

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002288-MR

CRAIG BRENT MILLINER

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 02-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

WINE, JUDGE: Craig Brent Milliner appeals, *pro se*, from an order entered by the Grayson Circuit Court denying his motion seeking RCr 11.42 relief based on allegations that he was afforded ineffective assistance of counsel. For the reasons stated herein, we affirm.

In early 2002, the Grayson County Sheriff's Office received a tip that Milliner was manufacturing methamphetamine

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

at his residence. Because Milliner was on probation at the time, the sheriff's office notified his probation officer, Tracy Mountardier. Deputy sheriffs also accompanied Mountardier on a routine visit to Milliner's home on February 21, 2002. When Mountardier and the officers arrived at Milliner's home, Milliner ran into his residence.

The officers then observed lithium batteries in the yard where Milliner had been standing just moments before. The officers knew that lithium batteries are used in the production of methamphetamine. Without entry, Mountardier and the officers were able to look into Milliner's lit garage and observe chemicals and equipment used in the manufacture of methamphetamine. Milliner then opened his front door to Mountardier and the officers who could see evidence of the manufacture of methamphetamine inside the residence as well.

Milliner was placed in custody and charged with manufacturing methamphetamine, possession of anhydrous ammonia not in a proper container and for the purpose of manufacturing methamphetamine, possession of marijuana, and possession of drug paraphernalia. Thereafter, Milliner accepted an offer from the Commonwealth to plead guilty to all of the charges in exchange for concurrent sentences totaling 13 years. The trial court accepted Milliner's guilty plea and sentenced him in accordance with the Commonwealth's recommendation.

Subsequently, Milliner sought RCr 11.42 relief on the grounds that he received ineffective assistance of counsel. The trial court denied the motion without conducting an evidentiary hearing. This appeal followed.

Milliner contends his trial counsel was ineffective for failing to pursue a motion to suppress evidence and a motion to dismiss the indictment that were filed prior to Milliner's guilty plea. It is well settled that a defendant who seeks reversal of a conviction based on a claim of ineffective assistance of counsel must satisfy both portions of a two-part standard. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, "the defendant must show that counsel's performance was deficient," as demonstrated by a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Second, "the defendant must show that the deficient performance prejudiced the defense" as demonstrated by a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. The Court further described the second of these components, stating that, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Furthermore, when a defendant has entered a plea of guilty, as in this case, the general standard is slightly modified. In such cases, the Court has stated that a defendant must further show that his defense counsel's performance was deficient and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203, 210 (1985). In other words, Milliner must show that his trial counsel's decision not to pursue the motions was unreasonable, and that Milliner would not have accepted the guilty plea due to a favorable ruling on at least one of the motions. We conclude that Milliner failed to make a showing on either element.

In the motion to suppress, Milliner argued that the search of his property was warrantless and in violation of his Fourth Amendment rights. Milliner further alleged that his parole officer's visit was a pretext for the police to make a warrantless search. In support of his argument, Milliner relies on Coleman v. Commonwealth, 100 S.W.3d 745 (Ky. 2002), in which a probation officer came to the defendant's residence accompanied by several officers. Even though the defendant denied the officers access, the probation officer and the police conducted an extensive warrantless search and found a firearm and contraband.

But in the present case, unlike Coleman, there was no illegal search of Milliner's property because the officers never entered Milliner's garage or residence. Rather, the officers observed the lithium batteries in plain view on the ground from where he fled. Likewise, the officers could see the other evidence of manufacturing methamphetamine without entering the garage or house. Finally, Milliner presented no evidence of bad faith on the part of either his probation officer or the officers.

Second, Milliner contends his attorney erred by not pursuing a motion to dismiss the indictment, also filed prior to Milliner's guilty plea. In this motion, Milliner asserted that the Commonwealth could not prove the presence of all of the chemicals necessary to manufacture methamphetamine as required by Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003). In Kotila, the Kentucky Supreme Court interpreted KRS 218A.1432(1)(b) as requiring evidence of "all of the chemicals or all of the equipment necessary to manufacture methamphetamine." Id. at 237. Recently, however, that statutory interpretation was abrogated by Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006). In Matheney, the Supreme Court held that Kotila incorrectly construed KRS 218A.1432(1)(b), and that the elements of the offense in fact were satisfied if, with the intent to manufacture

methamphetamine, a defendant possessed two or more of either the chemicals or the items of equipment needed for the manufacture of methamphetamine. Thus, Milliner's argument that his attorney should have pursued the motion to dismiss the indictment pursuant to Kotila is moot as such action would have proven futile in light of the Supreme Court's holding in Matheney.

In the alternative, Milliner contends that his attorney was ineffective because the motion itself was meritless and counsel was ineffective for filing it in the first place. It is superfluous to determine whether trial counsel was deficient in filing the motion to dismiss because, even conceding Milliner's argument is correct, Milliner fails to show under the second prong of the Strickland test how the proceeding would have been different had counsel not filed the motion. To the contrary, defense counsel's filing of the motion, based on the then-applicable holding in Kotila, may have been what motivated the Commonwealth to agree to a 13-year total sentence for a defendant as opposed to a potential life sentence. Even if counsel had prevailed on a motion to dismiss once Kotila was overturned, the Commonwealth could have reindicted the movant. We agree with the trial court that, had trial counsel pursued his pending motions prior to negotiating a plea agreement, the likely outcome, based on the facts of this case, were that

Milliner's attorney "would have been left with a losing hand and no cards to play." (TR, Vol. 2, p. 210).

Milliner further complains that his attorney never discussed the pending motions with him, or counsel's reasons for filing them prior to Milliner pleading guilty. However, these allegations are refuted by Milliner's admissions during his guilty plea. At his hearing, Milliner stated that he was satisfied with the advice of his attorney, and that he understood the pending motions had not been resolved but that he also understood what it would take to make a successful defense. (TR, Vol. 2, pp. 151-53). The record clearly refutes Milliner's claim that trial counsel failed to properly inform him of the applicable defenses to the charges. Thus, he was not entitled to an evidentiary hearing on this issue. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

For the reasons stated herein, we affirm the Grayson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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