RENDERED: SEPTEMBER 16, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002303-MR

MICHAEL MICKENS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 01-CR-002131

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: Michael Mickens (Mickens) brings this appeal from an opinion of the Jefferson Circuit Court, entered October 6, 2003, summarily denying his *pro se* motions for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, appointment of counsel and an evidentiary hearing. Before us, Mickens claims that he is entitled to an evidentiary hearing on four issues pertaining to ineffective assistance of counsel on his guilty plea. We affirm three issues that can be refuted from the face of the record.

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Mickens' allegations of counsel's ineffectiveness for failure to investigate witnesses who could testify to a warrantless search of the residence, prior to the execution of the search warrant, cannot be refuted from the record. For the following reasons, we vacate and remand for an evidentiary hearing as to that issue only.

Testimony and exhibits of record from a suppression hearing established the following:[2] In the early morning hours of May 9, 2001, Metro Police Narcotics Detective Rodney Seelye received information from a confidential informant that Mickens, who lived at 4404 Petersburg Road with his mother, was selling large quantities of cocaine. The residence was put under surveillance for drug activity. A vehicle seen arriving at the residence and leaving a short time later was followed by Metro Police Detective John Lewis. When the vehicle was stopped for speeding, driver/co-defendant Anthony Graham was making a cell phone call. Graham was searched and one-half ounce of cocaine and marijuana was found in his pocket. He was arrested at 11:30 p.m. Detective Lewis contacted Metro Police Sergeant Larry Colburn who was still on surveillance of the residence and informed him of the stop, the discovery of the cocaine, and that at the time of the stop Graham had been on a cell phone.

[2] According to comments at the beginning of the suppression hearing, co-defendant Anthony Graham and his counsel had been present in court the previous day but had indicated that they would not be present for Mickens' suppression motions.

Contemporaneous with the stop of Graham and relay of information from Detective Lewis, Sergeant Colburn observed Mickens leave the residence, get in a vehicle and drive away, all while on a cell phone. On Detective Seelye's directive, Sergeant Colburn stopped Mickens about a mile from the residence. When stopped, Mickens was advised that a vehicle containing drugs had just been stopped leaving his residence. Mickens denied any knowledge of any drugs and consented to a search of his vehicle, which yielded nothing. When asked if he would consent to a search of the residence, Mickens told the officers that he could not give consent because it was his mother's house.

The officers advised Mickens that they would obtain a search warrant. While in this process, Mickens was detained and placed in Sergeant Colburn's vehicle. He was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and returned to the residence. After being advised of his rights, on the way back to the residence, Mickens indicated that there were no drugs at the residence. Sergeant Colburn commented that if any drugs were found in the residence they must, then, belong to Mickens' mother. Mickens thereafter admitted that he was not a big dope dealer and he only had one ounce of cocaine in the house.

Based on the information from the confidential informant that put the surveillance of the residence in motion, Detective Seelye had typed up an affidavit for a search warrant before the surveillance began. After Mickens' admission as to the cocaine, Detective Seelye added a handwritten notation to the affidavit referencing the recent activity at the residence and Mickens' admission. The search warrant was presented to Jefferson District Judge Virginia Whittinghill, who signed it at 12:35 a.m. on May 10, 2001. She also initialed Detective Seelye's handwritten notation. Mickens' mother was present when the warrant was executed on the residence, and he apologized several times to her for dealing drugs out of her house. Mickens was also present at the residence during the search and he showed the officers about one ounce of cocaine located there. Mickens was arrested at 1:23 a.m.

On September 6, 2001, the Jefferson County Grand Jury charged Mickens with two counts of first degree trafficking in a schedule II controlled substance (cocaine),[3] and one count of illegal use or possession of drug paraphernalia.[4] Graham was indicted as a co-defendant on one count of first degree trafficking in a schedule II controlled substance (cocaine), as

[3] Kentucky Revised Statutes 218A.1412, a class C felony.

[4] Kentucky Revised Statutes 218A.500, a class A misdemeanor.

well as one count of illegal possession of a controlled substance, schedule I hallucinogen (marijuana).[5]

In preparation for trial, Mickens' counsel filed several suppression motions: 1) a motion to reveal the identity of a confidential informant, or alternatively to exclude any statements made by him or evidence viewed or handled by him; 2) a motion to suppress evidence seized from an illegal stop and search; and 3) a motion to suppress Mickens' statements. A suppression hearing was held on April 19, 2002.

At the hearing, the Commonwealth refused to reveal its confidential informant, but did concede in response to Mickens' first motion that it may not introduce at trial any information or statements made by the informant in that such information constituted inadmissible hearsay pursuant to Kentucky Rules of Evidence 802. The circuit court signed an order to that effect, which was entered May 10, 2002.

The hearing continued on Mickens' remaining motions: 1) to suppress evidence seized from an illegal stop and search, and 2) to suppress Mickens' statements. Detective Seelye and Sergeant Colburn were the only witnesses, and they testified to facts as indicated above.

During the hearing the parties broke several times to discuss plea negotiations. On the video record of the

[5] Kentucky Revised Statutes 218A.1422, a class A misdemeanor.

suppression hearing, Mickens was adamant several times that he would not accept more than ten years to resolve both this indictment and Indictment Number 01-CR-002789, pending in another division of Jefferson Circuit Court.[6] After several offers and discussions Mickens accepted the Commonwealth's offer on a plea of guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), agreeing to a sentence of nine years each on the two felony trafficking counts as charged, and a sentence of twelve months on the misdemeanor possession count as charged, all sentences to run concurrently for a total of nine years but consecutive to any other sentences. As part of the agreement, Mickens agreed not to seek probation, shock probation, or early release, except for parole, and to forfeit all items seized. The circuit court accepted the plea as voluntary after conducting a colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

At the same time, the circuit court accepted another Alford plea in Indictment Number 01-CR-002789 to one year on an amended charge of illegal possession of a schedule II controlled substance (cocaine);[7] twelve months on illegal possession of drug

[6] This indictment charged Mickens with Kentucky Revised Statutes (KRS) 218A.500, illegal use or possession of drug paraphernalia, a class A misdemeanor; KRS 218A.1422, illegal possession of a controlled substance, schedule I hallucinogen (marijuana), a class A misdemeanor; and KRS 218A.1412, first degree trafficking in a schedule II controlled substance (cocaine), a class C felony.

[7] Kentucky Revised Statutes 218A.1415, a class D felony.

paraphernalia;[8] and twelve months on illegal possession of a controlled substance (marijuana);[9] for a one year sentence to run consecutively with the instant indictment. Mickens waived the pre-sentence investigation and was sentenced on both indictments to a total of ten years in accordance with his pleas.[10]

The Commonwealth noted at the sentencing hearing that Mickens was presently serving a seven year sentence in Indictment Number 99-CR-000171, which consecutive to the nine year sentence on the instant indictment and consecutive one year sentence on Indictment Number 01-CR-002789 resulted in a total of seventeen years. Mickens did not offer any objection to this statement.

One month later, Mickens' co-defendant, Graham, pleaded guilty as charged in the indictment to one count of first degree trafficking in a schedule II controlled substance (cocaine) and one count of illegal possession of a schedule I hallucinogen controlled substance (marijuana). On August 23, 2002, his recommended concurrent sentences of five years and twelve months, respectively, were probated for five years.

Approximately sixteen months after sentencing, on September 5, 2003, Mickens, *pro se*, filed the RCr 11.42 motion

---

[8] Kentucky Revised Statutes 218A.500, a class A misdemeanor.

[9] Kentucky Revised Statutes 218A.1422, a class A misdemeanor.

[10] The judgment was entered on May 10, 2002.

that forms the basis for this appeal, alleging ineffective assistance of counsel for advising him to plead guilty, or alternatively for failing to advise him to plead guilty conditionally under RCr 8.09, based on the following alleged errors during the suppression hearing: 1) failure to impeach Detective Seelye and Sergeant Colburn on their investigative report; 2) failure to impeach police testimony as to Graham's stop and his stop; and 3) failure to challenge Mickens' claim that the police illegally entered the residence before obtaining the search warrant. Mickens also requested an evidentiary hearing and appointment of counsel.

On October 6, 2003, the circuit court summarily denied Mickens' motions for RCr 11.42 relief, appointment of counsel, and an evidentiary hearing:

> Mickens' argument focuses on the events that took place at an April 19, 2002, evidentiary hearing based on motions made by Mickens' trial counsel concerning incriminating statements and other evidence. Prior to the evidentiary hearing, the Commonwealth offered Mickens' nine years to serve on this indictment (01-CR-2131), but he declined the offer. Then, Mickens' motion details the evidentiary hearing and alleges several general faults on the part of his attorney. After the hearing, though, Mickens ended up signing the Commonwealth's Offer on a Plea of Guilty for a reported nine-year sentence on this 01-CR-2131 indictment. Thus, it appears the (sic) Mickens is in the exact same circumstance that he would have been in before the evidentiary hearing began.

> Because Mickens has not alleged specific enough faults on the part of his attorney, because the few instances cited in his motion do not rise to the "detrimental" level described by Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], and because it is unclear how Mickens was prejudiced by this allegedly detrimental conduct, Mickens' motion fails to meet the standards and requirements set forth in Strickland and in the Rcr (sic) 11.42 rule itself.

This appeal followed.

As stated in Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990):

> It should first be noted that the effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense. Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970); Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234 (1970). A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea. White v. Sowders, 644 F.2d 1177 (6th Cir. 1980).

Mickens makes no claim that the indictment herein failed to charge an offense.

Pursuant to Centers, then, Mickens' guilty plea waived all defenses unless the plea was involuntary. Mickens claims involuntariness through his allegation of ineffective assistance of counsel. Rigdon v. Commonwealth, 144 S.W.3d 283, 288-89 (Ky.App. 2004). As stated in Rigdon, supra:

> In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." Bronk[v. Commonwealth], 58 S.W.3d [482] at 486 (Ky. 2001) (footnotes omitted). To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:
> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial. Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986).
>
> Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236-37 (1983). The Kentucky Supreme Court has stated that "[g]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.,* an evidentiary hearing." Rodriguez[v. Commonwealth], Ky., 87 S.W.3d [8] at 11 (2002).

Where the trial court has denied the request for post-conviction relief without an evidentiary hearing, our inquiry is whether the motion states grounds for relief that could not be

conclusively resolved from the face of the record, and which, if true, would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000).

Mickens initially claims that counsel was ineffective for failing to cross-examine Detective Seelye and Sergeant Colburn on two inconsistencies between their testimony and Detective Seelye's investigative report, specifically the confidential informant's failure to give a specific address or location of the residence in the investigative report; and the omission of surveilled activity by Graham and Mickens earlier in the day, when they left Mickens' mother's house together, went to the west end of Louisville where the officers lost them in traffic, and later returned to the house together. Mickens' claim regarding the confidential informant's statement is refuted by the investigative report, as follows:

> Detectives received information from a confidential and reliable informant that Michael Mickens was selling large quantities of cocaine from his mother's residence at 4404 Petersburg Road.

The second claim follows from the first paragraph in the investigative report:

> Detectives set up surveillance and observed Anthony Graham arrive at 4404 Petersburg Road and leave with Michael Mickens. These 2 suspects were followed to the west end where they were lost in traffic. Surveillance was set up on Petersburg and detectives observed both

> subjects arrive back at 4404 Petersburg and both entered the residence.

While it is true that neither officer testified regarding the above paragraph, in that Detective Seelye only testified about the events surrounding the typed and handwritten portions of the search warrant and Sergeant Colburn testified about the actual events the led to the stop of both Graham and Mickens and the search of the residence, neither were asked to testify about the earlier surveillance and neither testified contrary to or inconsistent with the report. As the record refutes both of these claims, there was no need for an evidentiary hearing on this claim.

Mickens also claims that counsel was ineffective in failing to cross-examine the officers on testimony that allegedly misled the court into believing that Graham had only made a brief stop at Mickens' residence consistent with a drug buy and that Graham was arrested near Mickens' residence. The record refutes this claim. Sergeant Colburn testified that when the house was under surveillance, one car pulled up, stayed a short while, and left (consistent with drug transactions), and was stopped several miles away. There is nothing contradictory or inconsistent between this testimony and the arrest slip or the investigative report, and nothing in the testimony to

mislead the court. As the record refutes these allegations, no evidentiary hearing was required on this issue.

Mickens' above argument evolves into an additional contention, that counsel was ineffective for failing to cross-examine the officers as to the stop of Mickens, specifically alleging that as there was no evidence identifying Mickens as the source of the drugs found on Graham, that the officers did not have the requisite level of reasonable suspicion to either make the stop or to detain him once no contraband was discovered on him or in his vehicle. The record, however, refutes Mickens' claim that counsel was ineffective by "failing to call the officers on their misleading testimonies, subjecting the Commonwealth's case to meaningful adversarial testing."

Sergeant Colburn testified that he was informed by Detective Seelye that the stop and search of Graham revealed drugs, and that Detective Seelye directed him to stop Mickens. In answering a question as to why Mickens was stopped since there was no evidence that the drugs on Graham were identified as coming from Mickens, Sergeant Colburn stated that it is very common in a drug investigation to see cars pull up to a house and stay a short period of time and leave, and when Mickens left he was stopped. He further explained that Mickens was not stopped for a traffic violation.

Not only was Sergeant Colburn's testimony as to the stop of Mickens not misleading, but counsel subjected the Commonwealth's case to adversarial testing by filing the suppression motions, participating at the suppression hearing, and cross-examining the officers, including Sergeant Colburn's testimony regarding Mickens' statement. Counsel was prepared to brief this particular issue but for Mickens' decision to enter a guilty plea, once the Commonwealth offered him the ten years he had originally sought at the beginning of the suppression hearing.[11]

Mickens also claims that counsel was ineffective for failing to call witnesses to challenge the obtaining and execution of the search warrant, specifically the irregularities with regard to the handwritten notation on the affidavit and Mickens' claim that the police did a warrantless search of the residence before obtaining the search warrant.

With regard to the handwritten notation on the affidavit, Mickens' counsel thoroughly questioned Detective

[11] A review of the evidentiary hearing indicates that it was Mickens who was determined to plead if the Commonwealth would make him the right offer. Before the hearing started, Mickens rejected a ten year offer. Later, he indicated that he would accept ten years to wrap up this indictment and pending Indictment Number 01-CR-002789. The frustration of the Commonwealth was evident but that offer was eventually made and accepted by Mickens. Mickens was thus able to wrap up a potential of thirty years' incarceration on both indictments for one-third of that time, ten years. Additionally, at the time he was currently serving time for a felony making him subject to indictment as a persistent felon. KRS 532.080. The record is also very clear that despite his counsel's objection to Mickens being sentenced without the opportunity to rebut a pre-sentence investigation report, Mickens wanted to be sentenced that day.

Seelye with regard to the affidavit in support of the search warrant, specifically pertaining to the typed portion versus the handwritten portion. Detective Seelye's testimony that the affidavit was typed in preparation for presentation to the judge and the handwriting was added after the events unfolded in the field was consistent with the four corners of the document. The search warrant was signed and dated by Judge Whittinghill. She initialed below the handwritten portion of the affidavit, as well as over a change in date from "9" to "10." The credibility of the officers was within the exclusive province of the circuit court and we fail to see how the calling of Judge Whittinghill would have affected the outcome. We also note that Mickens chose to plead guilty before counsel had the opportunity to brief the issue. The record refutes Mickens' argument; we can find no error in counsel's actions, as he did thoroughly question the officers on this issue, and Mickens cannot now express dissatisfaction with statements to the contrary in his guilty plea.

The record, however, fails to refute Mickens' argument that his counsel was ineffective for failing to call witnesses, such as his mother and neighbors, to dispute the police officers' testimony that the police searched the residence after obtaining the search warrant. Although the officers testified that they did not search the residence before obtaining the

search warrant, Mickens claimed in his RCr 11.42 motion that these witnesses would testify that when he was stopped the officers took his key ring, tried to open the side door to the residence, discovered that the lock was broken, opened the door, entered, and searched the residence, finding the cocaine. If true, this testimony has the potential of invalidating the search warrant and suppressing the fruits of the search. Therefore, pursuant to Baze, supra, Mickens' RCr 11.42 motion states grounds for relief that could not be conclusively resolved from the face of the record, and which, if true, would invalidate his conviction. He is therefore entitled to an evidentiary hearing on the specific issue of whether the residence was searched prior to obtaining the search warrant.

As a continuation of this argument, Mickens also claims that counsel was ineffective for failing to advise him, in light of search and seizure issues including the validity of the warrant, to conditionally plead guilty pursuant to RCr 8.09 and preserve these issues for appeal. The circuit court clearly explained to Mickens that he was waiving his right to appeal his conviction by pleading guilty and Mickens acknowledged his understanding. As the Kentucky Supreme Court stated in Jewell v. Commonwealth, 725 S.W.2d 593, 595 (Ky. 1987):

> A multitude of events occur in the course of a criminal proceeding which might influence a defendant to plead guilty or

> stand trial. It would be impossible to inform a defendant of all facts and all law which might affect his decision. A defendant has a right to counsel, and a right to a proper Boykin hearing prior to entry of a guilty plea. We believe such provides sufficient safeguards.

The record refutes this allegation, requiring no evidentiary hearing.

For the foregoing reasons, the opinion of the Jefferson Circuit Court is vacated as to that sole issue pertaining to counsel's ineffectiveness for failing to investigate witnesses, such as Mickens' mother and neighbors, to testify to the events surrounding the search of the residence, which we remand for an evidentiary hearing. As to the rest of the opinion, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

John W. Stewart
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky