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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002302-MR

LARRY LEE HUGHES APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-00072

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Larry Lee Hughes appeals from an order of the McCracken Circuit Court denying his motion for post-conviction relief pursuant to RCr[2] 11.42. Because Hughes' allegation that he received ineffective assistance in connection with trial counsel's failure to move to suppress evidence obtained by the police in two

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[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 KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

searches of his residence is not clearly refuted by the record, we vacate the trial court's order denying his motion for relief and remand for an evidentiary hearing on the issue.

FACUTAL AND PROCEDURAL BACKGROUND

On January 11, 2005, Paducah police officers conducted a knock and talk at the residence of Hughes and his wife, Ida. The police contend that Ida gave consent to search the residence. In his RCr 11.42 motion Hughes maintained that she did not, or, alternatively, that her consent was a result of coercion. He further maintains that even if she did consent, the search was conducted over his repeated objections. In any event, the police entered and searched the residence.

In the course of their search police discovered crack cocaine and baggie corners. Based upon these discoveries, the police secured the residence, obtained a warrant, and conducted a second search, during which additional crack cocaine was discovered, along with additional drug paraphernalia.

Based upon the foregoing, on February 25, 2005, Hughes was indicted for first-degree possession of a controlled substance, second offense; use/possession of drug paraphernalia, second offense; and of being a first-degree persistent felony offender. On May 24, 2006, Hughes entered into a plea agreement with the Commonwealth under which the persistent felony offender charge would be dropped, and he would receive five years' imprisonment on the remaining charges, to run concurrently.[3] Final judgment was entered in accordance with the plea agreement on May 25, 2006.

[3] The guilty plea was entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

On July 11, 2006, Hughes filed a pro se motion to vacate his sentence pursuant to RCr 11.42. On September 21, 2006, the trial court entered an order denying the motion. Hughes filed a motion requesting findings of fact concerning the trial court's decision, which was likewise denied. This appeal followed.

DISCUSSION

Before us, Hughes contends that he received ineffective assistance of counsel because trial counsel failed to investigate his case and interact with him; failed to file a motion to suppress to contest the initial search of his residence; and because trial counsel misadvised him resulting in his entry of a guilty plea that was not knowing, intelligent, or voluntary.

STANDARD OF REVIEW

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the *Strickland* test includes the requirement

that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

FAILURE TO FILE MOTION TO SUPPRESS

We first consider Hughes' argument that he received ineffective assistance because trial counsel failed to move to suppress the fruits of the two searches of his residence which produced the evidence leading to his indictment. In his RCr 11.42 motion, Hughes describes the events surrounding the alleged consensual search following the knock and talk as follows:

> The detective alleges to have received consent to search Movant's home. Movant's [sic] disputes this claim and further states the detectives totally ignored his repeated demands to exist [sic] his home, prior to finding any items of

> drug activity. The detectives (under color of law) used their authority by commanding Movant and his wife (Ida Hughes) into the front living-room. While one of the detectives were [sic] busy moving around Movant's home in search of evidence. Movant's wife, who has severe health problems, got up to use the bathroom. Det. Gilbert then informed Movant's wife that the bathroom has to be searched prior to her using it. Movant again objected to the search of his house and even informed the detectives of their lack of having a search warrant. At that time things got a little heated and a verbal confrontation between Movant and the detective ensured, due to Movant exercising his constitutional rights to not have his home searched without a warrant. In order to calm the confrontation between Movant and the detectives (who by then had called in for backup), Movant's wife stated to him: "Larry, I want him to search." This statement was directed toward Movant and under no circumstances did it give the detectives consent to search my home. Movant's wife was talking to him when the statement was made. Thus, in light of the totality of the circumstances, one must conclude the consent was not obtained freely or voluntarily. However, we do know the search was in violation of Movant's constitutional rights.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455,

91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), one “jealously and carefully drawn” exception, J*ones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez*, 497 U.S., at 181, 110 S.Ct. 2793. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock*, *supra*, at 170, 94 S.Ct. 988, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant, *Rodrigue*z, *supra*, at 186, 110 S.Ct. 2793.

Under the facts as described by Hughes in his motion, there is a cognizable argument that no consent was given by either Hughes or his wife (or else was coerced) to search the residence. Further, Hughes maintains that even if his wife did consent, the consent was over his objection. In *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), decided March 22, 2006, two months prior to the entry of appellant's guilty plea, the United States Supreme Court held that a warrantless search is unreasonable as to a defendant who was physically present and expressly refused to consent to the search, even if a co-occupant with authority to consent gives her consent to search. Hence, even if Ida did voluntarily consent to the search, if Hughes objected (as he states in his motion) then the initial search was nevertheless illegal, as to the appellant, under *Randolph*.

If the facts are as stated by Hugues in his RCr 11.42 motion - and we may not simply disbelieve his version of the facts - there was a valid basis upon which to seek suppression of the evidence obtained both as to the search conducted in connection with the talk and knock (because the search was nonconsenual, coerced, or in violation of *Georgia v. Randolph*) and in connection with the subsequent search pursuant to a warrant (because the information underlying the warrant was obtained in the illegal first search).

An evidentiary hearing upon an RCr 11.42 motion "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. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001).

Hughes' version of events is not conclusively refuted by the record. Thus, accepting Hughes' version of events as true, trial counsel's representation was deficient because no motion was filed seeking suppression of the evidence. Further, Hughes was prejudiced by the deficient performance because if the fruits of the two searches were suppressed, there is a reasonable probability that Hughes would not have entered into his guilty plea, but instead would have gone to trial.

In summary, Hughes has stated a prima facie violation of *Strickland* which is not refuted by the record. As such, we vacate the circuit court's summary denial of the motion and remand for an evidentiary hearing on the suppression issue.

LACK OF INVESTIGATION AND INTERACTION WITH CLIENT

Hughes also contends that he received ineffective assistance of counsel on the basis that trial counsel failed to properly investigate his case and failed to interact with him. More specifically, Hughes alleges that trial counsel "at no time [spoke] with him concerning the facts of the case"; that "the few conversations he did have with his attorney consisted of the attorney trying to convince him to plead guilty"; and that trial counsel "failed to follow even the basic guidelines for investigation on the behalf of his client in the instant case." We begin by noting that our discussion of this argument excludes in all respects any overlap with the suppression issue as discussed above, and is intended to address the argument only as it relates to issues other than Hughes' suppression argument.

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). First, it must be determined whether a reasonable investigation should have uncovered the defense. *Id.* If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. *Id*. Counsel's tactical choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Id.* If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would

have been different. *Id.;* s*ee also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

However, "RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (footnotes omitted).

Here, Hughes has failed to identify any particular witnesses who would have been helpful to his defense who were not interviewed by trial counsel, what information they may have regarding the case, or what their testimony would have been. Nor has he identified any particular evidence that additional investigation and/or interaction would have unveiled. In short, Hughes' allegation concerning failure to investigate and failure to interact with him amounts to no more than a fishing expedition, and the claim is outside the scope of RCr 11.42. *Mills*, *supra*.

VOLUNTARINESS OF PLEA

In his last argument Hughes contends that his guilty plea was not knowing, intelligent, and voluntary because trial counsel failed to inform him of available defenses. As discussed above, we agree with this argument to the extent that trial counsel failed to pursue suppression. However, aside from the suppression issue, Hughes has failed to identify any other failures of trial counsel which would merit post-conviction relief.

In addition, Hughes signed a motion to enter a guilty plea where he stated he had a full understanding of the charges against him and any defenses. The trial court

engaged in a colloquy with Wilson and was satisfied there was a factual basis for the plea and that it was entered into in a knowing and intelligent manner. Thus this argument is refuted by the record.

As such, with the exception of the suppression issue, we find this argument to be without merit.

CONCLUSION

For the foregoing reasons we vacate the judgment of the McCracken Circuit Court summarily denying the appellant's motion for post-conviction relief and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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