

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-001856-MR

DONALD CROWE

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE JULIA HYLTON ADAMS, JUDGE  
ACTION NO. 97-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: COMBS AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: Donald Crowe (Crowe), who ultimately pleaded guilty to two counts of first degree trafficking in a controlled substance and one count of being a persistent felony offender in the first degree, appeals from the trial court's dismissal of his motion made under RCr 11.42 to vacate his judgment and

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

sentence on the basis of ineffective assistance of counsel. On appeal, Crowe argues that his trial counsel was ineffective in failing to move to disqualify Crowe's former counsel from representation of Crowe's co-defendant. Because we conclude that Crowe has failed to demonstrate that the representation by his former attorney was personal and substantial, resulting in the communication of privileged information, we affirm the trial court's dismissal and further deny Crowe's alternative request for an evidentiary hearing.

On January 22, 1997, Appellant and his co-defendant Carla Hopper were seated on their living room couch watching television when police officers forcibly entered the home to execute a search warrant. During the search, the police found damaging evidence. Consequently, the Clark County grand jury indicted both Crowe and Hopper on May 30, 1997.

Crowe's indictment consisted of the following charges: Counts I-III, Trafficking in a Controlled Substance in the First Degree; Counts IV-V, Possession of a Controlled Substance in the First Degree; Count VI, Possession of a Firearm by a Convicted Felon; and Count VII, Persistent Felony Offender in the First Degree. During a June 19, 1997 Pre-Trial Conference, the court granted Appellant's motion to sever Count VI as well as the Commonwealth's motion to amend Count III to include "in the course of committing this offense the defendant possessed a

firearm". However, on June 23, 1997, as a result of a plea-bargain agreement, the Commonwealth deleted the amended language of Count III, and Appellant pleaded guilty to Counts I, III, and VII.

During the court's 37-minute plea colloquy with Crowe, Crowe acknowledged he had reviewed the evidence in the case, was present in the Pre-Trial Conference and had the opportunity to hear the discussions related to the evidence. Crowe also acknowledged that he had fully discussed the indictment and facts alleged by the Commonwealth with his attorney; he understood his rights; he was not coerced to enter his plea; and the entry of the guilty plea was in his best interest. Crowe met with his attorney the night before, and the court granted Crowe the opportunity to confer with his attorney that morning. When asked if he had any questions for the court, Crowe responded, "There was, but I forgot them." Moreover, Crowe acknowledged that counsel had done all he could do to represent him. Crowe did not offer a defense for the specific counts. On July 10, 1997, the court sentenced Crowe to two twenty-year concurrent sentences. Had Crowe proceeded with trial, he faced a minimum sentence of twenty years and a maximum sentence of life imprisonment.

Initially, Jennifer Hall represented both Crowe and Hopper during a preliminary hearing. However, due to conflict,

the court appointed Clay Bedford to represent Hopper. However, since Bedford was already representing Crowe in an action in Powell County, Bedford suggested that Hall resume representation of Hopper, and Bedford would instead represent Crowe in the Clark County action as well. Hall agreed.

Crowe did not appeal his conviction. However, on April 18, 1998, Crowe, pro se, filed a RCr 11.42 motion to vacate judgment and sentence. The court appointed counsel and permitted Crowe leave to supplement the motion. Crowe alleged he was denied effective assistance of counsel through:

1. Counsel's deficiency in failing to challenge effectively the search and seizure in Crowe's residence;
2. Counsel's ineffectiveness as to the amendment of the charge;
3. Counsel's deficiency as to the guilty plea;
4. Counsel's duty to investigate; and
5. Cumulative Error

On December 11, 2000, the court granted an evidentiary hearing regarding the inadequacy alleged by counsel's failure to challenge the execution of the search warrant and, after setting forth its reasoning in a 12-page order, denied relief for Crowe's remaining claims. On July 23, 2001, after conducting an

evidentiary hearing on the search warrant issue, the court denied Crowe's claim in its entirety. This appeal followed.

Crowe raises two issues on appeal. First, Crowe argues that his trial counsel was manifestly ineffective in failing to move to disqualify Crowe's former counsel from representing Crowe's co-defendant, thus requiring a reversal of Crowe's conviction. Second, Crowe argues that the record does not refute his claim that his plea was involuntary because of counsel's incorrect advice; thus his conviction and sentence should be vacated and remanded for an evidentiary hearing.

The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Crowe to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203, 210 (1985). Crowe must show the attorney's performance was deficient, and the attorney's ineffective performance affected the outcome of the plea process. See id. "In other words, in order to satisfy the 'prejudice'

requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Generally, the burden of proving a Sixth Amendment violation rests on the accused, but some circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronin, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657 (1984). In this case, Crowe alleges that trial counsel was manifestly ineffective in failing to move to disqualify Crowe's former counsel from representation of his co-defendant. In support, Crowe cites SCR 3.130(1.9), which states:

A lawyer who has formerly represented a client in a matter shall not thereafter:  
(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation[.]

In further support, Crowe asserts that the Sixth Amendment "requires a careful inquiry by the trial court" and disqualification of a former attorney if his/her participation was "personal and substantial resulting in the communication of privileged information[.]" Whitaker v. Commonwealth, Ky., 895

S.W.2d 953, 955-57 (1995). No prejudice need be shown. See id. at 956. Instead, the focus of a reviewing court "is on the degree of the relationship established between attorney and client during the course of the representation." Id.

Crowe alleges that Hall's prior representation of him during a preliminary hearing was substantial and personal participation in his case and that her later representation of his co-defendant was prejudicial to his interests; and therefore, Bedford's failure to move for her disqualification constituted ineffective assistance of counsel. Despite Crowe's argument, we do not believe that Hall's continued representation of Crowe's co-defendant after the preliminary hearing was a violation of SCR 3.130. Hall never took part in any action against Crowe since plea agreement rather than trial resolved Crowe's case. Had the case gone to trial, Crowe's claim may have had merit.

Moreover, Whitaker, a direct appeal case, does not say that some prior representation warrants automatic disqualification of former counsel. The court instead remanded the issue for an evidentiary hearing to determine the depth to which the attorney/client relationship was established. Further action is warranted only in instances where the relationship was found to have been substantial. See Whitaker, 895 S.W.2d at 956.

The purpose of RCr 11.42 "is to provide a forum for known grievances, not to provide an opportunity to research for grievances." Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983). In order to prevail, "the movant must aver facts with sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971).

Crowe has made a specific complaint in his allegation that counsel was ineffective in failing to move to disqualify his co-defendant's counsel. However, the basis of his claim is that she knew "important issues" from the preliminary hearing that she later used against him. We believe that this statement is simply too vague to provide a basis for relief.

Since Hall did not participate in any action against Crowe and Crowe's motion is non-specific as to Hall's personal and substantial involvement, Crowe has failed to demonstrate a conflict, and no further action is necessary. As a result, Crowe has failed to establish the first prong of the Strickland test, that his counsel's assistance was deficient.

Crowe's second argument is that he did not enter his guilty plea voluntarily because he was not aware of its seriousness and finality. Moreover, the record cannot refute the voluntariness of his plea; therefore an evidentiary hearing on the issue is required. In support of this argument, Crowe asserts that his trial counsel led him to believe that entering

a guilty plea at the time was not permanent. In addition, Crowe's trial counsel convinced Crowe that he would have grounds to set aside his guilty plea in the near future, apparently by filing an RCr 11.42 motion. Moreover, Crowe alleges that had his trial counsel not misled him in this way, he would not have entered a guilty plea and would have proceeded to trial.

"Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorney's in criminal cases." Hill v. Lockhart, 474 U.S. at 56, 106 S. Ct. at 369 (internal citation and quotation marks omitted). Moreover, "an attorney may, after making an adequate investigation, in good faith and in the exercise of reasonable judgment, advise his client to plead guilty." Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1970). In this case, had Crowe gone to trial, he potentially could have received a life sentence. Instead, as a result of the plea agreement, Crowe received a twenty-year sentence.

"The validity of a guilty plea depends 'upon the particular facts and circumstances . . . including the background, experience and conduct of the accused.' In other words, the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is

taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978) (internal citations omitted).

On June 23, 1997, Crowe pleaded guilty to Counts I, III, and VII in a 37-minute colloquy. Crowe appeared before the court having already been convicted of seven felonies. As the trial court pointed out in its order which denied Crowe post-conviction relief on certain grounds, Crowe even corrected the court on the date and locations of his felony record as set forth in the persistent felony offender count of the indictment. During the colloquy, Crowe acknowledged that his trial counsel had done all he could do to represent him including providing an explanation of his rights as well as the charges and evidence against him. He further acknowledged that he was not coerced to enter his plea, and the entry of the guilty plea was in his best interest. Considering the totality of the circumstances and Crowe's background, experience and conduct, we hold that his guilty plea was made in a knowing and intelligent manner.

Appellant believes that he is entitled to an evidentiary hearing on the issues that he has raised, namely ineffective assistance of counsel and entry of his guilty plea involuntarily. However, an evidentiary hearing is required if there is a "material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an

examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). Because our examination of the record establishes that Crowe received effective assistance of counsel and gave his guilty plea voluntarily, an evidentiary hearing is not required. As Crowe offers no other issues of fact in support of his claims, we affirm the trial court's dismissal of his motion and alternatively deny his request for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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