

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001780-MR

ERIC STEVEN KING

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 99-CR-001001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

NO. 2002-CA-000328-MR

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COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING APPEAL NOS. 2001-CA-001780-MR & 2002-CA-000328-MR

** ** *

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Eric Steven King (hereinafter "King"),
proceeding with appointed counsel, has appealed from the

Jefferson Circuit Court's Judgment of Conviction and Sentence entered July 19, 2001, and from the Amended Judgment entered July 25, 2001, which were entered pursuant to a conditional guilty plea.¹ King, proceeding *pro se*, has also appealed from the Jefferson Circuit Court's January 18, 2002, opinion and order denying his post-conviction Motion to Vacate, Correct or Set Aside Judgment pursuant to RCr 11.42.² Having considered the parties' briefs, the record and the applicable case law, we affirm in both appeals.

Because of the complicated procedural history below, a complete recitation of the facts applicable to these appeals is necessary. On April 20, 1999, the grand jury returned a ten-count indictment against King and co-defendant, Jacinta Goode (hereinafter "Goode").³ The grand jury indicted King on two counts of Trafficking in a Controlled Substance, First Degree (heroin)⁴ and on one count each of Burglary II,⁵ Tampering with Physical Evidence,⁶ Assault III,⁷ Illegal Use or Possession of

¹ Appeal No. 2001-CA-001780-MR.

² Appeal No. 2002-CA-000328-MR.

³ Goode entered a guilty plea and received a twelve-month sentence for possession of marijuana on July 19, 2001, which the trial court probated for one year.

⁴ KRS 218A.1412.

⁵ KRS 511.030.

⁶ KRS 524.100.

⁷ KRS 508.025.

Drug Paraphernalia,⁸ Resisting Arrest,⁹ and of being a Persistent Felony Offender II.¹⁰ These charges stemmed from two separate incidents, which took place on July 17, 1997, and on April 2, 1998, in Louisville, Kentucky.

On July 17, 1997, detectives from the Metro Narcotics division of the Louisville Police Department obtained information from a confidential informant that King would be driving a blue Ford Probe and would be delivering heroin to several locations. When the detectives attempted to stop King, he evaded them for one and one-half blocks before exiting the car and running into a backyard. King broke into a house and hid in the cellar until the officers located him. The officers recovered \$221 and a pager from a corner in the cellar as well as a portion of a knotted baggie and heroin scattered on the concrete and grass. Following a consent search of King's girlfriend's house, the officers recovered digital scales and \$1,900 in cash.

On April 2, 1998, Detectives Susan Williams and Steve Farmer received information from a confidential informant that King was in possession of a large amount of heroin and was

⁸ KRS 218A.500.

⁹ KRS 520.090.

¹⁰ KRS 532.080.

driving a blue Olds Delta 88. Along with other detectives, they stopped King and his passenger, Goode, at a B.P. gas station. King began to struggle when he was taken out of the car, and bit the hand of one of the detectives. The detectives recovered 20.84 grams of heroin, plastic capsules used to package heroin, digital scales, and \$14,000 in cash.

At the time of his arraignment on April 26, 1999, King was jailed in Los Angeles, California on unrelated charges. He was later extradited to Kentucky and arraigned. Thomas Clay entered an appearance on King's behalf on April 17, 2000. During the summer of 2000, plea negotiations between the Commonwealth and both King and Goode ensued. For King, the Commonwealth's offer was for him to serve a total of fifteen years in exchange for guilty pleas on all charges and the forfeiture of all cash seized. The Commonwealth apparently lowered its offer to a ten-year sentence at some point, although the record does not reflect that the offer was ever reduced to writing.

Later that year, counsel for King discovered that King was a federal informant, and attempted to determine what type of deal King received in exchange for being an informant. The trial court held a Workman¹¹ hearing to determine if King made a deal relating to his pending state charges and, if so, what the

¹¹ Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979).

deal entailed. King attempted to subpoena Assistant U.S. Attorney Alexander T. Taft, Jr., to testify concerning communications between himself and Detectives Williams and Farmer while he was in jail in California. The trial court eventually quashed the subpoena, but held a Workman hearing on three separate days regarding the communications.¹²

During the hearing, both Detectives Williams and Farmer testified that in October 1999, they made arrangements with King's former attorney, David Ward, to interview King while jailed in Los Angeles in regard to a federal drug investigation involving Christopher Buchanon and Jonte Rutledge and a California state investigation involving Phillip King.¹³ In exchange for his information regarding these two investigations, King would not be named as a defendant in either the Rutledge-Buchanon federal case or in the Phillip King state case, but would instead be a witness. Both detectives testified that they did not question King concerning his pending state charges in Kentucky and did not offer any deal relating to those charges. King testified that the deal for his cooperation was that he would not be prosecuted in federal court with Buchanon and Rutledge, from whom he had purchased heroin in the past. He

¹² The hearing began on November 13, 2000, continued on January 22, 2001, and concluded on March 27, 2001.

¹³ Phillip King apparently has no relation to Eric King.

indicated that he did not have any information regarding Phillip King.

At the end of the Workman hearing on March 27, 2001, King, through his counsel, indicated that he was interested in accepting the Commonwealth's offer and entering a conditional guilty plea. His counsel proposed that a range of sentences be submitted so that the trial court could allow King some consideration, if he was entitled to any. On April 4, 2001, the parties appeared before the trial court to discuss the possible entry of a guilty plea. Attorney Clay was not present, but King was represented by a substitute attorney who indicated that King would accept ten years. The Commonwealth stated that the ten-year offer was no longer available as King had rejected it, and presented a new written offer of twelve to fifteen years contingent upon a plea agreement with Goode. On April 30, 2001, the parties again appeared in court, at which time the trial court accepted King's open guilty plea, conditioned on his right to appeal the forthcoming decision on the Workman issue. The trial court entered a judgment accordingly. However, the Commonwealth argued that King could not enter a conditional guilty plea without its consent. The trial court ordered the parties to brief several issues, including whether a deal was entered into and whether King should have been permitted to enter a conditional guilty plea.

On June 18, 2001, the trial court heard arguments concerning King's pro se motion to withdraw his guilty plea and enter a plea of not guilty, or sentence him to ten years pursuant to the Commonwealth's offer. After discussing the matter with his counsel, King opted to keep his guilty plea and allow the trial court to determine the appropriate sentence as originally planned. On July 17, 2001, the trial court held a sentencing hearing. The trial court made several findings on the record, determining that there was no Workman issue, that there was no offer made upon which King detrimentally relied, and that King never accepted the ten-year offer while it was viable. The trial court also found that the agreement made with the detectives in Los Angeles was that he would not be indicted in federal court with the other defendants, and that their discussions did not affect his Kentucky state charges. On July 19, 2001, the trial court entered a final judgment, which was amended on July 25, 2001, sentencing King to concurrent five-year sentences on the trafficking charges; to a five-year sentence on the burglary charge, to run consecutively with the trafficking sentences; to one-year sentences each on the tampering with physical evidence, assault, and illegal possession of drug paraphernalia charges, to run concurrently with the trafficking and burglary sentences; and to a twelve-month sentence on the resisting arrest charge, also to run

concurrently with the trafficking and burglary sentences, which were all enhanced to fifteen years due to the PFO II conviction.¹⁴ It is from the judgment and amended judgment that King took his first appeal.

On December 12, 2001, King filed a pro se motion to vacate pursuant to RCr 11.42, arguing that his attorney provided him with ineffective assistance when he coerced King into not accepting the Commonwealth's ten-year offer and when he failed to file motions to suppress and dismiss the charges against him. In a supplemental motion, King argued that his plea was involuntary because it was based upon incompetent advice of counsel. In essence, he argues that he would not have entered a guilty plea had he known that he could have challenged the searches. King also moved for an evidentiary hearing. The trial court denied the motion without an evidentiary hearing in an opinion and order entered January 18, 2002. It is from this order that King took his second appeal.

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In this appeal, King, through appointed counsel, argues that he was entitled to specific performance of the agreement reached with the detectives in Los Angeles in regard to his pending circuit court charges in Kentucky and that the

¹⁴ The judgment was amended in order to remove a conviction for a charge attributable to Goode only.

trial court too narrowly interpreted the immunity agreement. King argues that although the detectives maintained that immunity was only extended to him in relation to the prosecutions of Buchanon, Rutledge and Phillip King, the information they received overlapped with the trafficking in heroin charges pending against him at the time of their communication. Likening the situation in his case to those dealing with the prohibition against using statements made during plea negotiations at trial, King relies upon the two-prong test adopted in Roberts v. Commonwealth, Ky., 896 S.W.2d 4 (1995), and argues that his expectation that he would be given immunity from prosecution on his pending indictment was reasonable. King requests specific performance of the deal, arguing that the proper remedy is dismissal of the two trafficking in heroin counts.

On the other hand, the Commonwealth argues that the trial court properly found that there was no violation of the agreement negotiated with King because there was no agreement concerning the pending trafficking in heroin charges. According to the detectives' testimony, the deal made during the interview in Los Angeles only extended to the federal prosecution involving Buchanon and Rutledge and the California state prosecution of Phillip King. In fact, King himself testified that the agreement only extended to his immunity from federal

prosecution in the Buchanon-Rutledge case. In any event, King received the benefit of this bargain because he was not charged in either the federal prosecution or in the state prosecution of Phillip King. Lastly, the Commonwealth argues that the relief requested by King in his brief, i.e., that Counts One and Two of the indictment be dismissed, is not properly before this Court because the claim was not first presented to the trial court.

In the case of Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), the Supreme Court of Kentucky reversed Workman's murder conviction after determining that the Commonwealth failed to honor the terms of its agreement to abandon its prosecution if Workman were to pass a polygraph examination. Although Workman passed two separate polygraph examinations, the Commonwealth proceeded with its prosecution. The trial court denied Workman's motion to dismiss the indictment, giving no reason for its ruling. The Supreme Court reversed, holding that "[w]hen as here, our historical ideals of fair play and substantial justice do not permit attorneys for the Commonwealth to disregard promises and fail to perform bargains, it does not permit the judge to allow such iniquities to succeed." Id. at 207. Later, in Adkins v. Commonwealth, Ky.App., 647 S.W.2d 502 (1982), the Court of Appeals stated that the law in Kentucky on this issue as follows: "[T]he fundamental fairness guaranteed by the Fourteenth Amendment

makes it reversible error for a trial court to permit the government to welch on a bargain with an accused." Id. at 504.

We are also mindful of the decision in Roberts v. Commonwealth, Ky., 896 S.W.2d 4 (1995), wherein the Supreme Court adopted a two-prong test as set forth in United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978), to be used to determine whether a discussion might be characterized as a plea discussion:

1. Whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion

AND

2. Whether the accused's expectation was reasonable given the totality of the objective circumstances.

Id. at 6.

We have thoroughly reviewed the record in this appeal, and have determined that the trial court did not abuse its discretion in finding that there was no agreement made in Los Angeles between King and the detectives regarding his pending charges in Kentucky. Both Detective Williams and Detective Farmer testified that they were there only to discuss the Buchanon-Rutledge federal prosecution and the Phillip King state court prosecution, and to secure King's testimony as a witness in exchange for their promise that he would not be charged in those two prosecutions. Even King testified that the bargain

was only to protect him from federal prosecution. There is no indication in the record and no argument from King that the detectives did not keep their side of the bargain – King was not prosecuted in either the Buchanon-Rutledge federal prosecution or in the Phillip King prosecution in California. Likewise, King cannot now argue that he reasonably believed that the deal reached with the detectives affected his pending state charges when he testified that he believed the deal only protected him from federal prosecution.

The trial court was correct in finding that there was no Workman issue because the deal reached with Detectives Williams and Farmer did not concern his pending state charges in Kentucky. Furthermore, and even though it appeared that his trafficking charges might have overlapped with the investigation being conducted by the detectives, any expectation King might have had regarding his pending state charges would not have been reasonable. His pending charges in Kentucky were never discussed with any specificity, if at all, and the deal as testified to at the hearing involved only the federal Buchanon-Rutledge prosecution and the California state prosecution of Phillip King.

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In this appeal, King continues to argue that he received ineffective assistance of counsel because his attorney

prohibited him from accepting the Commonwealth's ten-year offer and failed to file motions to suppress and dismiss, and that his plea was involuntary. On the other hand, the Commonwealth argues that King received effective assistance of counsel and that the record refuted his allegations.

Because we believe that the trial court's excellent opinion and order adequately and properly addresses the issues raised in this appeal, we shall adopt it as our own as follows:

This matter is before the Court on Defendant Eric King's Motion to Vacate, [Correct] or Set Aside a judgment pursuant to RCr 11.42 on the grounds of ineffective assistance of counsel. After careful review of King's memorandum, as well as the relevant statutory and case law and the record herein, the Court finds that the relief sought is inappropriate, and denies the Motion.

King claims that his trial counsel was ineffective for several reasons. First, King claims that his trial counsel's decision not to accept an offer for a ten-year sentence was prejudicial in that King was ultimately sentenced to fifteen years. Second, his trial counsel failed to seek the suppression of physical evidence that was illegally seized on April 2, 1998. Finally, his trial counsel failed to seek the suppression of physical evidence that was illegally seized on July 17, 1997. The Court will address each of these issues in turn.

Respecting the first issue, the record reflects that the prosecution offered a fifteen-year sentence that King's counsel, after several court appearances, negotiated down to ten years. King's counsel advised

King not to accept this offer, believing that he could negotiate a better deal. King eventually agreed to accept this offer, but the offer had expired and the Commonwealth raised the sentence to twelve years in a subsequent offer. King felt that the increase was unfair and refused the deal, opting instead to enter an open guilty plea, upon which the Court imposed a sentence of fifteen years. King claims that his trial counsel "coerced" him into not accepting the ten-year deal, and refused to accept the offer for him despite his instructions. As a general rule, when a defendant alleges that his trial counsel coerced him into a plea agreement, and the charge of inadequacy is made with such particularity as to suggest substance, the court should conduct an evidentiary hearing to determine the issue of ineffective assistance of counsel. McCarthy v. Commonwealth, Ky., 432 S.W.2d 50, 50-51 (1968). The rule also applies when trial counsel refuses to accept a plea offer, and the defendant receives a greater sentence than the offer. Osborne v. Commonwealth, Ky., 991 S.W.2d 860, 863-64 (1999). However, if the record refutes the allegations of ineffective assistance, then there is no need for a hearing. Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1999). The burden of proof is on the defendant to show that he was not adequately represented. Osborne, 992 S.W.2d at 863.

This Court has conducted numerous hearings on the plea bargaining in this case, and has compiled a substantial record. The only evidence that King's counsel "coerced" him or refused to accept the offer as instructed are contained in King's self-serving RCr 11.42 motion. Rather, the record reflects that King's attorney advised him not to accept the offer because he believed he could negotiate a better deal and that, although King was willing to accept the ten-year offer, he followed his attorney's advice until the point when he

finally decided to accept the offer. The fact that the ten-year offer expired and the Commonwealth then raised the offer to twelve years, which King refused to accept, does not establish that King was coerced in any way. The record reflects that King's attorney reasonably believed that he could negotiate a better deal, and that King followed his attorney's advice in this matter. Thus, the record refutes King's allegations of ineffective assistance, King has failed to satisfy the burden of proof, and there is no need for a hearing on this issue.

As to the second issue, King claims that his trial counsel was ineffective because he failed to file a motion to suppress physical evidence that was illegally seized on April 2, 1998. To prevail on this claim, King must show that "counsel's representation fell below an objective standard of reasonableness [and that] there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Osborne, 992 S.W.2d 863, quoting Hill v. Lockhart, 474 U.S. 52, 57 (1985). Thus, the question here is whether there is a reasonable probability that the suppression motion would have been granted, and would have led to the dismissal of the charges. The record reflects that police officers received information from a reliable confidential source that King was at a certain address, and that King would be leaving shortly in a blue Olds Delta 88, Kentucky license DTR-809, with a quantity of heroin. Upon arriving at the stated address, officers found King in a blue Olds Delta 88, license DTR-809, at which point they seized King and discovered heroin in his possession. Thus, prior to the seizure, the confidential source's information was personally verified in every respect but for the heroin possession. As the United States Supreme Court stated in Draper v. United

States, "surely, with every other bit of [the source's] information being thus personally verified, [the officers] had 'reasonable grounds' to believe that the remaining unverified bit of . . . information - that [the defendant] would have the heroin with him - was likewise true." 358 U.S. 307, 313 (1959). Although the Court need not, and does not, rule on the legality of the search and seizure, it does find that there is not a reasonable probability that the suppression motion would have been granted. King has not satisfied his burden of proof on this issue.

Finally, King argues that his trial counsel was ineffective in failing to investigate and file a motion to suppress and motion to dismiss that would have resulted in the dismissal of charges resulting from his arrest on July 17, 1997. The record reflects that, on that date, King fled police and broke into a private dwelling by breaking a door window. King claims that the charge of burglary would have been dismissed had his trial counsel investigated King's claim that he had permission to enter the residence and that "the door was slightly ajar and fragile." Considering the circumstances of this offense, the Court finds that King's allegations fail to satisfy the burden of proof to show that a reasonable probability that, but for his trial counsel's alleged unprofessional errors, the charges would have been dismissed. King further claims that the police had no probable cause of the search and seizure that led to the charge of heroin possession in this arrest. However, King has failed to produce any facts that would show that his trial counsel's representation fell below an objectively reasonable standard, or that the results of the proceeding would have been different but for counsel's alleged unprofessional errors. The Court finds that King has not satisfied

his burden of proof on this issue.
Accordingly, for the reasons stated above,

IT IS HEREBY ORDERED and ADJUDGED that Defendant Eric King's Motion pursuant to RCr 11.42 is DENIED, in its entirety. The Court will not conduct an evidentiary hearing on this motion.

Having thoroughly reviewed his arguments, we disagree with King's assertion that his guilty plea was involuntary. We agree with the trial court's determination that King's trial counsel did not coerce him into refusing to accept the Commonwealth's ten-year offer, and that trial counsel was not ineffective in failing to file motions to suppress and dismiss. At the guilty plea hearing, the trial court conducted the necessary hearing pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 264 (1969), to determine that the plea was intelligently and voluntarily entered.

The trial court properly denied King's RCr 11.42 motion without an evidentiary hearing, as King's allegations are refuted on the face of the record.

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's final judgment on a conditional guilty plea, as amended, and the opinion and order denying King's RCr 11.42 motion are affirmed.

ALL CONCUR.

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NO. 2001-CA-001780-MR:

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