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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001213-MR

ROGER WHITAKER — APPELLANT

v. — APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 01-CR-00105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Roger Whitaker, *pro se*, has appealed from the denial of his motion by the Bullitt Circuit Court. Although the motion was captioned as a "motion for modification of sentence," it was treated as one filed pursuant to RCr[1] 11.42. We affirm.

Whitaker was indicted on August 31, 2001, by a Bullitt County grand jury. The indictment charged him with possession of a controlled substance in the first degree, manufacturing methamphetamine, and being a persistent felony offender in the

[1] Kentucky Rules of Criminal Procedure.

first degree (PFO I). Whitaker entered into a plea agreement in which the Commonwealth offered to dismiss the manufacturing methamphetamine charge, to recommend that his sentence run concurrently with any related federal sentence, and to make a sentencing recommendation of five-years' imprisonment -- enhanced to ten years. In exchange, Whitaker entered his guilty plea on October 16, 2001, to possession of methamphetamine and to being a persistent felony offender in the first degree.

Whitaker and his counsel signed the standard form 491 of the Administrative Office of the Courts, and the trial court entered a judgment of conviction on the guilty plea following the Commonwealth's sentencing recommendation. The trial court specifically found that Whitaker understood the nature of the charges against him and that he knowingly and voluntarily waived his rights. On December 17, 2001, Whitaker was sentenced to five-years' imprisonment enhanced to ten years in accordance with the Commonwealth's recommendation. On January 11, 2002 an agreed order was entered indicating that Whitaker was entitled to a credit of 263-days for time served.

Whitaker filed a document styled "motion for modification of sentence" in April 2002. In the motion, he alleged that he had been denied the effective assistance of counsel in numerous respects. The trial court treated his *pro se* motion as one for relief pursuant to RCr 11.42. In an order

entered on May 2, 2002, the circuit court summarily denied the motion.

On May 30, 2002, Whitaker filed another document styled "motion to reopen and amend." In this motion, he contended that the court's order denying relief should be set aside since his April motion had been "filed in error, by a Legal Assistant at the Roederer Correctional Complex, on behalf of Defendant. . . ." He contended that the April motion should not have been construed as one for RCr 11.42 relief but as an untimely request to modify his sentence.

On May 31, 2002, Whitaker's defense attorney filed a notice of appeal, and the Department of Public Advocacy (the DPA) immediately undertook his representation. Later, after closely reviewing the record, the DPA concluded that the appeal was not one that a reasonable person with adequate means would be willing to bring at his own expense. KRS[2] 31.110(2)(c). As a result, the Department contended, Whitaker had "no further right to be represented by counsel under the provision of [the public advocacy statutes]." Citing KRS 31.110(2), the DPA requested permission to withdraw as Whitaker's counsel. On December 2, 2002, we granted the DPA's motion to withdraw from representation. Whitaker was given 60 days in which to file a brief.

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[2] Kentucky Revised Statutes.

Instead of pursuing the appeal, Whitaker filed a motion to dismiss the appeal in January 2003. He argued again that his April motion for relief should not have been treated as a request for relief pursuant to RCr 11.42. However, he argued that since the motion was unverified and otherwise deficient, the trial court had never acquired jurisdiction to entertain it. The Commonwealth opposed the motion. Concluding that the procedural defects in Whitaker's motion had been waived by the Commonwealth, a motion panel of this court denied the motion to dismiss and assigned the appeal to this panel on the merits of the case.

On appeal, Whitaker argues that the trial court erred by denying his motion based on ineffective assistance of counsel without an evidentiary hearing. We disagree.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in 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). He must demonstrate: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance so that counsel was not performing up to the standard of representation guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously

that there is a reasonable probability that the defendant would not have pled guilty and that the outcome would have been different. In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Whitaker intimates that his defense attorney, Rebecca Murrell, persuaded him to accept the Commonwealth's offer only because she had inadequate time to prepare properly for trial and had failed to request a continuance. Whitaker cites portions of Murrell's correspondence in support of his contention.

In a letter dated September 21, 2001, Murrell advised Whitaker that his case had been scheduled for trial on October 11, 2001. She indicated that she would meet with him to discuss the case following her review of the discovery materials provided by the Commonwealth and that he should feel free to contact her at any time with information or questions about his case. However, Murrell advised Whitaker that she anticipated being involved in a murder trial when the discovery materials were likely to be forwarded to her office. Consequently, she indicated that his trial might have to be continued to a later

date since she would need adequate time to prepare the case for trial.

We cannot construe this correspondence as pressuring Whitaker to accept the Commonwealth's offer. The correspondence merely kept Whitaker properly advised of the status of his case and explained that a continuance might be necessary due to Murrell's time constraints and that it would not, therefore, entitle him to a dismissal for failure of the court to try him within 180 days (in accordance with his *pro se* request for a speedy trial pursuant to KRS 500.110). The record before us shows that Murrell was willing and able to protect her client's interests at every juncture and that she was meticulous in keeping him fully informed as to the status of his case. As an example, we quote the following exchange between the parties recorded on October 15, 2001:

> THE COURT: Okay. Can we get an OFAP [Order for Appearance of Prisoner] tomorrow?
>
> MS. MURRELL: He's [Whitaker] at Community Corrections Center in Jefferson County. I'll advise the Court right now that if it has to go tomorrow I'll put on the record an objection to have him to try it tomorrow even though my client wants to go forward. I have not had it long enough to prepare.
>
> THE COMMONWEALTH: We won't object to that. Of course he's made that Speedy Trial Motion and that's got us all in a bind.

MS. MURRELL: Well, it does. And that probably will have to control over what my wishes are.

The record refutes Whitaker's claim that Murrell's statements to him caused him to believe that he had no choice but to plead guilty because she was unprepared to present a defense and had failed to request a continuance. Consequently, the trial court did not err by summarily denying the motion for relief on this ground. Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

Next, Whitaker claims that his guilty plea was not knowing, voluntary, and intelligent because counsel failed to investigate the evidence thoroughly. He maintains that the police failed to handle and collect the evidence properly and that they also failed to maintain a proper chain of custody. Thus, he argues that the evidence collected against him could not have been shown to be reliable and could not have been used against him at trial even if he had he decided to go forward. Whitaker contends that if counsel had properly "investigated the facts of this case, she would have learned that all of the Commonwealth's evidence in this case was inadmissible. . . ." Appellant's brief at p. 5. Consequently, he submits that his counsel was ineffective for failing to investigate the integrity of the evidence and to follow up with a motion to suppress. We disagree.

Through discovery provided by the Commonwealth, Whitaker's counsel was aware that the police had retrieved a black and red gym bag from the vehicle that Whitaker was driving when he was apprehended. The gym bag contained more than 20 assorted household items commonly used in the manufacture of methamphetamine. Additionally, the police retrieved plastic containers holding white residue identified as methamphetamine, and they took twenty-three photographs of the scene and of the physical evidence. The Commonwealth provided counsel with the names of ten Kentucky State Police and Jefferson County Police Department personnel who had observed Whitaker's alleged offenses and had helped to subdue him.

The Commonwealth also provided counsel with copies of an investigation report, recovered property reports, and chain of custody forms. The reports and forms detailed how the individual items of evidence had been properly marked for identification and where and by whom the items had been deposited for safekeeping. The state of the record as it existed at the time of the guilty plea was credible, and the Commonwealth's ability to complete the chain of custody was thorough. Thus, if the case had proceeded to trial, we do not believe that the trial court had any reasonable basis for suppressing the evidence collected against Whitaker. Under these circumstances, we conclude that the record conclusively

proved that Whitaker's counsel was not ineffective for failing to investigate the facts of the case nor was her representation flawed by the decision not to file an unnecessary and futile motion to suppress. An evidentiary hearing was not required.

Whitaker also contends that his guilty plea was induced by misrepresentations made to him both by the Commonwealth and by his defense counsel. He claims that he was under the impression that he had agreed to plead guilty to being a persistent felony offender in the second degree (PFO II) rather than to a PFO I. He says he would not have pled guilty if he had known the true nature of the plea agreement. In his brief, Whitaker states that he "simply went along with the Judge at the Boykin Hearing, thinking that he was pleading guilty to the P.F.O. II." Appellant's brief at p. 4. Whitaker also cites a page from a pre-sentence investigation report (prepared by a probation and parole officer) that misidentified his offenses.

However, the record shows conclusively that throughout the course of the proceedings, Whitaker understood that he was pleading guilty to being a PFO I and not a PFO II. He signed a petition to enter his guilty plea in open court and in the presence of his defense counsel. The petition recited that Whitaker was charged in count three of the indictment as being a PFO I, that he was aware of the facts that would have to be proven in order to convict him of being a PFO I, and that he

was, in fact, pleading guilty to being a PFO I as charged under count three of the indictment. During the plea proceedings, the trial court carefully engaged in a lengthy and thorough interchange with Whitaker. The court painstakingly explained the terms of the indictment, the potential sentence for each offense, and the Commonwealth's recommendation with respect to each offense. The court questioned Whitaker extensively and repeatedly with respect to his understanding of the charges against him and the nature and consequences of his guilty plea. Whitaker indicated to the court that he understood everything about the proceedings, that he was satisfied with his representation, and that he was prepared to enter a guilty plea pursuant to his agreement with the Commonwealth. No discussion of a PFO II offense ever occurred.

Whitaker is correct that the pre-sentence investigation report of November 20, 2001, does erroneously identify him as being a PFO II. However, any clerical error in that report was fully cured by the extensive colloquy with court that his plea indeed involved PFO I. Under these circumstances, we conclude that the record conclusively proves that Whitaker's plea was not induced by misrepresent-ations made either by the Commonwealth or by defense counsel.

Finally, Whitaker maintains that defense counsel rendered ineffective assistance by intervening on his behalf

after his motion styled as a "motion for modification of sentence" was filed in April 2002. While Whitaker did assert in the motion that he had been denied the effective assistance of counsel, he contends that defense counsel erred by filing a motion on his behalf to have the motion treated as one for RCr 11.42 relief.

In the motion, Murrell clearly identified herself as Whitaker's <u>former</u> counsel. In its order, the trial court recounted its difficulty in determining the true nature of Whitaker's *pro se* motion, explaining that since the motion requested relief based only upon the alleged deficiencies of counsel, it would be treated as a motion for relief pursuant to RCr 11.42. We find no merit in this contention as Whitaker was not prejudiced in any fashion by counsel's motion. The trial court did not err when it summarily determined that Whitaker's counsel had not rendered ineffective assistance.

The order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roger Whitaker, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

William L. Daniel, II
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