuntary and unintelligent guilty plea," and, further, failed to present evidence regarding his state of mind at the time of sentencing. Couch contends that his mental state was affected at sentencing because he had been arrested just hours before sentencing "for sniffing paint and intoxication."

These arguments address themselves to the voluntariness of the guilty plea rather than to mitigation. 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), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). The record reflects that Couch voluntarily, knowingly and intelligently made the decision to plead guilty and

was aware of the ramifications of such a plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

In the plea agreement, Couch acknowledged that he understood the charges against him and that he had told his attorney all of the facts surrounding the case and that his attorney had counseled him at length as to the nature and cause of each accusation against him. The agreement also stated that trial counsel had informed Couch of any possible defenses that he may have. The agreement also stated that he understood his right to plead not guilty, of his right to a speedy and public trial; of his right to see, hear, and confront all witnesses called against him; and of the right to compel the production of any evidence in his favor. The agreement also states that the decision to enter a guilty plea was made freely and voluntarily and of Couch's own accord.

Couch maintains that he later changed his mind about the guilty plea and sought to withdraw the plea prior to his sentencing hearing on June 3. The record does not contain the videotape or transcript of that hearing; however, the judgment and sentence order dated June 3, 1996, and entered on June 4 1996, contains the finding that Couch understood the nature of the charges against him and that his guilty plea was voluntary. "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). Hence, we must assume that the trial

court's sentencing order finding that Couch's plea was voluntary is supported by the omitted portion of the record.

Couch's contention that he was intoxicated likewise fails to demonstrate that his guilty plea was not voluntarily made. Couch signed his plea agreement on April 15, 1996. Therein he acknowledged that he fully understood the charges against him and the consequences of his plea. The sentencing hearing was not until June 3. In addition, the trial court's sentencing order contains the finding that Couch's plea was voluntary.

For the foregoing reasons the September 18, 1998, order of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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