

RENDERED: January 14, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

(Opinion rendered October 15, 2004 withdrawn)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002449-MR

WILLIAM D. EARLYWINE

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
INDICTMENT NO. 99-CR-00236

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

MINTON, JUDGE: William Earlywine appeals following the denial of his motion for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. The circuit court held that Earlywine's allegations of error were either refuted by the record or not properly the subject of a motion for relief under RCr 11.42. Having reviewed Earlywine's

RCr 11.42 motion, we agree with the circuit court's holding and affirm.

Earlywine's case began with the issuance of a search warrant for an apartment in Lexington, Kentucky. The affidavit in support of the warrant relied primarily on information supplied by confidential informants who relayed that Earlywine was selling cocaine from the apartment. According to the affidavit, these sales had occurred as remotely as February 4, 1998, and as recently as within the forty-eight hours preceding the issuance of the warrant on January 19, 1999.

The search warrant was executed the next day, during which the police discovered a fanny pack containing five plastic baggies of cocaine; \$1,465.00; a loaded .22 caliber Derringer; and a pill bottle containing twelve pills of an unidentified substance. The fanny pack was found on a kitchen counter next to Earlywine's wallet and checkbook. In the rear bedroom of the apartment, police seized two handguns, a baggy of marijuana, a crack pipe, and two baggies with one corner missing. Miscellaneous other drug paraphernalia was seized in the bedroom and bathroom of the apartment.

Earlywine was leaving the apartment as the police arrived to serve the warrant. Though Earlywine and the Commonwealth dispute the details, both sides recount that Earlywine was taken by the police back into the apartment where

he made several incriminating statements. As a result of the search, Earlywine was charged with trafficking in a controlled substance in the first degree with a firearm, possession of drug paraphernalia, and of being a persistent felony offender in the second degree. Larry Morgan, the apartment's actual lessee, was charged with misdemeanor possession of marijuana and drug paraphernalia. Earlywine pled guilty on March 12, 1999, to the amended charge of trafficking in cocaine without a firearm and being a persistent felony offender, in exchange for which the Commonwealth recommended an enhanced sentence of fifteen years. The circuit court sentenced Earlywine in accordance with the Commonwealth's recommendation on April 13, 1999.

Following his plea and sentencing, Earlywine moved to have the judgment and sentence set aside because of ineffective assistance of counsel. Earlywine's specific allegations, reiterated on appeal, were that (1) his trial counsel failed to seek discovery, perform an investigation, or sufficiently communicate with him; (2) counsel should have moved to suppress the physical evidence seized during the search; (3) counsel should have moved to suppress his statements to the police following the search; (4) counsel's advice to plead guilty was erroneous because the Commonwealth could not prove that Earlywine possessed the seized drugs; and (5) counsel promised

that if Earlywine pled guilty, he would be out of prison in six months. On all of these points, we disagree.

In Hill v. Lockhart,¹ the United States Supreme Court enumerated the applicable standard to apply in cases where an appellant alleges ineffective assistance of counsel to attack a guilty plea. Hill essentially restated the two-pronged analysis of Strickland v. Washington,² but modified it slightly. While the first prong of the analysis remains whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases,"³ the second prong (*i.e.*, the "prejudice" showing) requires that the defendant demonstrate that "there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁴ Limiting this statement, however, is the proposition that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."⁵

¹ 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

² 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

³ Hill, 474 U.S. at 56, quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

⁴ *Id.* at 59.

⁵ *Id.*

Earlywine's allegations that his counsel failed to seek discovery or meet with him more than three times do not assert prejudice specifically as a result of those alleged failings. Therefore, Earlywine's contentions do not afford a basis for relief under Hill v. Lockhart.

Likewise, we do not believe Earlywine's counsel was ineffective for failing to challenge the search warrant issued for the apartment because, contrary to Earlywine's argument on appeal, probable cause existed for the search. The affidavit stated that an informant had witnessed sales of cocaine at the apartment in question and that a controlled purchase of cocaine occurred there within the preceding forty-eight hours. Furthermore, all descriptions of drug sales at the apartment included a white Mazda pickup truck parked in front, which truck Earlywine was reported to drive. This is precisely the sort of information contemplated by the requirement of Guth v. Commonwealth⁶ that the affidavit in support of an application for a search warrant states sufficient facts to establish probable cause for the search of the particular premises. While Earlywine argues that the information relied on was too old to be relevant to determining whether there were drugs or other evidence of drug trafficking present in the apartment at the

⁶ 29 S.W.3d 809 (Ky.App. 2000).

time the warrant was issued, we disagree. It is not unreasonable to suspect that drugs will be present within forty-eight hours of a controlled buy. Therefore, counsel was not ineffective because the warrant was based on probable cause; and any motion to suppress the search as having been pursuant to an improper warrant would properly have been denied.

In his argument regarding the physical evidence seized, Earlywine alleges that there was never a lab test to confirm that the substances were indeed illegal drugs. Earlywine argues that he received ineffective assistance of counsel in that his attorney did not determine whether the substance was actually submitted to the Kentucky State Police lab for testing and whether it tested positive for cocaine.

In order to state adequate grounds for relief on this issue, it was incumbent upon Earlywine to allege that the substance was not cocaine. In the absence of such an allegation, no prejudice could result. Furthermore, it was incumbent on Earlywine to allege that he told his attorney that the substance seized was not cocaine. Earlywine made none of these allegations in his motion before the circuit court or in his brief on appeal. So, under RCr 11.42(5), we conclude that Earlywine's allegation of ineffective assistance of counsel in this regard was properly rejected by the trial court without an evidentiary hearing.

With regard to the admissibility of his statements to police, Earlywine's arguments are multi-faceted. He first claims that his statements made to the police during and/or immediately after execution of the search warrant should be suppressed because they were not voluntarily given. Earlywine claims that he was under the influence of cocaine and in poor health⁷ at the time he was taken into custody, and the police exploited his infirmity in seeking a confession. Earlywine also makes a similar claim with respect to an interrogation at the police station. He alleges that the police threatened to withhold medical care and/or use the Internal Revenue Service to harass his mother if he did not cooperate. Earlywine further asserts that the police erroneously thought counsel represented him at the time of the interrogation at the police station. Finally, Earlywine argues that at no point was he given the warnings required by Miranda v. Arizona⁸ or, at a minimum, he did not voluntarily waive those rights. We disagree.

In Cox v. Commonwealth,⁹ the Court held that "[i]lllegality of a confession is not a ground for an RCr 11.42 attack on a conviction entered pursuant to a plea of guilty."¹⁰

⁷ It is uncontested that Earlywine has significantly impaired lung capacity as a result of Legionnaire's Disease.

⁸ 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁹ 411 S.W.2d 320 (Ky. 1967).

Earlywine did not allege in his RCr 11.42 motion that he advised counsel there could be a problem with the statements he made to the police. He did not allege that he ever told his counsel that he was in poor health or intoxicated when the statements were made. Further, Earlywine did not allege in his motion that he advised his attorney that his statements were coerced or were in violation of his Miranda rights. If counsel was not made aware of any problems with the incriminating statement, he could not have known to move for a suppression hearing.

RCr 11.42(2) requires that the motion state "the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion. Furthermore, in Hodge v. Commonwealth,¹¹ the Kentucky Supreme Court stated, "[t]he RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume the facts omitted from the motion establish the existence of such a violation."¹² Thus, even though Earlywine may have alleged in his motion that his confession was invalid, he has not stated grounds for RCr 11.42 relief since he did not allege that he had

¹⁰ *Id.* at 321.

¹¹ 116 S.W.3d 463 (Ky. 2003).

¹² *Id.* at 468. See also Skaggs v. Commonwealth, 803 S.W.2d 573 (Ky. 1990).

put his own attorney on notice of any such problems with the confession.

Based on the admissibility of these statements, Earlywine's allegation that his counsel was ineffective for advising him to plead guilty because of difficulties in the Commonwealth's proof is without merit. Considering the incriminating nature of his statements and his subsequent confession, we do not believe trial counsel was ineffective in advising Earlywine to accept the Commonwealth's plea offer.

Finally, we address Earlywine's contention that his counsel promised him release from prison in six months if he pled guilty. The Commonwealth points to Earlywine's statements during the guilty plea colloquy with the circuit court at the time the plea was entered as conclusively disproving Earlywine's allegations. The Commonwealth is correct insofar as it states that "solemn declarations in open court carry a strong presumption of verity."¹³ While this presumption may be overcome in certain cases, Earlywine has not presented us with an allegation of such an extraordinary circumstance as would overcome it. Therefore, the circuit court was correct that this alleged basis for relief is foreclosed by the record.

Accordingly, the circuit court's order is affirmed.

¹³ Brief for the Commonwealth at 6, *citing Blackledge v. Allen*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed. 136 (1977).

ALL CONCUR.

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