

RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002102-MR

RAY ANTHONY WALTERS, II

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-00618

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Ray Anthony Walters, II appeals from the summary denial of his RCr² 11.42 motion. We affirm.

Walters was indicted on four counts of trafficking in a controlled substance, first degree. In exchange for Walters's guilty plea on counts 1 and 2 of the indictment, the Commonwealth agreed to drop the remaining charges and recommend

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

a six-year sentence on count 1 and five years on count 2. Walters entered a guilty plea to two counts of first-degree trafficking on July 7, 2000, and on August 1, 2000, appeared with counsel for sentencing. The court rejected the Commonwealth's sentencing recommendation and sentenced Walters to ten years on each of the two counts to run consecutively, but probated for a period of five years. On January 18, 2002, Walters was found to be in violation of his probation. After various motions for shock probation were denied, Walters filed an RCr 11.42 motion and requested an evidentiary hearing and appointment of counsel. Counsel was appointed and the court, after reviewing the record, denied the motion.

Walters contends that his counsel failed to adequately investigate his case to determine his guilt or innocence; failed to procure the Commonwealth's discovery; and, failed to file pretrial motions or offer a defense strategy. These allegations of ineffective assistance of trial counsel, Walters contends, entitled him to an evidentiary hearing. We disagree.

In an RCr 11.42 proceeding the burden is on the movant to demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced his defense.³ When the judgment is the result of a guilty plea, the court's inquiry

³ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985).

is limited to whether the plea was invalid and whether counsel made errors so serious that the defendant would not have pleaded guilty, but would have insisted on going to trial.⁴ An evidentiary hearing is not required where the record refutes the allegations or where there is no factual support for the defendant's claims.⁵

Walters contends that his counsel did not properly investigate his case. He alleges that counsel did not listen to the tapes of his drug sales to a confidential informant. He does not deny that it was his voice on the tape, therefore, whether his counsel listened to the tapes would not affect his decision to accept the Commonwealth's offer. The record also refutes the claim that counsel did not procure the Commonwealth's discovery. The Commonwealth and Walters's counsel agreed to provide discovery pursuant to RCr 7.24 and RCr 7.26, and as noted by the circuit court, it is customary in the Fayette Circuit Court for discovery to be provided at the pretrial conference. Walters's vague allegations that counsel should have conducted more discovery and investigation is not specific as to what information might have been gained or how it

⁴ Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

⁵ Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 390 (2002).

would have affected his decision to plead guilty. The summary dismissal of that part of his RCr 11.42 claim was proper.⁶

The record clearly refutes Walters's allegation that his plea was not voluntarily, knowingly and intelligently entered. The colloquy between the court and Walters reveals that Walters was fully informed of his rights, and with the consequences of his plea, and further, that he was satisfied with his counsel's representation. Also, he was told that the court was not bound to accept the Commonwealth's recommendation. After the terms of his probation were explained, Walters was asked if he would like to withdraw his plea, to which Walters responded "no." The record further reflects that Walters understood that he was agreeing to a longer total sentence than that recommended by the Commonwealth in exchange for a probated sentence. His plea was knowingly, willingly and voluntarily entered.⁷

Walters was not entitled to an evidentiary hearing based on vague allegations of ineffective assistance of counsel and those otherwise refuted by the record. The order is affirmed.

⁶ Sanders, *supra*.

⁷ Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks Tandy
Covington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky