

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000661-MR

LYLE C. MCDONALD

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE JERRY D. WINCHESTER, JUDGE  
ACTION NO. 05-CR-00005-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Lyle C. McDonald appeals from an order of the McCreary Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. We affirm.

In December 2004, police officers arrived at McDonald's residence in Stearns, Kentucky, with a warrant for his arrest. After no one answered the door, the

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<sup>1</sup> Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

officers entered McDonald's home and found his girlfriend flushing marijuana down the toilet. The officers obtained a search warrant for the premises and arrested McDonald and his girlfriend.

McDonald was indicted by a McCreary County Grand Jury on February 28, 2005. The indictment charged: Count I) first-degree possession of a controlled substance (methamphetamine) while in possession of a firearm; Count II) second-degree possession of a controlled substance (Tylenol 3) while in possession of a firearm; Count III) possession of a handgun by a convicted felon; Count IV) being a persistent felony offender in the first degree; Count V) possession of matter portraying a sexual performance by a minor; Count VI) possession of marijuana while in possession of a firearm; and Count VII) possession of drug paraphernalia. McDonald's girlfriend was also indicted for possession of marijuana and tampering with physical evidence.

On May 13, 2005, the Commonwealth submitted a written offer on plea of guilty which recommended dismissal of Counts IV and V of the indictment. On the remaining charges, the Commonwealth recommended an aggregate sentence of fifteen years' imprisonment. McDonald accepted the Commonwealth's offer and signed a motion to enter guilty plea on July 1, 2005. The court accepted McDonald's guilty plea and sentenced him to fifteen years' imprisonment in accordance with the Commonwealth's recommendation.

On February 16, 2006, McDonald filed a motion for appointment of counsel, a motion to vacate his sentence pursuant to RCr 11.42, and a motion for a full

evidentiary hearing. The court found that McDonald's guilty plea was entered voluntarily and denied the motions on March 2, 2006. This appeal followed.

McDonald argues that his guilty plea was involuntary due to ineffective assistance of counsel. Specifically, McDonald contends his attorney failed to investigate his case, failed to advise him of a suppression issue, and failed to carry out the terms of the plea agreement. McDonald also alleges the circuit court erred by denying his motion without an evidentiary hearing.

To prove ineffective assistance of counsel on a guilty plea, the defendant must show, “(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) *citing Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985).

McDonald first argues his attorney failed to investigate his case and interview witnesses. He also opines that he had limited interaction with his attorney and that his attorney only encouraged him to plead guilty.

McDonald fails to state with any specificity what further investigation by his attorney would have uncovered. Likewise, McDonald does not suggest any witnesses who could have aided his defense. “RCr 11.42 exists to provide the movant with an

opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule.”

*Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (citations omitted).

Furthermore, the record shows that the plea agreement negotiated by McDonald's attorney resulted in a substantially lower prison sentence. McDonald offers no specific allegations that his attorney negotiated the plea agreement in bad faith, and encouraging a defendant to accept a lighter sentence does not constitute ineffective assistance.

*Commonwealth v. Campbell*, 415 S.W.2d 614, 616 (Ky. 1967). Under the circumstances presented here, McDonald's claims regarding counsel's alleged failure to investigate and advice to plead guilty are without merit and amount to a “fishing expedition.”

McDonald next argues he received ineffective assistance of counsel because his attorney failed to consult with him regarding a potential suppression issue. McDonald alleges the police unlawfully entered his home and, once inside, found evidence giving them probable cause to secure a search warrant. However, McDonald overlooks *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). In *Payton*, the United States Supreme Court concluded, “for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Id.* at 603, 100 S.Ct. at 1388. Here, the police had a warrant for McDonald's arrest. Additionally, McDonald admitted in his RCr 11.42 motion that he heard the police knock on his door and announce their presence. He also admitted that the police

knew McDonald was inside the residence. The record also shows that, once inside the house, the police found McDonald's girlfriend flushing drugs down the toilet.

Consequently, we find the record reflects that counsel made a strategic decision by not filing a motion to suppress the evidence. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (“[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.’”).

McDonald also contends his counsel rendered ineffective assistance by failing to carry out a promise he allegedly made to McDonald regarding the plea agreement. Specifically, McDonald complains that his attorney advised him that the Commonwealth would dismiss the charges against McDonald's girlfriend in exchange for McDonald's guilty plea. McDonald asserts that he was coerced into pleading guilty as a result of his attorney's promise.

McDonald's claim is refuted by the record. If there had been such a promise by his attorney, McDonald had several opportunities to bring this alleged condition of the plea agreement to the court's attention. McDonald signed both the motion to enter guilty plea and the Commonwealth's offer on a plea of guilty; neither document made any reference to his girlfriend's case. McDonald also appeared in court and disclosed that he was voluntarily pleading guilty and that no promises were made to him in exchange for his plea. The court read the entire plea agreement on the record, and McDonald advised the Court that he understood the plea agreement. Further, at his

sentencing hearing, McDonald stated he had nothing to say on his own behalf and he had no questions for the court. “Solemn declarations in open court carry a strong presumption of verity. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L. Ed.2d 136 (1977). Here, the record shows McDonald willingly and voluntarily pleaded guilty in open court.

Finally, McDonald argues he was entitled to an evidentiary hearing on his RCr 11.42 motion. He relies on *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002), for the proposition that, “[g]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, i.e., an evidentiary hearing.” *Id.* at 11. However, “[a]n evidentiary hearing is not required concerning issues refuted by the record of the trial court. Conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002) (citations omitted). After reviewing the record, we find that McDonald's claims of ineffective assistance of counsel are clearly refuted by the record and amount only to conclusory allegations. Accordingly, an evidentiary hearing was not required.

For the reasons stated herein, the order of the McCreary Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT.

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