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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000713-MR

RICHARD GOBLE

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE LARRY D. RAIKES, JUDGE  
ACTION NO. 00-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

SCHRODER, JUDGE: This is an appeal from a judgment denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel relative to his guilty plea to various drug offenses. From our review of the record, we agree with the lower court that appellant's counsel on the guilty plea did not render

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<sup>1</sup> 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.

ineffective assistance in advising his client to plead guilty. Hence we affirm.

On January 19, 2000, appellant, Richard Goble, was indicted on nine drug-related offenses: two counts of trafficking in marijuana over five pounds; two counts of trafficking in marijuana while in possession of a firearm; two counts of trafficking in marijuana over eight ounces; one count of possession of marijuana; one count of possession of drug paraphernalia; and one count of possession of a prescription in an improper container. The charges arose from the Commonwealth's allegation that on three separate occasions Goble assisted a confidential informant (David Rhodes) in purchasing marijuana from Chris Brown. Pursuant to a plea bargain, Goble pled guilty to: complicity to traffic in marijuana over five pounds; complicity to traffic in marijuana under eight ounces; possession of marijuana; possession of drug paraphernalia; and possession of a prescription drug not in a proper container. On May 17, 2001, judgment was entered sentencing Goble according to the Commonwealth's recommendation to a total of eight years in prison. No direct appeal was taken from that judgment.

On September 4, 2002, Goble filed a *pro se* motion pursuant to RCr 11.42, alleging, among other things, that his counsel on the guilty plea was ineffective for failing to advise him regarding the defense of entrapment. On May 5, 2003, a

supplemental RCr 11.42 motion was filed on behalf of Goble by a Department of Public Advocacy attorney, asserting only the claim that Goble's counsel was ineffective for failing to inform him of the defense of entrapment.

A hearing on the motion was held on January 29, 2004. At the hearing, Goble testified that his counsel on the guilty plea, Brian Darling, never discussed the defense of entrapment with him. Goble's ex-girlfriend, Shannon Donahue, who was present during some of Goble's meetings with Darling, also testified that she did not recall Darling discussing the defense of entrapment with Goble.

Conversely, Darling testified at the hearing that he and Goble discussed the case extensively and that he remembered Goble specifically asking him about a possible defense of entrapment during one of these discussions. Darling testified that after discussing the facts relative to a possible defense of entrapment, Darling concluded that Goble was a willing go-between in the drug transactions and that entrapment would be a tough defense to prove because of the lack of evidence of inducement or coercion. Darling also stated that he recalled discussing the possibility of an entrapment defense in Goble's case with his associate after which he again concluded that such a defense would be difficult.

On February 24, 2004, the court entered its findings of fact, conclusions of law and judgment denying the motion for RCr 11.42 relief. The court specifically found that Darling's testimony was more credible than Goble's, thus the court chose to believe Darling. Nevertheless, the court found that, even if Darling had not advised Goble of the defense of entrapment, the defense would not have been available to Goble because there was no evidence that he was encouraged or induced to commit the offense.

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the claimant must show first, that counsel's performance was deficient relative to current professional standards and, secondly, but for this deficient performance, there is a reasonable probability that the claimant would not have pled guilty and would insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986). A trial court's findings of fact on an RCr 11.42 motion will not be overturned unless they are clearly erroneous. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002).

Since there was substantial evidence in the record to support the court's finding that Darling did advise Goble about the defense of entrapment, said finding was not clearly erroneous and must stand. Accordingly, Goble's claim that

Darling rendered ineffective assistance for failing to discuss the defense of entrapment with him is without merit.

Next, Goble argues in the alternative that even if the court properly found that his counsel below advised him about the defense of entrapment, counsel's conclusion that the defense was not available to him was erroneous. Thus, Goble maintains that his counsel's inaccurate advice regarding the entrapment defense constituted ineffective assistance of counsel.

The defense of entrapment is set out in KRS 505.010 as follows:

(1) A person is not guilty of an offense arising out of proscribed conduct when:

(a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and

(b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.

(2) The relief afforded by subsection (1) is unavailable when:

(a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense; or

(b) The offense charged has physical injury or the threat of physical injury as one (1) of its elements and the prosecution is based on conduct causing or threatening such

injury to a person other than the person  
perpetrating the entrapment.

(3) The relief provided a defendant by  
subsection (1) is a defense.

The only evidence before the trial court regarding the facts of this case were those facts contained in the indictment and those facts presented at the RCr 11.42 hearing. Goble testified that at the time of the offenses he worked with Rhodes who, unbeknownst to Goble and Brown, was a confidential informant for the police. One day Rhodes asked Goble if he could get him some marijuana. Goble responded that he did not know if he could get any, but he would ask Chris Brown, a distant relative of his. According to Goble, he then put Rhodes and Brown in contact with each other and they arranged a deal. However, Brown would not sell to Rhodes without Goble being present. Thereafter, on three different occasions, Goble drove Rhodes to buy marijuana from Brown. Goble testified that on the last occasion, he was to make \$50 on the buy which he never received. Goble testified that he had been using marijuana for over 12 years and that he distributed it on some occasions in the course of personal use.

Advising a defendant to plead guilty does not, in and of itself, constitute ineffective assistance. Beecham v. Commonwealth, 657 S.W.2d 234 (Ky. 1983). There is a strong presumption that counsel's performance was adequate and was

sound trial strategy. Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998) (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In the instant case, Goble was facing at least twenty-five years in prison, and Darling negotiated the sentence down to eight years with the plea bargain.

As for Darling's assessment than an entrapment defense would not likely succeed if the case went to trial, given the evidence, we cannot say that Darling's advice on this issue was inaccurate or constituted deficient performance. In light of Goble's admitted chronic marijuana use for the last fifteen years (which the Commonwealth pointed out necessarily included buying and distributing marijuana for he and his friends' personal use) and the fact that he knew Brown sold marijuana, it would have been difficult to prove that Goble was not otherwise predisposed to engage in the conduct at issue - assisting in the sale of the marijuana to Rhodes. It is highly likely that a jury would have viewed Rhodes' solicitation of Goble as merely an opportunity to commit the crime and not an inducement to commit the crime. In sum, Darling's advice to Goble to plead guilty pursuant to the negotiated plea agreement in this case was not ineffective assistance of counsel.

For the reasons stated above, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Ray Myers  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Ken W. Riggs  
Assistant Attorney General  
Frankfort, Kentucky