

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002125-MR

TRENT VOYLES

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NOS. 01-CR-00148
& 01-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Trent Voyles appeals from an order of the Ohio Circuit Court denying his *pro se* Motion to Vacate Judgment or Portion of Judgment Pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02(e) & (f). Voyles bases his motion on the Kentucky Supreme Court's decision in *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003), which held that a defendant could not be convicted of manufacturing methamphetamine if he possessed some, but not all, of the chemicals or equipment necessary for the

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

manufacture of the drug. For the reasons stated herein, we conclude that Voyles is not entitled to the relief he seeks and thus, we affirm.

On August 3, 2001, an Ohio County grand jury indicted Voyles on one count of possession of drug paraphernalia, one count of trafficking in a controlled substance (methamphetamine), and one count of manufacturing methamphetamine. The case was assigned number 01-CR-00148. He entered a plea of not guilty on August 9, 2001.

Subsequently, on September 6, 2001, Voyles was arrested for another offense of manufacturing methamphetamine. The arrest warrant indicated that he possessed chemicals and equipment used in the manufacture of methamphetamine, including anhydrous ammonia, salt, liquid drain cleaner, a large lighter, a funnel, valves used to control the flow of anhydrous ammonia, and a tank for storing it. As a result of the second arrest, the Ohio County grand jury returned a second indictment against Voyles on October 22, 2001, charging him with one count of manufacturing methamphetamine. This case was assigned number 01-CR-00180. Voyles pled not guilty to that charge on October 29, 2001.

Following negotiations with the Commonwealth, on March 27, 2003, Voyles appeared with counsel before the Ohio Circuit Court and entered an unconditional plea of guilty to the

indicted charges in both cases.² During the plea colloquy with the trial court pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969), Voyles affirmatively represented that he was not mentally impaired or under the influence of any drugs or medications. He further stated that he had been given an opportunity to discuss his case and the terms offered by the Commonwealth, and that he had no objections or complaints regarding the advice offered by his counsel. He likewise affirmed that his decision to enter a guilty plea had not been coerced and was being offered because he was guilty of the charges alleged in the indictments. After finding that Voyles' plea was made freely, intelligently and voluntarily, the trial court accepted it.

On April 17, 2003, Voyles appeared before the Ohio Circuit Court and moved to set aside his guilty plea on the ground that his counsel allegedly had coerced him into accepting the plea bargain. However, when pressed by the trial court to provide specifics, Voyles was unable to do so, blaming his lack of memory on medications he was taking, an inherently bad memory, and a prior head injury. Based on Voyles' inability to provide any evidentiary support for his motion, the trial court denied it. Nonetheless, the court did appoint new counsel to

²As a part of the same proceeding, Voyles also pled guilty in two additional cases to charges of possession of anhydrous ammonia in an unapproved container, possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and promoting contraband.

assist Voyles in reviewing the pre-sentence investigation report. After the newly appointed counsel informed the court that the report was "substantially correct," the court heard from both of Voyles' counsel as well as his grandmother. Following this, Voyles was sentenced in accordance with the plea agreement to 25 years in the penitentiary.

On March 2, 2004, Voyles filed a *pro se* motion pursuant to Kentucky Rule of Criminal Procedure ("RCr") 11.42 in both the cases at issue herein. He sought to have his convictions vacated on the ground of ineffective assistance of counsel, claiming that his trial counsel coerced him into accepting the plea agreement. On March 8, 2004, the trial court denied Voyles' motions. He did not appeal the trial court's ruling.

Subsequently, on August 18, 2004, Voyles filed a *pro se* motion pursuant to CR 60.02 seeking to vacate his convictions on the manufacturing methamphetamine charges based on *Kotila v. Commonwealth, supra*. In *Kotila*, the Supreme Court interpreted KRS 218A.1432 as requiring a defendant to possess either *all* of the chemicals or *all* of the equipment necessary to manufacture methamphetamine before a conviction could be had thereunder. Voyles argued in his CR 60.02 motion that the advice of his counsel to enter into the plea agreement was deficient because there was no proof that he possessed either all of the chemicals

or all of the equipment necessary for the manufacture of methamphetamine and thus he could not have been convicted of such under *Kotlia*. In September, 2004, the trial court denied Voyles' motion, and this appeal followed.

RCr 11.42 and CR 60.02 each provide distinct forms of relief. It is incumbent upon a defendant to include all arguments of which he is aware, or should be aware, pertaining to allegedly deficient advice of counsel in a motion seeking relief pursuant to RCr 11.42. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). Conversely, the purpose of CR 60.02 is *not* to provide additional opportunity to litigate matters that could have been presented in RCr 11.42 proceedings. *Id.*

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983)(emphasis in original).

In the present matter, Voyles relies upon *Kotila v. Commonwealth*, *supra* in his CR 60.02 motion. When Voyles filed his RCr 11.42 motion nearly nine months after *Kotila* was rendered he did not raise any arguments pertaining to that decision. Rather, Voyles first raised his *Kotila* argument in his August 18, 2004, CR 60.02 motion, filed over five months after his RCr 11.42 motion.

[W]e hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Gross v. Commonwealth, *supra* at 857 (emphasis added). Thus, we find that because Voyles did not raise his *Kotila* argument at the appropriate time in his RCr 11.42 motion, he cannot now avail himself of CR 60.02.

Further, even if Voyles had timely raised his *Kotila* argument in his RCr 11.42 motion, he would still not be entitled to the relief he seeks. The record reveals that at the time

Voyles entered his plea of guilty before the trial court on March 27, 2003, the Kentucky Supreme Court had not yet rendered its decision in *Kotila* and would not do so until June 12, 2003 - approximately two and one-half months later. Thus, at the time the guilty plea was entered, it was reasonable for Voyles' counsel to believe that the Commonwealth could obtain a conviction following trial. Because of this, we cannot now conclude that Voyles' counsel should have somehow foreseen the future change in the law and made recommendations accordingly. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(emphasis added).

[A] voluntary plea of guilty intelligently made *in the light of the then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky. 2004), quoting *Brady v. United States*, 397 U.S. 742 (1970)(emphasis added).

Finally, subsequent to the filing of the parties' briefs in this matter, the Kentucky Supreme Court abrogated its decision in *Kotila*. In the recent case of *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006), our Supreme Court held that the elements of the offense of manufacturing methamphetamine set forth in KRS 218A.1432 are satisfied if it is established that a defendant possessed two or more of either the chemicals or pieces of equipment necessary for the manufacture of the drug. Thus, the basis for Voyles' appeal -- that he received ineffective assistance of counsel due to his trial counsel's failure to advise him regarding *Kotila* -- has been rendered moot.

For the foregoing reasons, we affirm the judgment of the Ohio Circuit Court.

ALL CONCUR.

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