

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000426-MR

DONALD MARK BRISBY

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 99-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Donald Mark Brisby appeals from an order of the Union Circuit Court that denied without a hearing his RCr¹ 11.42 motion to vacate, set aside, or correct his sentence and conviction for manufacturing methamphetamine. We affirm.

On February 6, 1999, the Kentucky State Police executed a search warrant at a mobile home based on information received from medical personnel and an anonymous tip that a fire severely injuring two persons, including Brisby, was related to the manufacture of methamphetamine. In the search, the police

¹ Kentucky Rules of Criminal Procedure.

recovered some items consistent with the manufacture of methamphetamine including a book on the subject. In March 1999, the Union County grand jury indicted Brisby and two other individuals for processing chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.² One of the co-defendants provided information to the police implicating Brisby and agreed to testify for the prosecution.

On January 7, 2000, Brisby entered a guilty plea pursuant to a plea agreement to one felony count of manufacturing methamphetamine. Under the plea agreement, the Commonwealth recommended a sentence of twelve years to run concurrently with the sentence under another indictment³ and opposed probation. In February 2000, the circuit court sentenced Brisby to twelve years' imprisonment consistent with the Commonwealth's recommendation.

On January 9, 2001, Brisby filed a motion to vacate his sentence and conviction, a motion for appointment of counsel, and a motion for an evidentiary hearing pursuant to RCr 11.42. He alleged that his guilty plea was invalid based on several instances of ineffective assistance of counsel. Following a response by the Commonwealth, the circuit court entered an order denying the RCr 11.42 motion without a hearing, stating the

² Kentucky Revised Statute (KRS) 218A.1432(1)(b), a Class B felony. See KRS 532.060.

³ On the same day, Brisby pled guilty to one felony count of complicity to commit criminal attempt to manufacture methamphetamine in Indictment No. 99-CR-00003 with the Commonwealth recommending a sentence of five years. Brisby has not challenged that conviction.

records showed that Brisby's guilty plea was entered knowingly, understandably, and voluntarily and that he was well represented at all stages of the proceeding by competent counsel. This appeal followed.

Brisby's primary complaints on appeal are that the circuit court erred by failing to appoint counsel to assist him with his RCr 11.42 motion and by failing to conduct an evidentiary hearing on the motion.⁴ The Kentucky Supreme Court recently clarified the standards and analysis applicable to appointment of counsel in relation to an RCr 11.42 motion. In Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-53 (2001), the court held that a trial judge must appoint counsel to represent an indigent defendant where he specifically requests such appointment in writing and if an evidentiary hearing is required. An evidentiary hearing is required if there is a material issue of fact that cannot be conclusively resolved by examination of the record. Id.; RCr 11.42(5). Stated another way, as prior cases have said, an evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. See Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 199 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001); Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967), cited in Fraser, supra.

⁴ We note that Brisby has received legal assistance and appointment of counsel to represent him in this court.

Brisby claims that his guilty plea was invalid because defense counsel rendered ineffective assistance at a "critical phase" of the proceedings. First, he asserts that counsel was ineffective for failing to properly consult with him prior to his entering the guilty plea. He maintains that counsel discussed the case with him for only approximately thirty minutes and did not fully explain the charges against him or any available defenses. He states that in his discussions with counsel, she focused on the Commonwealth's guilty plea offer and advised him that he would be convicted and receive the maximum sentence if he went to trial. Brisby alleges that defense counsel had not investigated the case and that he pled guilty only because of fear of the consequences of going to trial with an unprepared attorney.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord 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 counsel, he must show both that the counsel made serious errors outside the wide range of professionally competent assistance 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 appellant 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); Phon v. Commonwealth, Ky., 51 S.W.3d 456, 459-60 (2001); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18, 22 (1999). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

A review of the record reveals that Brisby's current assertions conflict with his statements and actions at the guilty plea hearing. In both his written motion to enter a guilty plea and in response to oral questions from the circuit court, Brisby indicated that he had fully discussed the charges and any possible defenses with his attorney and that he believed she was fully informed about his case. Brisby told the court that he was satisfied with his attorney's assistance and that he did not need additional time to discuss the case with her prior to entering a plea. Brisby is critical of the trial court's method of conducting his guilty plea hearing simultaneously with seven other defendants. While this method is not optimal and the preferable procedure would be restricted to a single defendant, the court did obtain responses to each question from each individual defendant, including Brisby.

Solemn declarations under oath in open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 73, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1977); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). Any claim that conflicts with the statements made during a guilty plea hearing faces a formidable barrier in a collateral proceeding challenging

the plea. Id.; Lasiter v. Thomas, 89 F.3d 699, 702-03 (10th Cir.), cert. denied, 519 U.S. 998, 117 S. Ct. 493, 136 L. Ed. 2d 386 (1996). A defendant may surmount that barrier if there is proof that the representations were a product of misunderstanding, duress, or misrepresentation by others. Fraser, 59 S.W.3d at 457 (quoting Blackledge, supra). Brisby's assertions that he believed counsel was unprepared and he would receive a lesser sentence if convicted at trial are insufficient grounds to absolve him of responsibility for his statements at the hearing. Cf. Fraser (oral agreement with prosecution to provide misleading statements at guilty plea hearing was sufficient to overcome binding effect of statements made during hearing).

Brisby devotes a substantial portion of his brief on his claim that counsel did not fully consult with him and spent only approximately thirty minutes discussing the case with him. He argues that the pretrial period is a critical stage and perfunctory consultation violates both the Sixth Amendment right to counsel, see United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and ineffective assistance of counsel under Strickland. Relying on Mitchell v. Mason, 257 F.3d 554 (6th Cir. 2001), Brisby argues that his situation constituted constructive denial of counsel. His reliance on Mitchell is misplaced.

In Mitchell, the defendant's only contact with his attorney was during court proceedings for a total of six minutes prior to trial. Prior to trial, Mitchell wrote several letters to the trial judge and orally complained about his attorney's

failure to consult with him. In addition, his attorney was unavailable due to being suspended for a month. The court held that these circumstances constituted prejudice per se as a denial of counsel under Cronic. It stated, "the pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case." Id. at 567.

Unlike Mitchell, Brisby admits having met with his attorney on four separate occasions where they discussed the Commonwealth's plea offers and the risks of going to trial. In Mitchell, the court stated, "the undisputed record evidence demonstrates that Mitchell's counsel never consulted with him and that he was completely unrepresented during the entire month prior to his trial." 257 F.3d at 574. In addition, Brisby never complained about a lack of consultation with his attorney until a year after pleading guilty and stated at the guilty plea hearing that he was satisfied with his attorney and had sufficient time to discuss the case with her. In other words, the record clearly refutes his claim of denial of counsel or deficient performance with respect to this issue.

Additionally, Brisby has failed to show that counsel's conduct resulted in actual prejudice. He alleges that he is completely innocent of the offense and that counsel failed to investigate the case. He provides no valid information supporting these claims such as exculpatory evidence or useful information counsel would have discovered through further investigation.

Brisby asserts that counsel failed to interview a co-defendant, Donald Dunn, who was willing to testify that the third co-defendant, Gary Caldwell, had falsely implicated him. However, he also states that Dunn was innocent, when in fact, Dunn had pled guilty to the charges several months prior to Brisby's guilty plea. Brisby also says that counsel did not interview Jennifer Sturgill, who would have testified that he was innocent, but he provides no further information on this witness.

Brisby was severely burned when a methamphetamine lab exploded. Gary Caldwell, the other co-defendant also burned in the explosion, pled guilty and agreed to testify for the prosecution. Brisby received a twelve-year sentence on a Class B felony and a Class C felony under the two indictments, but he was subject to a possible maximum sentence of thirty years. The record clearly refutes a claim that defense counsel rendered deficient performance that would have reasonably affected his decision to plead guilty, rather than go to trial. See, e.g., Centers, 799 S.W.2d at 56 (appellant's ineffective assistance claim based on lack of investigation and failure to pursue possible defenses fails for lack of specificity).

In his original RCr 11.42 motion, Brisby argued that defense counsel was ineffective for not challenging KRS 218A.1432(1)(b) as being unconstitutionally vague and overbroad. A statute is void-for-vagueness under the due process clause if it does not provide fair notice of prohibited conduct and is susceptible to arbitrary and discriminatory enforcement. Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 43 (1997) (citing Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d

903 (1983)); Commonwealth v. Foley, Ky., 798 S.W.2d 947, 951 (1990). The overbreadth doctrine prohibits statutes that unduly penalize constitutionally protected First Amendment rights in an effort to control impermissible conduct. See Kash, 967 S.W.2d at 42; Commonwealth v. Ashcraft, Ky. App., 691 S.W.2d 229 (1985).

KRS 218A.1432(1)(b) prohibits the knowing possession of chemicals or equipment for the manufacture of a methamphetamine with the intent to manufacture methamphetamine. The overbreadth doctrine does not apply because this statute does not implicate constitutionally protected free speech rights. Furthermore, it does not violate the void-for-vagueness doctrine because it provides sufficient notice to ordinary persons of prohibited conduct and does not encourage arbitrary enforcement because it is directed at intentional conduct involving the manufacture of an illegal substance. Although some ordinary, otherwise legal compounds, are generally used to manufacture methamphetamine, prosecution under the statute is limited to situations involving amounts or combinations of chemicals indicative of use for production of methamphetamine. Cf. Commonwealth v. Hayward, Ky., 49 S.W.3d 674 (2001) (holding combination of common chemicals evidence of intent to manufacture methamphetamine). Consequently, the statute is not unconstitutionally vague or overbroad, and Brisby was not prejudiced by counsel's failure to challenge it.

In conclusion, Brisby's complaints of ineffective assistance of counsel are refuted on the record; therefore, the trial court did not err in denying his RCr 11.42 motion without a hearing and without appointing counsel.

For the foregoing reasons, we affirm the order of the
Union Circuit Court.

ALL CONCUR.

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