

RENDERED: DECEMBER 12, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001680-MR

EDDY DELOACH

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 03-CR-00129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: This is an appeal from the Grant Circuit Court's order denying Eddy Deloach's (Deloach) post-conviction motion to vacate his judgment of conviction and sentence pursuant to Rules of Criminal Procedure (RCr) 11.42. For the reasons set forth below, we affirm.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## FACTS

On September 10, 2003, a Grant Circuit Court Grand Jury indicted Deloach with Rape in the First Degree, based on evidence that the thirty-year-old Deloach had engaged in sexual intercourse with a five-year-old girl. On August 11, 2004, the Grant Circuit Court accepted Deloach's plea of guilty and on September 29, 2004, Deloach was sentenced to thirty-five years' imprisonment.

On May 15, 2007, Deloach filed a motion to vacate conviction and sentence under RCr 11.42 and for appointment of counsel and an evidentiary hearing. In support of his motion, Deloach alleged that counsel was ineffective. Deloach also argued the judge should have recused and that he erred when he accepted Deloach's guilty plea. The circuit court denied Deloach's motion on June 25, 2007, stating the issues raised were either clearly refuted by the record or were issues that could not be raised in a motion under RCr 11.42. Deloach appeals from this order.

## STANDARD OF REVIEW

Deloach raises several issues that require a different standard of review. Therefore, we will set forth the appropriate standard of review as we analyze each issue.

## ANALYSIS

Deloach argues in his brief that the circuit court judge erred when he did not appoint counsel to represent Deloach in his RCr 11.42 action; when he did not conduct an evidentiary hearing on Deloach's RCr 11.42 motion; when he did not rule on the merits of that motion; and when he did not recuse. Although the preceding are the stated issues, it appears that Deloach's primary issue is that he received ineffective assistance of counsel prior to entering his guilty plea.

Therefore, we will address that issue first.

### 1. Ineffective Assistance of Counsel

The test for determining ineffective assistance of counsel on a guilty plea is whether

counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and ...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*, 721 S.W.2d 726, 727-28 (Ky. App. 1986), citing *Hill v.*

*Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). Deloach

argues his counsel was ineffective for several reasons; we will address each in turn.

Deloach first argues counsel was ineffective because he failed to appeal the trial court's denial of his pre-trial motion to suppress his statements to police and statements from jailhouse informants.

The entry of a valid guilty plea effectively waives all defenses other than that the indictment charged no offense. Further, 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.

*Thompson v. Commonwealth*, 147 S.W.3d 22, 39 (Ky. 2004). Because Deloach pled guilty, he cannot now raise issues with regard to denial of these pretrial motions to suppress.

Next, Deloach alleges that counsel failed to challenge the fact that he was not properly Mirandized. However, counsel did file a motion to suppress statements Deloach made to the police, arguing Deloach was not properly Mirandized. The judge denied the motion, finding that Deloach was properly Mirandized and that his waiver of the right to counsel was knowingly and voluntarily made. Because counsel did move to suppress Deloach's statements, this allegation is unfounded.

Third, Deloach claims the Commonwealth did not provide him with exculpatory evidence, *i.e.*, medical reports of the examinations of the victim. Those reports stated that no semen, blood, or hair were found on the victim's undergarments or in any of the samples taken at the hospital. However, the record reveals that the Commonwealth filed a Supplemental Discovery and Inspection stating that reports of examinations and tests had been provided to Deloach. Therefore, the Commonwealth did provide the allegedly exculpatory evidence to Deloach, and his argument to the contrary is without merit.

Deloach next argues that his counsel was ineffective because he failed to challenge a search warrant that was issued based on the jailhouse informants' testimony. As with Deloach's pretrial motions, the right to challenge a search warrant is waived upon a guilty plea. *Sanders v. Commonwealth*, 663 S.W.2d 216, 218 (Ky. App. 1984). Because Deloach pled guilty, he cannot now challenge the issuance of the search warrant or the seizure of any evidence obtained with the search warrant. *Thompson, supra*.

During the course of his case Deloach changed counsel. For his fifth argument, Deloach alleges that the court erred when it refused to grant a continuance requested by substitute counsel. However, Deloach has not set forth with any specificity how the court's denial of his request for a continuance harmed Deloach. This allegation by Deloach is not one of ineffective assistance of counsel but rather one of due process. It is not proper to raise this issue by way of an RCr 11.42 motion; it may only be raised on direct appeal. Because Deloach pled guilty, he waived his right to direct appeal, and he cannot now raise this issue. *Thompson, supra*. Furthermore, even if Deloach could raise this issue here, the denial of a request for additional time is not necessarily a violation of the right to due process. *Collins v. Commonwealth*, 392 S.W.2d 77, *cert. denied* 382 U.S. 881, 86 S.Ct. 171, 15 L.Ed.2d 121 (1965).

Sixth, Deloach argues the court erred by allowing the victim to testify without a proper competency hearing. Initially, we note that Deloach pled guilty prior to standing trial. Therefore, the victim did not testify. We presume that

Deloach is appealing the court's order indicating the victim would be permitted to testify. As noted above, this is not an issue regarding ineffective assistance of counsel and is not the proper subject for an RCr 11.42 action. The propriety of a judge's ruling is an issue which must be raised on a direct appeal. As with the other issues raised by Deloach, he waived the right to raise this issue when he pled guilty. *Thompson, supra*.

Seventh, Deloach argues that counsel failed to challenge the "biased and prejudicial results" of his psychiatric examination. As with the majority of Deloach's other arguments, he waived the right to make this argument by pleading guilty. *Thompson, supra*.

Deloach next appears to argue that he should now be permitted to withdraw his guilty plea and/or that the court should not have accepted that plea. RCr 8.10 states that "[a]t any time before judgment, the court may permit the plea of guilty . . . to be withdrawn . . . ." After judgment, a guilty plea can only be withdrawn if the plea was made unwillingly or under circumstances of fear, deceit, or coercion. Deloach does not point to any evidence that would lead to the conclusion that he unwillingly entered a plea of guilty. In fact, prior to entering his plea, Deloach testified he understood he was giving up his right to a trial and his right to appeal. He further testified his judgment was not impaired in any way and that his attorney had fully explained his plea to him. Therefore, it is clear from the record that Deloach's plea was valid and it cannot be set aside in this RCr 11.42 action.

## 2. Entitlement to an Evidentiary Hearing

As set forth above, all of Deloach's allegations of ineffective assistance of counsel or other errors can be resolved by reference to the record. Therefore, the court correctly denied Deloach's motion for a hearing on his motion.

## 3. Entitlement to Counsel

A defendant does not have a right to counsel in an RCr 11.42 action when the issues raised can be resolved by reference to the record. *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006). The issues raised by Deloach can be resolved by reference to the record; therefore, he has no right to counsel and the court's denial of his motion for counsel was correct.

### 3. Failure to Rule on the Merits of the RCr 11.42 Motions

Deloach argues that the court did not rule on the merits of his motions. Although the court's order denying Deloach's motions is brief, it did rule on the merits of those motions. While the court may not have ruled the way Deloach would have preferred, it nonetheless ruled, which is all that is required.

## 4. Failure to Recuse

Post-conviction motions must aver facts with sufficient specificity to permit a basis for relief. *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). Deloach does not specify what actions the circuit court judge took, other than ruling adversely on his motions, that would constitute bias or prejudice

sufficient to warrant recusal. Therefore, we find no error in the circuit court judge's refusal to recuse.

### CONCLUSION

As set forth above, we discern no error by the circuit court.

Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eddy Deloach, *pro se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
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