

RENDERED: February 13, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-002484-MR

STEVEN TAYLOR

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE WILLIAM J. WEHR, JUDGE  
INDICTMENT NO. 01-CR-00383

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

#### REVERSING AND REMANDING

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BEFORE: COMBS, JOHNSON, and MINTON, Judges.

MINTON, Judge: Steven Taylor appeals from an order of Campbell Circuit court denying his motion for relief from sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He alleges that as a result of his counsel's ineffectiveness, he pled guilty to charges for which he would otherwise have insisted upon going to trial.

While on parole from a life sentence imposed following a murder conviction, Taylor was driving a car accompanied by two passengers. The Newport Police Department stopped the car based entirely on an anonymous tip that the persons in the car were dealing drugs and carrying firearms. After the police stopped the vehicle, they ordered all three occupants out of the car. The police allegedly "discovered a plastic bag containing illegal drugs sticking out of a brown paper bag in plain view, behind the driver in the back seat. Police also saw a scale in plain view and smelled marijuana coming from the vehicle."<sup>1</sup>

The police arrested all three occupants of the car and proceeded to search the vehicle. The search yielded 85 methadone tablets, an Intratec 9mm handgun wrapped in two plastic bags hidden in the back seat, and a Rossi .38 special handgun in a purse also in the back seat.

Taylor was indicted for trafficking in a controlled substance in the first degree, possession of a firearm by a convicted felon, possession of marijuana, possession of drug paraphernalia in the first degree, and for being a persistent felony offender in the first degree.

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<sup>1</sup> The quoted language is taken from the Commonwealth's brief on appeal. The word "allegedly" is used because no factual findings were made below regarding the stop.

Following an initial plea of not guilty, Taylor moved the court to withdraw his not guilty plea and enter a plea of guilty pursuant to North Carolina v. Alford.<sup>2</sup> The agreement reached with the Commonwealth was that in exchange for Taylor's plea of guilty to possession of a handgun by a convicted felon and being a persistent felony offender, the Commonwealth would dismiss the other charges and recommend a sentence of ten years' incarceration to be served concurrently with the sentence Taylor was serving from Kenton Circuit Court.

A few months after being sentenced following his guilty plea, Taylor moved pursuant to RCr 11.42 to vacate his conviction and sentence. He alleged as grounds for relief that (1) his counsel failed to investigate or challenge the initial stop of his vehicle as being in violation of the Fourth Amendment to the U. S. Constitution and Section 10 of the Kentucky Constitution, (2) his counsel failed to interview witnesses who would testify that Taylor was unaware of the contraband in his car, (3) his counsel forewent discovery in order to focus on plea negotiations, (4) his counsel coerced him to plead guilty by promising that an Alford plea would preserve his ability to appeal, and (5) the Commonwealth did not follow the plea agreement with respect to the sentence being run

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<sup>2</sup> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

concurrently with another sentence. Taylor argues that but for his counsel's ineffectiveness, he would not have pled guilty but would instead have insisted upon going to trial.<sup>3</sup>

The circuit court denied Taylor's motion without an evidentiary hearing. In its order denying the motion, the court only addressed the claim regarding the concurrent nature of his sentence. Specifically, the circuit court held that "concurrent," as contemplated by the plea agreement, referred only to Taylor's 1982 murder conviction, not any sentence he may have received in a later Kenton County case, Indictment No. 01-CR-794. Therefore, the circuit court concluded, the plea agreement had been followed and Taylor was not entitled to relief. However, the court did not address Taylor's other claims.

A motion under RCr 11.42 may be denied without an evidentiary hearing if the allegations in the motion can be resolved on the face of the record.<sup>4</sup> A hearing is required if one or more issues are raised which cannot be conclusively proved or disproved by an examination of the record.<sup>5</sup>

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<sup>3</sup> See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

<sup>4</sup> Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

<sup>5</sup> *Id.*

In this case, the record reveals no challenge to the permissibility of the traffic stop. Whether such a challenge would have been valuable or not can only be resolved after an evidentiary hearing. Likewise, while there is some record of his counsel having engaged in discovery, the circuit court never ruled on this allegation; and there is not sufficient documentation in the record for us to determine this issue conclusively. Finally, there is no evidence in the record to support or refute Taylor's claims with regard to his counsel's advice regarding the effects of an Alford plea. The circuit court did engage in the colloquy required by Boykin v. Alabama<sup>6</sup> at the time Taylor entered his guilty plea.

Nevertheless, while the representations of a defendant, his attorney, and the prosecutor at a Boykin hearing, as well as any findings by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings, [] that barrier is not insurmountable if there is proof that the representations were so much the product of such factors as misunderstanding, duress, or *misrepresentation by others* as to make the guilty plea a constitutionally inadequate basis for imprisonment.<sup>7</sup>

It is possible that Taylor could demonstrate the constitutional defectiveness of his guilty plea despite a thorough Boykin colloquy; therefore, an evidentiary hearing was required on this issue as well.

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<sup>6</sup> 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

<sup>7</sup> Fraser, *supra* at 457.

Accordingly, the circuit court erred when it denied Taylor's motion without an evidentiary hearing. Its order is reversed, and the case remanded for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

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