

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000400-MR

DALTON MORROW, II

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NOS. 97-CR-00654, 97-CR-00694,
97-CR-00734 AND 99-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹

BARBER, JUDGE: Appellant, Dalton Morrow II, appeals, pro se, the Warren Circuit Court's denial of his motion to vacate sentence pursuant to RCr 11.42. We affirm the circuit court, which found that defense counsel was not ineffective such that the sentence should be vacated.

In 1999, Morrow was found guilty of two counts of trafficking in a controlled substance, first degree. Trial

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

counsel suggested that Morrow use an entrapment defense at trial. Morrow agreed, and stated that he wanted to "beat" the plea offer of thirteen years' imprisonment. After a jury trial, Morrow was found guilty and sentenced to serve eight years on each count. The sentences were to run concurrently. Following trial, Morrow pled guilty to an additional three counts of trafficking. Morrow accepted three concurrent five-year sentences on those charges.

Morrow filed a motion to vacate his sentence, pursuant to RCr 11.42, on May 2, 2002. Morrow claimed, in his post-judgment motion, that defense counsel presented an "unauthorized admission of guilt" on the part of the defendant at trial. Morrow also asserted that counsel failed to advise him that relinquishment of his right to appeal the earlier conviction was a condition of his later plea agreement. The trial court appointed counsel for the purpose of the RCr 11.42 motion, and held an evidentiary hearing on the matter. The court found that defense counsel had not presented any unauthorized admission at trial, and that the decision to use an entrapment defense was sound trial strategy.

The circuit court also found that the relinquishment of the right to appeal was clear on the face of the plea agreement. Morrow also admitted his knowledgeable and voluntary

acceptance of the plea agreement on the record. The circuit court denied Morrow's motion for relief.

In his motion for relief, Morrow claims that counsel was ineffective by admitting the defendant's guilt at trial. Morrow claims that he was neither aware of the trial strategy, nor did he consent to it. Based upon the extensive evidence in the record showing that Morrow had committed the crimes charged, counsel used an entrapment defense to attempt to avoid conviction. At the hearing on Morrow's motion, counsel stated that Morrow was aware of his plan to use this defense, and had made no objection to it. Morrow argued that he did not consent to this defense strategy.

In the Order Denying the motion to vacate the conviction, the trial court stated that:

[b]ased upon the credible testimony of Mr. Williams [defense counsel], this Court FINDS that Mr. Williams met with the defendant and his grandmother and specifically discussed the trial strategy of using an entrapment defense because there was no question in Mr. Williams' mind that the defendant was involved in trafficking (the defendant admitted to Mr. Williams that he had sold the drugs) and there was no doubt that the jury, based on tape recordings of at least one of the transactions, would also believe that the defendant actually did the acts alleged by the Commonwealth.

The trial court further held that the record supported a finding that Morrow did not object to this defense.

Lastly, the trial court held that "the admission by trial counsel to the facts alleged by the Commonwealth was not an admission of guilt in this case because the defendant was, through the entrapment defense, in fact denying guilt. The trial court held that defense counsel had used trial strategy, and that Morrow had received a sentence substantially lighter than that offered by the Commonwealth in exchange for a plea bargain before trial.

Morrow also asserts that counsel was ineffective in failing to notify him that he was relinquishing his right to appeal the earlier conviction as part of the plea agreement he accepted with regard to the later charges. The record shows that Morrow signed the agreed Order on Plea of Guilty, which plainly stated that he relinquished his right to appeal the earlier conviction. During the guilty plea colloquy, Morrow acknowledged that he had read the plea agreement, and stated that he had agreed to dismiss the appeal of the earlier charges.

The trial court held, in its order denying Morrow's post-conviction motion, that the record did not support Morrow's claim that he was uninformed and that he did not voluntarily waive his right to appeal the earlier conviction. The court found that Morrow was aware that he was relinquishing the right to appeal and that the offer provided to Morrow in exchange for the plea of guilty was for a term of years markedly less than

Morrow could potentially receive at trial. The trial court is in the best position to make factual determinations regarding counsel's actions before it. Those determinations should be given deference by a reviewing court. Bronk v. Commonwealth, 58 S.W.3d 482, 485 (Ky. 2001). The appellate court must focus on the totality of evidence in the case when making its determination. Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983). In the face of this documentary evidence, Morrow's claim that he did not know what he was agreeing to must fail.

To prove that counsel was ineffective a defendant must show that "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel acted effectively. Mills v. Commonwealth, 170 S.W.3d 310, 318 (Ky. 2005). We do not believe that the record supports Morrow's claim that counsel was ineffective in his selection of trial strategy or in his advice to the defendant regarding the plea bargain offer. Therefore, the order denying Morrow's RCR 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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