

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001164-MR

DECORICK A. CURRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 00-CR-002127

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Decorick Curry appeals from an order of the Jefferson Circuit Court denying his RCr¹ 11.42 motion. We affirm.

On July 28, 2000, Detective Gary Hayden of the Louisville Police Department received a tip from a confidential informant that Curry was selling crack cocaine from the trunk of

¹ Kentucky Rules of Criminal Procedure.

a Cadillac near 540 South 20th Street in Louisville, Kentucky. Detective Hayden had knowledge of Curry from a previous drug investigation. Upon arriving near the location, Detective Hayden and his partner observed Curry reaching into the trunk of a Cadillac.

After exiting his vehicle, Detective Hayden approached Curry and identified himself. Detective Hayden testified that as he approached Curry, he detected the odor of burnt marijuana. He further testified that he asked Curry if he had recently smoked marijuana and that Curry responded that he had. Detective Hayden then asked Curry if he had any marijuana on his person. Curry claims that he responded by saying, "It's in me," and Detective Hayden claims that Curry said, "It's in my pocket." Detective Hayden searched Curry's pockets, but he did not find any marijuana.

Detective Hayden then asked Curry if he had placed the marijuana in the trunk as the officers approached. Curry denied having any drugs in the trunk, and Detective Hayden testified that Curry then gave him consent to search the trunk. Detective Hayden testified that Curry then started "fidgeting around," causing the detective to fear for his safety. He then handcuffed Curry and began to search the trunk of the Cadillac pursuant to Curry's consent. The search of the trunk revealed 63.18 grams of cocaine, a firearm, and a digital scale.

Curry was indicted by a Jefferson County grand jury on charges of first-degree trafficking in a controlled substance while in possession of a firearm, possession of a firearm by a convicted felon, illegal use or possession of drug paraphernalia while in possession of a firearm, and second-degree persistent felony offender (PFO II). Curry filed a motion to suppress the evidence seized from the trunk on the ground that he did not consent to the search. The court held a hearing and then denied Curry's motion.

On October 30, 2002, Curry filed a Motion to Enter Guilty Plea. Pursuant to his plea agreement with the Commonwealth, the charge of trafficking in a controlled substance while in possession of a firearm was amended to simply trafficking in a controlled substance. The range of penalty for that offense was thus diminished from ten to twenty years in prison to five to ten years in prison. Pursuant to the agreement, Curry was sentenced to five years in prison on that charge, enhanced to ten years due to PFO II status. Further, pursuant to the plea agreement, Curry was sentenced to ten years for possession of a handgun by a convicted felon and to five years, enhanced to ten years due to PFO II status, for illegal possession of drug paraphernalia while in possession of a firearm. Because the agreement provided that all sentences under this indictment run concurrently rather than

consecutively, Curry was sentenced to a total of ten years on the charges.

However, he was also charged with trafficking in a controlled substance under a separate indictment involving a separate incident. Curry was likewise sentenced to ten years in prison under that indictment, and the two ten-year sentences in the two indictments were ordered to run consecutively for a total of twenty years in prison. Furthermore, the plea agreement provided that the Commonwealth would not seek charges concerning an incident that led to Curry's arrest on October 16, 2002.

On November 7, 2003, Curry filed a motion to vacate or set aside his convictions and ten-year sentence under this indictment. In an opinion and order entered on April 30, 2004, the circuit court denied Curry's motion without granting an evidentiary hearing. This appeal by Curry followed.

Curry's first argument is that the circuit court erred when it denied his suppression motion prior to the entry of his guilty plea. He asserts that he never gave Detective Hayden consent to search the trunk of the Cadillac and that Detective Hayden never asked for such consent. Further, he argues that the tip received by Detective Hayden from the confidential informant was an insufficient basis to support a valid Terry stop.

An RCr 11.42 motion "is limited to issues that were not and could not be raised on direct appeal." Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998). Further, an illegal search is not a ground for relief under RCr 11.42. See Brown v. Wingo, 396 S.W.2d 785, 786 (Ky. 1965). Therefore, Curry was prohibited from collaterally attacking the validity of the search by way of his RCr 11.42 motion.

Second, Curry argues that the circuit court erred in denying his RCr 11.42 motion because he received ineffective assistance of counsel. He asserts that counsel rendered ineffective assistance by improperly advising him to plead guilty despite an illegal search and by not further investigating and challenging the validity of the search while pursuing the suppression motion. In order to show that he had received ineffective assistance of counsel in connection with his guilty plea, Curry had to prove "(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

We conclude that Curry's argument in this regard is without merit. First, his counsel did challenge the search by filing a motion to suppress the evidence and by pursuing an evidentiary hearing on the suppression motion. Second, considering the findings and ruling of the circuit court on the suppression motion, counsel's advice to Curry to plead guilty was not ineffective assistance. See Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970). In light of the findings of the circuit court concerning the circumstances surrounding Detective Hayden's search of the trunk, including the finding that Curry consented to the search, further pursuit of the suppression motion would have been to no avail. Third, as evidenced by the Motion to Enter Guilty Plea and the guilty plea colloquy of the guilty plea proceedings before the court, it is clear that Curry pled guilty knowingly, freely, and intelligently and that he was satisfied with his attorney's representation. See Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990). Under these circumstances, we conclude that the court did not err when it declined to grant Curry RCr 11.42 relief without holding an evidentiary hearing. See Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky. 1970).

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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