

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002657-MR
AND
NO. 2004-CA-001299-MR

TODD LOVETT

APPELLANT

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
INDICTMENT NOS. 00-CR-00030 AND 00-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: These are appeals from orders of the Marshall Circuit Court, denying Todd Lovett's motions made pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 and Kentucky Rule of Civil Procedure (CR) 60.02. The appeals have been consolidated for purposes of assignment to the same panel of this Court.

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

Lovett was indicted on February 2, 2000, on various drug charges stemming from a search pursuant to a warrant that police conducted at his home. The police found items and ingredients that are used in the manufacture of methamphetamine, as well as other drug paraphernalia.

Lovett's attorney made a motion to suppress the evidence, alleging that the warrant lacked probable cause because the affidavit upon which it was based did not describe the informant's reliability, veracity, and basis of knowledge. After holding an evidentiary hearing, the circuit court denied the motion to suppress, finding that the affidavit was sufficient. The court further found that even if the affidavit had been insufficient, the good faith exception would apply.²

Lovett ultimately entered an Alford³ plea to one count of manufacturing methamphetamine, one count of possession of a controlled substance in the first degree, one count of possession of a controlled substance in the third degree, one count of possession of drug paraphernalia, one count of

² In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the United States Supreme Court held that evidence seized by police should not be excluded if it is obtained pursuant to a search warrant which may later be determined to be flawed if the officers executing the warrant had an objectively reasonable good-faith belief in the probable cause determination by the magistrate and the sufficiency of the warrant. See Moore v. Commonwealth, 159 S.W.3d 325, 327 (Ky. 2005).

³ See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1977). A defendant entering a plea of guilty under Alford refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995).

possession of a firearm by a convicted felon and one count of endangering the welfare of a minor. He was sentenced to serve a total of twenty years' imprisonment.

The Kentucky Supreme Court subsequently affirmed Lovett's conviction. See Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2003). Shortly thereafter, Lovett filed a motion for relief pursuant to RCr 11.42, alleging ineffective assistance of counsel. The circuit court denied the motion in an order dated November 14, 2003. The court also denied Lovett's motion for appointment of counsel and for an evidentiary hearing.

Then on March 2, 2004, Lovett filed a motion to vacate the judgment pursuant to CR 60.02(e) and (f) based on the Kentucky Supreme Court ruling in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003). In this motion, Lovett argued that his conviction should be vacated in light of the Kotila court's clarification of the elements necessary to prove the offense of manufacturing methamphetamine. That motion was denied by the circuit court in an order entered on June 2, 2004.

These appeals followed.

2003-CA-002657-MR

This first appeal relates to the denial of Lovett's RCr 11.42 motion. Lovett argues that his attorney was ineffective for failing to raise several issues in his motion to suppress the evidence seized by police in the course of their

search of Lovett's home. Lovett further argues that the circuit court erred in denying his motion for an evidentiary hearing on the motion.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). An appellant must show that the attorney's performance was deficient and that the attorney's ineffective performance affected the outcome of the plea process. See id. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show 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." Id. at 59; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth

Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Kimmelman v. Morrison, 477 U.S. 365, 375, 91 L.Ed.2d 305, 319, 106 S.Ct. 2574 (1986). In Lovett's case, if the fruits of the search had been suppressed, the Commonwealth would not have been able to prosecute him for possessing the chemicals and equipment necessary for the manufacture of methamphetamine. Lovett must therefore demonstrate that his Fourth Amendment claim was meritorious.

Lovett argues that his counsel was ineffective for failing to raise the following issues: that the police officers may have failed to comply with the "knock and announce" requirement before searching Lovett's home; that the affidavit supporting the warrant did not accurately describe Lovett's prior convictions and therefore led the magistrate to issue the warrant on the basis of misinformation; that the magistrate was not neutral or detached and merely "rubberstamped" the warrant proffered by the police; and that the information in the affidavit was stale because the informant who had seen the methamphetamine lab at Lovett's house did so two months prior to issuance of the warrant.

These issues were all addressed in Lovett's direct appeal. Since his attorney had not raised them in the motion to

suppress, they were not preserved for review but Lovett requested that they be reviewed under the palpable error standard. See RCr 10.26. The Kentucky Supreme Court refused to engage in palpable error analysis because it found "all of these claims to be meritless." Lovett, 103 S.W.3d at 80. The Court also determined that the search warrant was "issued upon probable cause," and "was constitutionally valid." Id. at 79, 81. Since under Kimmelman, a claimant must prove that the Fourth Amendment claim was meritorious in order to prevail on an ineffective assistance of counsel claim, Lovett's claim is precluded because we are bound by the holding of the Supreme Court under the law of the case doctrine. "A final decision, right or wrong, is the law of the case and is conclusive of the questions therein resolved and is binding upon the parties, the trial court, and the Court of Appeals." Hogan v. Long, 922 S.W.2d 368, 370 (Ky. 1995) citing Williamson v. Commonwealth, 767 S.W.2d 323 (Ky.1989). In other words, the meritoriousness of the Fourth Amendment challenge, which is an element of the ineffectiveness claim under Kimmelman, has already been conclusively decided by the Supreme Court in Lovett's direct appeal. "RCr 11.42 cannot be used to relitigate issues decided on direct appeal[.]" Baze v. Commonwealth, 23 S.W.3d 619, 626 (Ky. 2000).

Finally, Lovett makes a general allegation that his counsel conducted an inadequate investigation as evidenced by his failure to raise these issues in the motion to suppress. His only evidence of this error appears to be that his counsel could have presented four additional theories (as discussed above) to support the suppression motion. This argument is also precluded from our review, as we are bound by the Supreme Court's determination that the warrant was constitutionally sufficient. Under Kimmelman, Lovett's counsel was not ineffective for failing to pursue these theories.

Lovett has also argued that the trial court erred in failing to grant his motion for an evidentiary hearing. Such a hearing is required "if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). Lovett has not raised any such material issues of fact because his claims are precluded by his direct appeal.

2004-CA-0001299

Lovett's argument in this appeal concerns the impact of the holding in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003) on the validity of his guilty plea. The opinion in that case was published over two years after Lovett entered his

guilty plea and was sentenced. In Kotila, the Kentucky Supreme Court held that in order for a defendant to be found guilty of manufacturing methamphetamine under KRS 218A.1432(1)(b), as it was then written, he or she had to possess either all of the necessary ingredients or all of the necessary equipment. Prior to the Kotila decision, it was unclear whether it was necessary for a defendant to possess all the ingredients or equipment in order to be convicted of manufacturing.⁴

Lovett argues that his conviction should have been vacated under CR 60.02 (e) or (f) because he was convicted of violating a statute which was later determined not to ban the conduct in which he allegedly engaged. He contends that the Commonwealth never argued that he had all the equipment or chemicals necessary to manufacture methamphetamine, and that the list of items seized from his residence shows that he did not possess denatured alcohol, one of the required chemicals. He asserts that this constitutes a violation of the due process clause of the Fourteenth Amendment which forbids a state from convicting a person of an offense without proving all of the elements of a crime beyond a reasonable doubt.

Lovett relies on Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), where it was held that a

⁴ KRS 218A.1432 was revised in 2005 to require possession of only two of the chemicals or equipment for a defendant to be found guilty of manufacturing methamphetamine.

state cannot, "consistently with the Federal Due Process Clause, convict [a defendant] for conduct that its criminal statute, as properly interpreted, does not prohibit." Fiore v. White, 531 U.S. 225, 228, 121 S.Ct. 712, 714, 148 L.Ed.2d 629 (2001). Lovett has also relied on Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1947).

Davis and White are distinguishable, however, because they involved convictions following jury trials rather than convictions following guilty pleas. "Kentucky courts have long held that a guilty plea precludes a post-judgment challenge to the sufficiency of the evidence." Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003). When he entered his plea of guilty to manufacturing methamphetamine, Lovett "forfeit[ed] the right to protest at some later date that the state could not have proven that he committed the crimes[.]" See Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App.1986). In Fiore and Davis, the defendants were convicted on less than sufficient evidence. By pleading guilty, however, Lovett conceded that the evidence against him was sufficient. "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent it quite validly removes the issue of factual guilt from the case." Menna v. New York, 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

For the foregoing reasons, the judgment and sentence
of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Euva D. May
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
ATTORNEY GENERAL OF KENTUCKY

Todd D. Ferguson
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky