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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002277-MR

LARRY LUTTRELL — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 02-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

McANULTY, JUDGE: Larry Luttrell (Larry) appeals the trial court's denial after an evidentiary hearing on a RCr 11.42 motion for relief from his guilty plea. Initially, Larry was indicted for first degree trafficking in a controlled substance, manufacturing methamphetamine and being a persistent felony offender in the second degree (PFO II). He pled guilty to first degree trafficking in a controlled substance and received a

[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.

sentence of ten years. Larry argues that his plea was involuntary because his attorney failed to tell him that he could not be convicted of the manufacturing charge as all the chemicals necessary for its manufacture were not present. Larry claims that he pled guilty to trafficking under the threat of the more serious manufacturing charge. Larry asserts that had he been informed of a defense to the manufacturing charge, however, he would not have pled guilty and would have insisted on going to trial. Because we conclude that counsel's performance under the circumstances was not deficient, we affirm.

In late January 2002, officers with the Jefferson County Police Department notified officers with the Hillview Police Department that they had received a tip that a methamphetamine lab was located at 120 Symmetric Street in Bullitt County. Larry's former co-worker corroborated the tip.

The officers went to the address and received consent to search the residence and the premises from the current occupant, Debbie Tedrow (Debbie), who was Larry's former girlfriend. In the search, they found the following items: one microwave oven with residue, three red air tanks, seven packs of lithium batteries, 13 loose batteries, 14 glass jars with residue, a one-gallon glass jar with red liquid, one large glass container with red liquid and white solid, a one-gallon can of

Acetone, 5851 pseudoephedrine pills, one bottle of Heet antifreeze, a one-gallon can of drain opener, plastic baggies, a brass valve for an air tank, four tubing pieces with residue, two pairs of gloves with residue, seven cans of denatured alcohol, a one-gallon can of denatured alcohol, 16 punctured cans of starter fluid, an air exchange valve and tube, one container of Creatin, one tin cup with residue, one bag of green ties, one mason jar with residue, mirror with suspected methamphetamine, four unknown pills, four watches, a straw with residue, one baggie with white powder, one piece of foil with brown and white powder, and $2687 cash.

In addition to consenting to the search, Debbie gave a statement that Larry would come to her house and spend hours in a shed behind her house. Debbie further stated that Larry brought little red pills in bags into her house a number of times.

A few weeks after the search, the Bullitt County Grand Jury indicted Larry for trafficking in a controlled substance first degree, a class C felony; manufacturing methamphetamine, a class B felony; and PFO II. Debbie was also indicted as a co-defendant. Larry retained an attorney.

On December 11, 2002, Larry pled guilty to the charge of trafficking in a controlled substance first degree for which the Commonwealth recommended a sentence of ten years in the

penitentiary to be served consecutively to a five year sentence he received in another case. In exchange for his guilty plea, the Commonwealth further recommended that the manufacturing charge and the PFO II charge be dismissed. After asking Larry a number of questions concerning Larry's understanding of the plea proceedings, the trial court found that his plea was made voluntarily, freely, intelligently and understandingly. A month and a half after the hearing, the trial court sentenced Larry in accordance with the plea agreement.

Over a year after Larry's sentencing, he filed a motion to vacate his sentence under RCr 11.42 and/or CR 60.02(f) on the basis that his defense counsel rendered ineffective assistance when he failed to advise Larry that he could not be convicted of the manufacturing charge if he did not possess all the chemicals necessary to manufacture methamphetamine. Larry argued that he did not possess anhydrous ammonia at the time of the search. In support of his argument, Larry cited Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003) (Kotila has been superseded by statute. The current version of KRS 218A.1432(1)(b)(2005) now requires possession of only two or more chemicals or items of equipment).

The trial court appointed counsel and scheduled an evidentiary hearing on Larry's motion, which occurred on August 30, 2004. Larry testified at the hearing, and he also called

his trial counsel as a witness. In turn, the Commonwealth called Kenny Hardin, the Director of the Drug Task Force, who was present during the search of Debbie's residence. After hearing the testimony, the trial court issued an order denying Larry's motion for relief under RCr 11.42.

In its order denying relief, the trial court reasoned that the Kentucky Supreme Court did not decide Kotila until six months after Larry pled guilty. And since Kotila was the earliest case to hold that in order to be convicted under KRS 218A.1432(1)(b), one must be in possession of all of the chemicals or all the equipment necessary to manufacture methamphetamine, Larry's trial counsel could not have been deficient by failing to advise Larry of any such defense.

The trial court further considered Larry's prejudice argument and concluded that it also failed considering (1) the two witness statements that Larry had cooked methamphetamine in Debbie's shed, and (2) Kenny Hardin's testimony that the discoloration and corrosion on the valve and fittings recovered in the search indicated that the air tanks had at one time contained anhydrous ammonia. The trial court's order and conclusions form the basis of this appeal.

Consistent with his arguments before the trial court, Larry argues that his guilty plea was involuntary by reason of ineffective assistance because his attorney failed to consider

or advise him of a possible defense to the manufacturing methamphetamine charge. Larry argues that the plain language of KRS 218A.1432(1)(b) requires all the chemicals to support a conviction, and it is of no consequence that Kotila held the same in 2003.

In a challenge arising from the entry of a guilty plea, the defendant claiming ineffective assistance of counsel must first prove that counsel's performance was deficient in that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. See Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky. App. 1986) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984)). The inquiry pertaining to deficient performance is whether counsel's assistance was reasonable considering all the circumstances. See Strickland, 466 U.S. at 688. Second, he must prove that he was prejudiced by the deficiency such that there exists a reasonable probability that but for those errors he would not have pleaded guilty and would have insisted on going to trial. See Taylor, 724 S.W.2d at 226 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Despite the test having two components, however, a court deciding an ineffective

assistance claim need not address both the attorney's deficient performance and prejudice to the defendant if the defendant makes an insufficient showing on one component. See Strickland, 466 U.S. at 697.

We review the trial court's factual determinations upon hearing the evidence under a clearly erroneous standard. See Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001); Adams v. Commonwealth, 424 S.W.2d 849, 851 (Ky. 1968) (citing CR 52.01). In reviewing the findings, we must recognize that the trial court is in a superior position to judge the credibility of witnesses and the weight to be given their testimony. See McQueen v. Commonwealth, 721 S.W.2d 694, 698 (Ky. 1986). We review *de novo*, however, the trial court's legal conclusion on the issues of deficient performance and actual prejudice. See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996).

Mindful of these guidelines, we consider Larry's argument. Here Larry pled guilty to trafficking -- not manufacturing -- methamphetamine. In spite of this, his argument does not pertain to the trafficking charge at all, only the manufacturing charge. As such, we believe Kotila has no application, regardless of Larry's argument otherwise.

Nonetheless, we conclude that Larry's counsel did not render ineffective assistance even when we consider the holding in Kotila. The presence of anhydrous ammonia can be proven by

circumstantial evidence such as discoloration of valves, the detection of its distinct smell by officers or expert testimony by a chemist as to the presence of ammonia in the residue on some of the equipment suspected as being used to manufacture methamphetamine. See Varble v. Commonwealth, 125 S.W.3d 246, 254 (Ky. 2004), Aydelotte v. State, 146 S.W.3d 392, 395-96 (Ark. App. 2004) (concluding that evidence was sufficient to support a conviction for manufacturing methamphetamine despite the absence of anhydrous ammonia when forensic drug chemist testified that chemical tests revealed that ammonia was present on several items recovered in an out-building where its manufacture took place). Larry's counsel was not ineffective in advising him to accept a plea to trafficking in exchange for the dismissals of the more serious manufacturing charge and the PFO II enhancement when officers recovered all of the other chemicals necessary for the drug's manufacture in a location in which two people would testify that Larry was known to manufacture it.

Having concluded that Larry's trial counsel did not render ineffective assistance, we need not address any alleged prejudice to Larry. The decision of the circuit court denying Larry's RCr 11.42 motion is affirmed.

ALL CONCUR.

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