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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001275-MR

RAUGHN LEWIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 03-CR-002515

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Raughn Lewis (Appellant) appeals the denial of his request for relief pursuant to Rule of Criminal Procedure (RCr) 11.42. In his RCr 11.42 motion, Appellant alleges that he received ineffective assistance of counsel and as such, his conviction should be overturned. The circuit court denied his motion without a hearing and the Commonwealth would have us affirm that decision. Specifically, Appellant claims that his trial counsel was ineffective because he

failed to conduct a pre-trial investigation, failed to contact certain witnesses, failed to fully explain a plea offer for probation, failed to pursue an alleged illegal search, and that counsel improperly waived his right to appeal. Additionally, Appellant claims that the sentencing agreement he entered into was done so involuntarily, unintelligently, and under coercion from trial counsel. We find that the circuit court properly denied Appellant's 11.42 motion, that no hearing was needed, that he received effective assistance from counsel, and that he knowingly entered into his sentencing agreement.

On May 7, 2003, Officer M. Campbell pulled Appellant over and initiated a traffic stop after witnessing suspicious activity. After a discussion with Appellant and a passenger in the car, Officer Campbell asked Appellant if he would consent to a search of his person and the car. Appellant consented to the search of his person, but not the car. Nothing incriminating was found on Appellant.

Officer Campbell then asked the passenger if he could search him. The passenger consented and marijuana was found on him. During this time, another officer, Officer Schaffer, arrived on the scene. The passenger was arrested and the car was searched pursuant to this arrest. Officer Schaffer searched the vehicle and found a loaded handgun. Appellant was then arrested for carrying a concealed deadly weapon. It was later discovered Appellant was a convicted felon.

On September 25, 2003, Appellant was indicted by the Jefferson County Grand Jury and charged with one count each of: complicity to first-degree trafficking in a controlled substance (from a separate incident occurring July 1, 2003); complicity to possession of a firearm by a convicted felon; no motor vehicle insurance; possession of an open alcoholic beverage container in a motor vehicle; and first-degree persistent felony offender (PFO).

A jury trial was held solely concerning the possession of a firearm by a convicted felon. Appellant was found guilty. He waived jury sentencing and entered into a sentencing agreement with the Commonwealth in which he would get an enhanced 10-year sentence. Pursuant to the agreement, he would also enter a plea of guilty to the remaining charges. For these charges, Appellant received an enhanced sentence of 10 years imprisonment. Both 10-year sentences were to run concurrently for a total of 10 years. These were the minimum possible sentences for these crimes.

On July 22, 2005, Appellant filed his RCr 11.42 motion alleging ineffective assistance of counsel and requesting a hearing on the matter. The trial court denied the motion without holding a hearing and this appeal followed.

A movant is not automatically entitled to an evidentiary hearing for an RCr 11.42 motion. "[A] hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

Id. at 691-692. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that 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. "In reviewing an ineffectiveness claim, the court must

consider the totality of the evidence before the judge or jury at trial and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonably professional assistance." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998).

Appellant's first argument is that his trial counsel failed to do any pre-trial investigation and call certain witnesses. Specifically, he argues that his counsel should have interviewed Vonda Sworinger (the owner of the car and gun), employees of a car wash, and an unnamed female police officer who was allegedly present at the time of the automobile was searched.

Pre-trial investigations are important in case preparation, but Appellant fails to allege how any investigation into these potential witnesses could have changed the outcome of his case. Ms. Sworinger was in fact called as a witness during trial and stated that she was the owner of the car and the gun. It is unlikely that any pre-trial investigation could have produced better testimony from her.

As for the car wash employees, Appellant alleges their testimony would have bolstered the fact that he did not know the gun was in the car. During Appellant's cross-examination, the prosecutor elicited testimony that he washed the car on the day he was arrested. The prosecutor suggested that if he washed the car, he would have spotted the gun. Appellant clarified and stated that he had the

car washed. Any testimony by the car wash employees would have added little to Appellant's case.

As for the female police officer, Appellant offered no explanation as to what relevant evidence or testimony she possessed or why her testimony would have helped his case. It is also reasonable to assume that any evidence or testimony she could have provided would have been similar to that of the other two officers who testified. We do not find Appellant's trial counsel was ineffective in these instances. Any failure to investigate these potential witnesses produced little to no prejudice for Appellant's case. We do not see how the outcome of the proceeding would have been any different.

Appellant next argues that his trial counsel failed to fully explain a pre-trial plea offer for probation. Prior to trial, the Commonwealth offered Appellant a plea offer for ten years of probation. This offer was put on the record prior to jury selection. Appellant argues that had his trial counsel fully explained it to him or explained that he could only be on probation for a maximum of five years[1] that he would have accepted the plea agreement. However, during the discussion of this offer on the record both the prosecutor and Appellant's trial counsel explained the agreement. Also, the judge asked Appellant if he was declining the offer. Appellant stated on the record that he was not going to accept

[1] KRS 533.020(4) states in relevant part: "The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony. . ."

the offer because he believed the police officers were lying. We agree with the trial court's finding that Appellant understood the plea agreement and declined it.

Next Appellant argues that his trial counsel failed to pursue the search of the car as an illegal one. We find that this is not the case. Appellant's trial counsel filed a motion to suppress on October 7, 2004. The motion argued that the automobile stop was without probable cause and that any evidence obtained through it should be suppressed. The motion was overruled by the trial court. It is clear that counsel did try to get the evidence suppressed.

Appellant also claims that his trial counsel improperly waived his right to appeal his conviction. This is not the case. The waiver of appeal was part of the sentencing agreement Appellant entered into.

None of the alleged errors of counsel amount to ineffective assistance. Appellant either misstates the facts revealed in the record, as is the case with the suppression issue and waiver of appeal, or he does not show how the alleged errors prejudiced his case, as with the pre-trial investigation and witness issues. No hearing was necessary on this issue.

As for Appellant's argument that he was coerced into entering into a sentencing agreement or that it was done involuntarily and unintelligently, we agree with the trial court's findings to the contrary. Appellant does not give any specifics as to the coercion. He merely states that he was coerced into pleading guilty on the trafficking charge because he did not know all the facts of that case. This does not show or even suggest coercion. This undetailed allegation does not

entitle Appellant to a hearing on the issue. *See Evans v. Commonwealth*, 453 S.W.2d 601, 603 (Ky. 1970).

With regard to the alleged unintelligent entry into the sentencing agreement, we find that it was done so intelligently and voluntarily. There was a colloquy and any time Appellant stated he was confused, the judge or trial counsel explained things to him. The agreement was explained to him by trial counsel prior to the colloquy and he signed the agreement forms. If Appellant was unhappy with his counsel's performance or the agreement, he had many opportunities to make it known.

For these reasons we find that Appellant entered into the sentencing agreement voluntarily and received effective assistance of counsel. Additionally, no hearing was necessary as there were no facts that could not be determined from the record.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Raughn Lewis, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky