

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001634-MR

TERRY GILBERT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
INDICTMENT NO. 02-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY and MINTON, Judges.

MINTON, Judge. Terry Gilbert, *pro se*, appeals the denial of his petition for post-conviction relief pursuant to Rule of Criminal Procedure (RCr) 11.42. We affirm.

Gilbert was indicted on March 7, 2002, by a McCracken County Grand Jury. The indictment charged him with two counts of trafficking in a controlled substance in the first degree (methamphetamine), possession of drug paraphernalia in the first degree, and carrying a concealed deadly weapon (brass knuckles). More specifically, the indictment charged that on January 28,

2002, Gilbert and a co-defendant possessed with intent to sell and sold a quantity of methamphetamine to an undercover police officer while possessing drug paraphernalia and concealing brass knuckles. On July 31, 2002, Gilbert entered into a plea agreement with the Commonwealth; and Gilbert and his counsel signed the standard motion to enter guilty plea. The trial court specifically found that Gilbert understood the nature of the charges; that his plea was a knowing and voluntary relinquishment of his right against self-incrimination, to a jury trial, to cross-examination of witnesses, to production of evidence, and to an appeal; and that a factual basis existed for the plea. On October 14, 2002, Gilbert was sentenced in accordance with his plea agreement to five years on each count of trafficking in a controlled substance in the first degree, methamphetamine, to run consecutive, and twelve months each on possession of drug paraphernalia in the first degree and carrying a concealed deadly weapon, to run concurrently, for a total of ten years.

On July 7, 2003, Gilbert, *pro se*, filed a motion to vacate judgment pursuant to RCr 11.42. In the motion, Gilbert alleged that his attorney was ineffective in failing to investigate the chain of custody regarding the drugs tested in his case. In support of said motion, Gilbert attached documentary exhibits consisting of Kentucky State Police

requests for examination and a lab report which he alleged did not establish that the same drug evidence recovered by the arresting officer was the same drug evidence received by the lab for testing. Gilbert also requested appointment of counsel and an evidentiary hearing if necessary.

On July 23, 2003, the trial court summarily denied Gilbert's motion finding that the documents attached to Gilbert's motion indicated that the "drugs recovered in his case were sent to the lab, were received, were tested and that the chain of custody was intact."

On August 4, 2003, Gilbert filed a *pro se* notice of appeal. On appeal, Gilbert argues that counsel was ineffective for advising him to plead guilty when there was insufficient evidence; denial of due process and equal protection by the chain of custody on the drug evidence being broken; and ineffective assistance of counsel for counsel's failure to investigate and file a motion to suppress the drug evidence on the chain of custody issue. Although tendered in three separate arguments, all relate to an ineffective assistance claim on the chain of custody issue. Gilbert's ineffective assistance of counsel argument alleges that counsel's advice to plead guilty was based on a lack of investigation in the integrity of the drug evidence. If counsel had investigated, Gilbert alleges, he would have found that the chain of custody on the drug evidence

was corrupted and thus evidence was lacking that the evidence seized at the scene was, in fact, methamphetamine. Upon realization of this, counsel would have filed a motion to suppress the evidence instead of advising Gilbert to plead guilty. We disagree.

Through discovery provided by the Commonwealth, Gilbert's counsel was aware that pursuant to Gilbert selling alleged methamphetamine to an undercover police officer, suspected methamphetamine was recovered in a cigar box with Gilbert's prescription medication, scales, pipes, and Gilbert's driver's license. One baggie found in the cigar box field tested positive for methamphetamine. The Commonwealth additionally provided counsel with the names of four Paducah police officers involved in the transaction.

Additionally, according to the bill of particulars, the Commonwealth provided counsel with an evidence log, a lab report, prior convictions, a taped confession, methamphetamine, and buy money. Exhibit No. A, the Kentucky State Police Request for Evidence Examination form, dated January 28, 2002, indicated that Exhibits 1, 4, and 5, consisting of .8, .4, and .2 grams of alleged methamphetamine, respectively, were recovered in Commonwealth v. Terry Gilbert, KSP case #02-3848 on January 28, 2002. Further, Exhibit No. C, the KSP Lab Report, indicated that in KSP Case No. #02-3848 (Terry Gilbert), Exhibits 1, 4, and 5 were

received by the lab examiner by registered mail on April 29, 2002, and upon testing each were found to contain methamphetamine.

In order to prevail on an ineffective assistance of counsel claim, 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 pleaded 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 pleaded 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).

The record refutes Gilbert's allegations. Gilbert's claim of ineffective assistance for counsel's failure to investigate is at most speculative that a suppression motion

would have been granted if filed, especially given the documentary evidence. 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 Gilbert. Under these circumstances, we conclude that the record conclusively proved that Gilbert's counsel was not ineffective for failing to investigate the facts of the case, nor was his representation flawed by the decision not to file an unnecessary and futile motion to suppress.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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