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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001370-MR

EVERETT LETTERLOUGH APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 03-CR-000809

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Everett Letterlough, hereinafter Appellant, is appealing the Jefferson County Circuit Court's denial of his RCr 11.42 motion to Vacate, Set Aside, or Correct the Judgment of his conviction. Appellant entered into a conditional guilty plea to one count of first-degree trafficking in a controlled substance, one count of possession of a firearm by a convicted felon, one count of possession of drug paraphernalia while in possession of a firearm, one count of possession of marijuana while in possession of a firearm, and one count of being a

persistent felony offender (PFO) in the first-degree. He received an enhanced sentence of seventeen years in the penitentiary. Appellant argues that his sentence was unlawfully enhanced twice, that he had ineffective assistance of counsel, and that his plea was involuntary. The Commonwealth argues that the double enhancement issue was not preserved for review, that Appellant received effective assistance from his trial counsel, and that his guilty plea was voluntary.

On January 7, 2003, Detective Mike Brackett of the Jefferson County Sheriff's Office was told by a confidential informant, who he deemed to be reliable, that Appellant was selling drugs from room 129 at the InTown Suites in Louisville, Kentucky. The informant described the car Appellant would be driving, but did not know the make or model of the vehicle. Detective Brackett was aware that this motel was a common location for drug transactions.

After receiving this information, Detective Brackett performed a criminal background check on Appellant which revealed past drug arrests with "gun involvement." Also, the check revealed Appellant had recently been paroled on July 24, 2002.

Detective Brackett and four other officers went to the motel to investigate the tip. Upon arriving, Detective Brackett allegedly verified from the front desk that room 129 was registered to Appellant. The police officers then set up surveillance of the room.

Approximately 20 minutes into the surveillance, a car matching the informant's description entered the parking lot and parked across from room 129.

Detective Brackett had obtained a physical description of Appellant from the background check. The driver of the car matched that description.

When Appellant exited the vehicle, Detective Brackett and Detective Troy Pitcock approached him. At this point, there is some dispute as to what occurred. Regardless, the officers performed a *Terry* stop[1] and patted down Appellant to make sure he was not carrying a weapon. The officers found a loaded pistol in a holster under Appellant's jacket. He was then placed under arrest for being a convicted felon in possession of a firearm. He was then searched further incident to the arrest. The officers found 11 pieces of crack cocaine, digital scales, six pieces of individually wrapped crack cocaine, a small amount of marijuana, and $1,875.

After Appellant was searched, his hotel room and car were searched. Appellant argues that he never consented to these searches, but the Commonwealth contends that he did, pointing to a signed consent form. During the search of the room and car, the officers further found two crack pipes, several plastic baggies with their corners removed[2], another loaded gun, ammunition, and $80.

On March 20, 2003, Appellant was indicted for trafficking in a controlled substance in the first-degree (cocaine) while in possession of a firearm, possession of a firearm by a convicted felon, illegal use or possession of drug paraphernalia while in possession of a firearm, illegal possession of a controlled

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[2] Detective Brackett stated this is a common method used by drug dealers to package crack cocaine intended for sale.

substance (marijuana) while in possession of a firearm, and being a PFO in the first-degree.

Prior to trial, Appellant filed a motion to suppress all evidence obtained from the search of his person, the motel room, and the car. The motion was based on the warrantless and allegedly unconstitutional stop and seizure of Appellant by detectives. This motion was denied.

Appellant then entered into a conditional guilty plea agreement with the Commonwealth. Appellant was allowed to reserve his right to appeal the denial of his motion to suppress. On March 16, 2004, a judgment was entered in which the trial court convicted Appellant of trafficking in a controlled substance in the first-degree (cocaine), possession of a firearm by a convicted felon, illegal possession of a controlled substance (marijuana) while in possession of a firearm, illegal possession of drug paraphernalia while in possession of a firearm, and PFO in the first-degree. He was sentenced to serve seventeen years in prison.

On October 20, 2005, a previous panel of this Court affirmed the denial of the motion to suppress holding that there was sufficient information to support the reasonable suspicion of criminal activity to justify the *Terry* stop. In April, 2006, Appellant filed the current RCr 11.42 motion, which was denied without a hearing.

On appeal, Appellant only argues three of the issues presented in the RCr 11.42 motion. We find that the double enhancement issue was not preserved

for review and that the ineffective assistance of counsel and involuntary guilty plea issues are without merit.

First, Appellant argues that his charges were enhanced twice, first by the Controlled Substance Act (KRS 218A *et seq.*) and then again by his PFO status. This issue was not raised in the trial court as part of his motion and is therefore not preserved for our review. *See Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976).

Second, Appellant argues that his trial counsel was ineffective because she failed to investigate or call as witnesses the manager of the motel and the motel security staff. Appellant contends that these witnesses would have testified that there was no unusual activity coming from Appellant's room, that Appellant argued with the officers that they did not have a warrant or consent for their search, and that Appellant's girlfriend, who was in the room when it was searched, was only a guest and could not consent to the search of the room or car.

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).

We affirm the trial court's finding that Appellant's trial counsel was effective. As stated above, Appellant was indicted for trafficking in a controlled

substance in the first-degree (cocaine) while in possession of a firearm, possession of a firearm by a convicted felon, illegal use or possession of drug paraphernalia while in possession of a firearm, illegal possession of a controlled substance (marijuana) while in possession of a firearm, and being a PFO in the first-degree. All of these offenses stem from the *Terry* stop, pat down, and subsequent search incident to arrest. A previous panel of this Court found the *Terry* stop and pat down legal. The *Terry* stop and pat down led to the discovery of the gun. This then led to Appellant's arrest for possession of a firearm by a convicted felon. Finally, there was a search incident to an arrest, which is a search that does not require consent or a warrant. *Rainey v. Commonwealth*, 197 S.W.3d 89, 92 (Ky. 2006).

Since all of the offenses Appellant was charged with came from the initial search of his person, which was previously deemed legal by this Court, any evidence that could have been obtained by these witnesses would have been irrelevant. These witnesses could only have provided evidence regarding the search of the room and car. Therefore, the performance of Appellant's trial counsel in regard to this matter was not deficient.

Finally, Appellant argues that his guilty plea was involuntary because his counsel was not prepared or willing to go to trial. This allegation is directly refuted by Appellant's own statements during the guilty plea colloquy. When the trial judge asked Appellant if he had any complaints about his counsel's representation of him he stated that he did not. He went on to further comment on

how he wished his appointed counsel could have been his attorney from the beginning[3].

Also, during the plea colloquy, Appellant confirmed that he had read and signed all the plea forms and that he had discussed them with his attorney; that he understood he was giving up his right to a jury trial; and that he had no reservations about pleading guilty. Appellant had multiple opportunities to inform the trial court that he was unhappy about either his plea agreement or trial counsel's representation. If he did not wish to plead guilty he should have informed the court. He did not. Accordingly, we find that his guilty plea was voluntary.

For the foregoing reasons we affirm the circuit court's denial of Appellant's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Everett Letterlough, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

[3] Appellant was briefly represented by privately retained counsel during the preliminary stages of this case.