RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001186-MR

AUNDREY CHANDLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 99-CR-001760 & 00-CR-000418

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Aundrey Chandler appeals from an order of the Jefferson Circuit Court that denied his RCr[1] 11.42 motion to vacate his conviction and 20-year prison sentence. The basis of Chandler's motion was that he received the ineffective assistance of counsel. We affirm the court's order.

Chandler was indicted and convicted of two counts of kidnapping, one count of criminal attempt to commit murder, one count of assault in the first degree, and one count of robbery

[1] Kentucky Rules of Criminal Procedure.

in the first degree. His convictions were the result of guilty pleas to the offenses. Chandler was sentenced to 20 years in prison on each count, and all counts were ordered to run concurrently with each other. The final judgment was entered on September 13, 2000.

In early January 2002, Chandler filed an RCr 11.42 motion. The circuit court entered an order denying the motion and denying an evidentiary hearing. On October 31, 2002, this court entered an order granting Chandler's motion to file a belated appeal.

Chandler raises four arguments to support his claim of ineffective assistance of counsel. First, he argues that his counsel rendered ineffective assistance by allowing him to plead guilty to both assault in the first degree and robbery in the first degree. He maintains that a conviction for both offenses is prohibited by the double jeopardy clause. See Fifth Amendment to U.S. Constitution and Section 13 of Kentucky Constitution. He also states that assault in the first degree is a lesser included offense of robbery in the first degree, that the assault charge merged into the robbery charge, and that, therefore, the assault charge could not be the basis for a separate conviction. See KRS[2] 505.020(1)(a).

[2] Kentucky Revised Statutes.

In Taylor v. Commonwealth, Ky., 995 S.W.2d 355 (1999), the test for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy was set forth as follows:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. at 358, quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In the Taylor case, the defendant was convicted of both assault and robbery. The assault conviction was based on the defendant having struck the victim with a pistol. The robbery conviction was based on the defendant being armed with a deadly weapon. The court stated that "each offense required proof of an element that the other did not." Id. at 359. Thus, the court determined that the constitutional proscription against double jeopardy was not violated, and it upheld both convictions. Id. at 360, 363.

In the case *sub judice*, the basis of the assault charge against Chandler was that he intentionally caused serious physical injury to Dante Carrethers by means of a gun. See KRS 508.010(1)(a). The basis of the robbery conviction was that Chandler, while in the course of committing theft, threatened the immediate use of physical force upon Corey Tynes and that he

caused physical injury to Tynes or was armed with a deadly weapon. See KRS 515.020. In other words, the assault charge related to Carrethers as a victim, and the robbery charge related to Tynes as a victim. Furthermore, the assault conviction was based on causing serious physical injury by means of a gun, and the robbery conviction was based on causing physical injury to another victim or being armed with a deadly weapon. Thus, each offense required proof of additional facts that the other did not. Under the principles of the Taylor case, there was no double jeopardy violation. See also Polk v. Commonwealth, Ky., 679 S.W.2d 231, 234 (1984). Therefore, counsel could not have rendered ineffective assistance in this regard.

Chandler's second argument is that he received ineffective assistance of counsel during a hearing held pursuant to his motion to suppress pretrial identification. According to Chandler's brief, the victims were able to identify him as a participant in the crime in a photographic lineup despite having failed to identify him in earlier photographic lineups. Chandler claims that he was identified in the last photographic lineup because the lineup was "unduly suggestive." See Sanders v. Commonwealth, Ky., 844 S.W.2d 391, 392-93 (1992). He asserts that "[i]mproper employment of photographs by police caused a mis-identification in this case."

As to how this relates to his ineffective assistance of counsel claim, Chandler states that a police detective lied during the suppression hearing concerning his prior knowledge of Chandler, that his counsel did not bring the matter to the court's attention, and that the outcome of the case would have been different had counsel "told the court about this Det. Stone's false testimony."

We fail to see how the detective's prior knowledge of Chandler's identity would have had any bearing on the pretrial photographic lineup. Regardless of whether the detective knew Chandler or not prior to including his picture in the photographic lineup, the fact remains that his picture was included and Chandler was identified by the victims as a participant in the crime. Chandler's attorney challenged the lineup procedure by filing a suppression motion. Chandler's attorney apparently told him that the detective's previous knowledge of his identity had no bearing on the case, and Chandler has not persuaded us that such knowledge would have affected the outcome of the case in any way. Further, Chandler does not persuade us that the lineup was unduly suggestive. Thus, we fail to see how counsel rendered ineffective assistance.

Chandler's third argument is that he received ineffective assistance of counsel because his counsel failed to

investigate and failed to prepare a defense or raise a possible defense on his behalf. He alleges that his attorney did not interview witnesses and that such investigation would have revealed that "there was two different story's [sic] of the incident." Apparently, an eyewitness had said that the kidnappers had on masks, but the two victims had said that the kidnappers did not have on masks during the abduction.

The discrepancy between the testimony of the eyewitness and the testimony of the victims regarding masks was revealed during the suppression hearing. Therefore, counsel was aware of this fact by no later than that time and further investigation to learn the fact was not required. Also, Chandler does not state what any additional investigation by counsel would have revealed or what possible defenses counsel should have discussed with him. Therefore, we again fail to see where counsel rendered ineffective assistance.

Chandler's fourth argument is that the Commonwealth welshed on a previous plea agreement that he had signed. According to Chandler, the Commonwealth withdrew the agreement because a co-defendant had not accepted a plea agreement. Chandler relies on Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), overruled on other grounds by Morton v. Commonwealth, Ky., 817 S.W.2d 218, 222 (1991). He does not state in his brief

how he might have received ineffective assistance of counsel in this regard.

Chandler does not allege that the Commonwealth signed the agreement. Furthermore, we have searched the record, and we are unable to find the agreement to which Chandler refers. If the Commonwealth had not signed the agreement, it likely would not have been bound by it. The Commonwealth states in its response that the prosecutor may offer a "package deal" to co-defendants and condition that deal on acceptance by all co-defendants. Again, since the agreement is not in the record, we are unaware of the facts and circumstances surrounding it and are unaware of whether the agreement with Chandler was conditioned on reaching an agreement with a co-defendant.

Since Chandler does not allege ineffective assistance of counsel regarding the alleged welshing on the agreement by the Commonwealth, then this was an issue that could have been raised by him on direct appeal. By pleading guilty to the offense pursuant to a later agreement, Chandler waived all defenses to the charges, including that the Commonwealth welshed on a prior agreement. See Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). Therefore, we reject this argument.

The order of the Jefferson Circuit Court denying Chandler's RCr 11.42 motion is affirmed.

ALL CONCUR.

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