

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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000004-MR

DARIN HOUCHINS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 02-CR-00137

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: Darin Houchins, pro se, appeals from an order of the Henderson Circuit Court entered December 5, 2003, denying his motions to vacate sentence under Rule of Criminal Procedure (RCr) 11.42, for appointment of counsel, and for an evidentiary hearing. We affirm.

On April 19, 2002, Darin Houchins (Houchins), was arrested by the Henderson City Police Department and charged with manufacturing methamphetamine, first offense, and possession of a controlled substance (methamphetamine), first degree. Houchins' purchase of a forty-eight count box of Suphedrine from the Wal-Mart pharmacy department raised

suspicion from the employees who notified the police that Houchins was very nervous acting and appeared to be under the influence. After being followed to his car, Houchins denied having any precursors and allowed the car to be searched. Fourteen boxes of unopened Suphedrine or Sudafed were located under the rear floor board below a folded down rear seat. A small bottle of methamphetamine was also found in the car. Houchins explained that he could sell the boxes of medicine for twice what he paid to people making "meth."

On May 7, 2002, Houchins was indicted by the Henderson County Grand Jury for manufacturing or conspiring, aiding or attempting to aid another to manufacture methamphetamine, a class B felony pursuant to KRS 218A.1432 and 502.020; possession of a controlled substance, first degree, a class D felony pursuant to KRS 218A.1415; and as a persistent felony offender, second degree (PFO 2), pursuant to KRS 532.080.

On August 26, 2002, the Commonwealth offered in exchange for a plea of guilty to amend the charge of manufacturing methamphetamine to facilitation to manufacture methamphetamine. With PFO 2 enhancement, this reduced the potential sentence from life to ten years. The offer on the remaining charge was a concurrent ten year sentence on a guilty plea to possession of a controlled substance, first degree and PFO 2. These concurrent ten year sentences were to run

consecutive with any other charges. Houchins and his counsel signed the standard guilty plea form indicating a waiver of constitutional rights and satisfaction with counsel's representation. The circuit court accepted the guilty plea and on October 17, 2002, Houchins was sentenced in accordance therewith.

Nine months later Houchins filed a pro se motion for relief pursuant to RCr 11.42 arguing ineffectiveness by both district and circuit court counsel. Houchins also requested an evidentiary hearing and appointment of counsel to supplement the RCr 11.42 motion. On December 5, 2003, the circuit court denied all of Houchins' motions, finding that no evidentiary hearing was necessary as the record refuted all of Houchins' allegations. The circuit court found that Houchins' guilty plea waived his constitutional rights, indicated satisfaction with counsel's advice, and was factually based on a search of his car which yielded fourteen boxes of Suphedrine and a quantity of methamphetamine. Further, the court held that neither district nor circuit court counsel fell outside the standard of effective assistance of counsel as stated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). This appeal followed.

As stated in Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990):

It should first be noted that the effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense. Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970); Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234 (1970). A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea. White v. Sowders, 644 F.2d 1177 (6<sup>th</sup> Cir. 1980).

The indictment herein charged an offense and Houchins makes no claim that the totality of the plea itself was involuntary. Therefore, Houchins' collateral claims must fail.

As in Centers, however, this Court will address Houchins' ineffective assistance of counsel claims. In this appeal Houchins is primarily seeking a remand for an evidentiary hearing and appointment of counsel pursuant to RCr 11.42(5). An evidentiary hearing on an RCr 11.42 motion is unnecessary "if the material issues of fact can fairly be determined on the face of the record." Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965). In addition to establishing that the record does not refute his allegations on his ineffective assistance claim Houchins is required to show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as he was not performing as counsel guaranteed by the Sixth Amendment and (2) that the

deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty and the outcome would have been different. Centers, supra, citing Strickland, supra. See also Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L.Ed.2d 203 (1985).

First, the circuit court correctly found that the record refutes Houchin's claims that counsel was ineffective for failing to argue that the arrest was illegal and the fruits thereof inadmissible. The initial stop of Houchins was based on a reasonable articulable suspicion from the observations of the pharmacy department employees. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Houchins' consent to the search of the car was supported by reasonable suspicion of illegal drug activity. As Houchins was not illegally detained, the consent was not tainted and the items seized (fourteen unopened suphedrine boxes, a black leather bag containing a razor blade and a small glass bottle containing methamphetamine) would have been properly admitted into evidence if the charges went to trial. Id. Counsel did explore the circumstances of the arrest on cross-examination of the arresting officer at the preliminary hearing.

Further, counsel could not have made a successful dismissal argument based on insufficient evidence of

manufacturing methamphetamine on the basis of failure to have all the chemicals or equipment. Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 237 (2003), which defines sufficient evidence under this charge, had not been rendered at the time of Houchins' guilty plea. The record refutes the allegations of ineffective assistance on this claim, thus there is no need for an evidentiary hearing or appointment of counsel.

Next, the circuit court correctly found that Houchins' counsel was not ineffective in advising him to plead guilty to facilitation to manufacture methamphetamine. The original charge, enhanced by PFO 2, carried a possible maximum sentence of life. Houchins pleaded guilty to the amended charge and the possession charge, and was sentenced to ten years concurrent as enhanced by PFO 2. Houchins' plea indicated that he understood the charges and defenses to the charges. Houchins' PFO 2 charge, which he does not dispute, indicated previous contact and thus knowledge of the court system. Houchins cites no controlling authority supporting his allegation and his guilty plea is a judicial admission of the underlying requisites to the charge. Toppass v. Commonwealth, Ky. App., 799 S.W.2d 587, 589 (1990). It is perfectly proper for an attorney to advise his client to plead guilty. Quarles, supra at 694. As the record refutes Houchins' allegations of ineffective assistance, no evidentiary hearing or appointment of counsel was required.

The circuit court also correctly found and the record further refutes that counsel's representation of Houchins was not ineffective due to lack of preparation. The record indicated that at the district court level counsel announced ready and cross-examined witnesses at the preliminary hearing. At the circuit court level counsel met face to face with Houchins in the months between indictment and entry of the plea; filed successful motions on Houchins' behalf; represented Houchins at arraignment, the taking of the plea and sentencing; and stated he was willing to work with Houchins on a defense if the plea offer was not accepted. Houchins' mentioned a specific federal agent to counsel, indicating that the agent "had gotten others in more serious trouble off on probation" and that he would testify that Houchins had no "intent." Houchins also mentioned that "informant" witnesses told him to contact this federal agent as a witness because he was the "answer" to Houchins' problems. Assuming these witnesses would testify as Houchins' alleges, their testimony is inconsistent with Houchins' guilty plea and statements at the scene. Houchins has failed to show error by counsel on this claim. As the record refutes the claim, no evidentiary hearing or appointment of counsel is required.

The circuit court next correctly found, and the record further refutes, that counsel was not ineffective for failing to

question Houchins' competency for Houchins' comment that his best bet was to "blow his brains out" the morning of trial. Again, Houchins fails to cite to any controlling authority which points to counsel's ineffectiveness for failing to address a client's competency based on one statement by the client. Additionally, Houchins' signature on the guilty plea and the circuit court's judgment on the plea refute this allegation. As stated by the circuit court in the order denying the RCr 11.42 motion:

. . . during the guilty plea procedure, the Movant stated under oath that he understood all the consequences of pleading guilty, that he had the right to go to trial, that counsel had explained to him that he would still represent him at trial, that he was satisfied with what his attorney had done for him in the case.

Houchins has not established an error and as the record refutes this allegation, there was no need for an evidentiary hearing or appointment of counsel.

Lastly, counsel was not ineffective as a result of cumulative error. Because the allegations have no merit individually they can have no cumulative value. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

Houchins has failed to meet the necessary tests for a successful ineffective assistance of counsel claim. His guilty plea initially waived all claims herein, and he does not show

that counsel made serious errors outside the range of competent assistance that prejudiced his defense to the degree that he would not have pled guilty. Centers, supra; and Strickland, supra. Furthermore, as the record refutes his allegations, he is not entitled to an evidentiary hearing or appointment of counsel. Maggard, supra. The circuit court correctly denied his motions.

For the foregoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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