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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000903-MR
AND
NO. 2006-CA-001043-MR

DAMON McCORMICK — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 00-CR-00009

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: In this appeal, Damon McCormick seeks relief from an order of the Union Circuit Court in which the trial court denied his motion to withdraw his guilty plea. On appeal, McCormick claims that his guilty plea was involuntary because his trial counsel rendered ineffective assistance of counsel by failing to inform McCormick about the holding of *Kotila v. Commonwealth*;[1] failing to explain to him that manufacturing

[1] 114 S.W.3d 226 (Ky. 2003), *overruled by Matheney v. Commonwealth,* 191 S.W.3d 599 (Ky. 2006).

methamphetamine could not be used as a predicate for organized crime; and failing to advise him that a conviction for complicity to manufacture methamphetamine and a conviction for engaging in organized crime involving the manufacture of methamphetamine may have constituted double jeopardy. Finding no merit to McCormick's claims, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In early 2000, a Union County grand jury indicted Damon McCormick and formally charged him with one count of engaging in organized crime in violation of KRS[2] 506.120, one count of complicity to manufacture methamphetamine in violation of KRS KRS 218A.1432 and KRS 502.020, and one count of being a persistent felony offender (PFO) in the first degree in violation of KRS 532.080.

Several years after McCormick was indicted, the Commonwealth, on May 21, 2003, made a written plea offer to McCormick. In exchange for McCormick's guilty plea, the Commonwealth agreed to move the trial court to dismiss the PFO charge and amend the complicity to manufacture methamphetamine charge to criminal conspiracy to manufacture methamphetamine. In addition, the Commonwealth agreed to recommend a fifteen-year sentence.

On that same day, the trial court held a hearing, and the Commonwealth moved the trial court to amend the complicity charge to criminal conspiracy and to dismiss the PFO charge. The trial court granted the Commonwealth's oral motions and

[2] Kentucky Revised Statute.

requested how McCormick would plead to the amended charges. McCormick responded guilty. With this brief exchange, the trial court disposed of McCormick's case.

Subsequent to McCormick's guilty plea, the trial court held a sentencing hearing on July 16, 2003. At the sentencing hearing, McCormick, through his trial counsel, moved to withdraw his guilty plea and asked for a separate hearing relating to RCr[3] 11.42 issues.[4] However, the trial court summarily denied McCormick's motion to withdraw his guilty plea. On July 22, 2003, the trial court entered a judgment and sentence on a plea of guilty that reflected that McCormick had pled guilty to one count of engaging in organized crime and one count of criminal conspiracy to manufacture methamphetamine and had been sentenced to a total of fifteen years in the state penitentiary.

McCormick appealed from the trial court's denial of his motion to withdraw his guilty plea. The Court of Appeals reversed the trial court's denial of McCormick's motion to withdraw his guilty plea, determining that the trial court abused its discretion when it summarily denied McCormick's motion. According to this Court, the holdings in *Rodriquez v. Commonwealth,* 87 S.W.3d 8 (Ky. 2002), and *Rigdon v. Commonwealth,* 144 S.W.3d 283 (Ky. App. 2004), required the trial court to conduct an evidentiary hearing to explore what transpired between McCormick and his trial counsel in order to determine whether McCormick's plea was voluntary. Therefore, our Court remanded the matter with directions for further proceedings.

[3] Kentucky Rule of Criminal Procedure.

[4] Neither McCormick nor his trial counsel elaborated on these reasons.

Upon remand, the trial court scheduled a hearing regarding McCormick's motion to withdraw his guilty plea.[5] At the evidentiary hearing, McCormick explained to the trial court that his guilty plea was involuntary due to ineffective assistance of counsel. McCormick argued that his trial counsel had failed to advise him that to be convicted for complicity to manufacture methamphetamine, the Commonwealth would have had to prove that he had possessed all the chemicals to create methamphetamine or possessed all the equipment to produce the illicit drug. According to McCormick, it "all happened while *Kotila* was coming out."

Additionally, McCormick claimed that his previous attorney failed to advise him that manufacturing methamphetamine could not be used as the predicate for a charge of engaging in organized crime. Lastly, McCormick argued that his trial attorney failed to advise him that a conviction for both complicity to manufacture methamphetamine and engaging in organized crime potentially constituted double jeopardy.

To support his arguments that his guilty plea was involuntary, McCormick called his trial attorney, Chris Woodall, to testify. During direct examination, Woodall explained that, prior to McCormick's guilty plea, he did not advise McCormick that the Commonwealth had to show that either McCormick possessed all the chemicals necessary to manufacture methamphetamine or he possessed all the equipment needed to manufacture methamphetamine. Woodall explained that *Kotila* had yet to be rendered by the time McCormick pleaded guilty, so Woodall doubted that he advised McCormick

[5] At the evidentiary hearing, McCormick appeared with new post-conviction counsel.

about *Kotila's* holding. Woodall attested that the Supreme Court had rendered *Kotila* after McCormick's guilty plea but before his sentencing hearing.

Regarding McCormick's claim that manufacturing methamphetamine could not be used as a predicate for engaging in organized crime, Woodall explained that he did not recall discussing that subject with McCormick. However, Woodall did admit that he had concerns, at that time, whether manufacturing methamphetamine would meet the definition for trafficking under the organized crime statute.

Regarding McCormick's double jeopardy claim, Woodall testified that he doubted that he advised McCormick that a conviction for manufacturing methamphetamine and for engaging in organized crime would constitute double jeopardy. According to Woodall, he recalled that the caselaw held that a criminal defendant could be convicted of engaging in organized crime and its predicate offense, so he doubted that he discussed the issue with McCormick.

Upon cross-examination by the Commonwealth, Woodall attested that he only met with McCormick once prior to the guilty plea and had only one telephone conversation prior to the guilty plea. Despite this, Woodall claimed that he remembered that he and McCormick discussed plea offers and other resolutions that would be acceptable to McCormick. According to Woodall, McCormick was concerned about whether he could receive a sentence that would run concurrently with his prior sentences or receive a sentence that would not substantially add to his prior sentences. Woodall also attested that McCormick was very concerned about the evidence against him and the

discovery that the Commonwealth had provided. According to Woodall, he spent a great deal of time discussing the "ins and outs" of the case with McCormick.

In response to the Commonwealth's cross-examination, Woodall explained that he and McCormick were aware that the Commonwealth had numerous witnesses, all of whom had been previously convicted of manufacturing methamphetamine, who were willing to testify and implicate McCormick in manufacturing methamphetamine. Additionally, Woodall attested that he understood that, prior to the plea agreement, the Commonwealth intended to prove that McCormick had participated in actually manufacturing methamphetamine, not simply possessing either the chemicals or equipment to manufacture methamphetamine.

Regarding the original sentencing hearing at which McCormick moved to withdraw his guilty plea, McCormick explained to Woodall that prior to his guilty plea, he had been placed on a new medication after he was transferred to a new penitentiary. As a result of this new medication, McCormick did not feel as if he was in his "right mind" when he pleaded guilty. According to Woodall, on the day of sentencing, McCormick also expressed concern that he did not think that Woodall was prepared. However, at the time of the guilty plea, McCormick did not express concerns about Woodall's preparation.

After Woodall had testified, McCormick took the stand to testify on his own behalf. According to McCormick, Woodall never advised him about the holding in *Kotila* that to be convicted of manufacturing methamphetamine, the Commonwealth

would have to prove that he possessed either all the chemicals or all the equipment.[6] McCormick attested that he did not learn this until after he had pleaded guilty but before he was sentenced. McCormick insisted that if he had known about *Kotila*, then he would not have pleaded guilty.

Regarding McCormick's claim that manufacturing methamphetamine could not be used as the predicate for engaging in organized crime, McCormick's new counsel admitted that no caselaw supported this proposition. Despite this dearth of caselaw, he asked if McCormick was aware of this issue. In response, McCormick claimed that Woodall did not apprise him of this. Regarding his double jeopardy claim, McCormick asserted that Woodall never advised him that a conviction for manufacturing methamphetamine and engaging in organized crime could potentially constitute double jeopardy. According to McCormick, if Woodall had advised him of the *Kotila* issue, the predicate issue and the double jeopardy issue, he would not have pleaded guilty.

Upon cross-examination by the Commonwealth, McCormick admitted that several attorneys had represented him before he pleaded guilty. McCormick insisted that each attorney quit once he or she learned that he would not plead guilty. According to McCormick, he never told Woodall or any of his prior attorneys that he was willing to plead guilty. He insisted that Woodall also encouraged him to plead guilty. McCormick contradicted Woodall's testimony and claimed Woodall never discussed the evidence with him. McCormick also boldly asserted that nearly all of the Commonwealth's

[6] We note that McCormick was never charged with manufacturing methamphetamine.

witnesses had sent letters to him in which they recanted and apologized to him.[7] Furthermore, McCormick insisted that he never bargained with the Commonwealth for anything. And, while he admitted that he did not remember many details of the circumstances surrounding his case, McCormick vehemently insisted that he never intended to plea guilty. Finally, McCormick complained the he felt that he had been forced into pleading guilty, although he did not elaborate on this, and he testified that he believed that *Kotila* supported that he was not guilty.

After McCormick testified, the Commonwealth called Woodall back to the stand. Woodall testified that he did not recall telling McCormick that he had to plead guilty, and he strenuously insisted that he had never told any of his clients that they had to plead guilty. Woodall recollected that McCormick understood his case and understood what was transpiring.

After the evidentiary hearing, the trial court entered a written order determining that McCormick had received effective assistance of counsel and denying McCormick's motion to withdraw his guilty plea. Regarding McCormick's *Kotila* claim, the trial court determined, based on the amended charge, that *Kotila* did not apply to McCormick's case. Furthermore, the court noted that McCormick was aware that at least five witnesses had been willing to testify that he had actually manufactured methamphetamine.

[7] McCormick failed to bring any of these letters to the evidentiary hearing to support this assertion.

Regarding McCormick's second and third claims, the trial court determined that manufacturing methamphetamine could be used as the predicate for engaging in organized crime and determined that double jeopardy did not prohibit McCormick from being convicted for engaging in organized crime and its underlying predicate. In addition, the trial court concluded that Woodall and McCormick had discussed both the predicate issue and the double jeopardy issue. After denying McCormick's motion, the trial court resentenced him to serve fifteen years in prison.

II. STANDARD OF REVIEW

Once a defendant has pleaded guilty, he may move the trial court to withdraw his guilty plea. *Rigdon,* 144 S.W.3d at 288. If his guilty plea was involuntary, then the trial court must grant the motion and withdraw the plea. *Id*. However, if the plea was voluntary, then the resolution of the defendant's motion is within the sound discretion of the trial court. *Id*. In resolving a defendant's motion to withdraw a guilty plea, the trial court must make a factual inquiry into the circumstances surrounding the plea to determine if it was voluntary. *Id*. We review a trial court's decision regarding voluntariness under the clearly erroneous standard. *Id*. If the decision is supported by substantial evidence, it is not clearly erroneous. *Id*. And, if the trial court ultimately decides that the plea was voluntary, then the resolution of the motion falls within its discretion; we will not disturb that decision except for an abuse of discretion. *Id*. A trial court abuses its discretion if its actions are arbitrary, unreasonable, unfair or unsupported by legal principles. *Id*.

Where the defendant claims that his plea was involuntary due to ineffective assistance of counsel, the trial court must consider the totality of the circumstances surrounding the guilty plea to evaluate counsel's performance in light of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate ineffective assistance of counsel regarding his guilty plea, the defendant must show that his trial counsel made errors that were so serious that his performance fell below the norm of professionally competent assistance; and that counsel's defective performance was so serious that it affected the outcome of the plea process; and, but for counsel's deficient performance, there was a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on proceeding to trial. *Id*.

III. ANALYSIS

On appeal, McCormick maintains that his guilty plea was not voluntarily made because his trial counsel rendered ineffective assistance of counsel. McCormick avers that he pleaded guilty a mere twenty-two days prior to *Kotila's* being rendered, and he points out that *Kotila* changed the elements that the Commonwealth must prove to convict a person of manufacturing methamphetamine. According to McCormick, his trial counsel, Woodall, testified that he was aware of *Kotila* but failed to advise him of its holding that the Commonwealth had to prove that he either possessed all the chemicals or all the equipment necessary to make methamphetamine. McCormick reasons that Woodall's failure to advise him about *Kotila* constituted ineffective assistance of counsel.

The record in this present appeal clearly establishes that McCormick pleaded guilty on May 21, 2003. Twenty-two days later, the Supreme Court rendered its opinion in *Kotila*. At the evidentiary hearing, McCormick's former counsel, Woodall, testified that he was generally aware that the *Kotila* case was pending before the Supreme Court but doubted that he discussed *Kotila* with McCormick. This only stands to reason because the Supreme Court had yet to render *Kotila* at that time. A trial counsel's failure to anticipate a future change in the law cannot constitute ineffective assistance of counsel. *Taylor v. Commonwealth,* 63 S.W.3d 151, 165 (Ky. 2001), *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36, 64, 124 S. Ct. 1354, 1371-1372, 158 L. Ed. 2d 177 (2004); *see also Sanborn v. Commonwealth,* 975 S.W.2d 905, 913 (Ky. 1998), *cert. denied*, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999). Accordingly, Woodall was not required to anticipate *Kotila's* holding; thus, his failure to advise McCormick regarding a case that had not been rendered at that time simply did not constitute ineffective assistance.

In addition to his *Kotila* argument, McCormick argues that manufacturing methamphetamine could not be used as the basis for a charge of engaging in organized crime. According to McCormick, KRS 218A.010(28) defines trafficking to include manufacturing except as provided in KRS 218A.1431. McCormick explains that KRS 218A.1431 defines "trafficking" as distributing, dispensing, selling, transferring methamphetamine or possession with intent to distribute, dispose or sell methamphetamine. Kentucky Revised Statute 218A.1431 specifically defines

"trafficking" to exclude the manufacturing of methamphetamine. According to McCormick, the definition in KRS 218A.1431 of "trafficking" should have been used rather than KRS 218A.010(28)'s definition to determine whether manufacturing methamphetamine could be used as the predicate for engaging in organized crime. McCormick argues that Woodall failed to advise him of this.

McCormick's argument assumes that trafficking is one of the essential elements that the Commonwealth must prove in order to convict him of engaging in organized crime. However, trafficking is not an element of engaging in organized crime; it is merely part of the definition of a criminal syndicate as used in KRS 506.120(3)(e). *Hill v. Commonwealth,* 125 S.W.3d 221, 233 (Ky. 2004). Therefore, the definition for trafficking found in KRS 218A.1431 does not apply to this case. In other words, manufacturing methamphetamine could be used as the predicate offense for a charge of engaging in organized crime. Because McCormick's predicate argument was not and is not supported by the caselaw and is without merit, Woodall was under no duty to advise him of it. Thus, Woodall did not render ineffective assistance of counsel regarding this issue.

McCormick also argues that Woodall rendered ineffective assistance regarding double jeopardy. Citing *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and *Walden v. Commonwealth,* 805 S.W.2d 102 (Ky. 1991), McCormick argues that an individual can be prosecuted for two criminal offenses arising from the same incident without violating double jeopardy if each offense requires proof

of a fact that the other offense does not. Additionally, McCormick argues that the charge of complicity to manufacture methamphetamine was subsumed by the charge of engaging in organized crime because there was insufficient evidence to prove McCormick was guilty of engaging in organized crime independent of the evidence introduced to demonstrate that he engaged in manufacturing methamphetamine. To support this proposition, McCormick relies on *Beaty v. Commonwealth,* 125 S.W.3d 196 (Ky. 2003). According to McCormick, the *Beaty* Court held that a person could not be convicted of possession of methamphetamine and manufacturing methamphetamine based on the same quantity of methamphetamine. McCormick argues that double jeopardy prohibited him from being convicted of complicity to manufacturing methamphetamine and engaging in organized crime predicated on the manufacturing of methamphetamine because both offenses were based on the same quantity of methamphetamine as in *Beaty*.

McCormick relies heavily on *Beaty*. In *Beaty*, the appellant was convicted of possessing and manufacturing the same quantity of methamphetamine. 125 S.W.3d at 202. The *Beaty* Court held that double jeopardy prohibits a criminal defendant from being convicted of both possessing and manufacturing the same quantity of methamphetamine because possession is an element of manufacturing methamphetamine if the defendant actually manufactured a quantity of methamphetamine.[8] *Id*. at 212. In this present appeal, McCormick was not charged with, nor convicted of, either possession of methamphetamine or manufacturing methamphetamine. In addition, complicity to

[8] This is opposed to being charged and convicted of manufacturing methamphetamine by possessing either the chemicals or the equipment to manufacture methamphetamine.

manufacture methamphetamine is not an element of engaging in organized crime nor is engaging in organized crime predicated on manufacturing methamphetamine an element of complicity. Therefore, the holding in *Beaty* simply does not apply to this case.

Rather than *Beaty*, the holding in *Commonwealth v. Burge,* 947 S.W.2d 805, 811 (Ky. 1996) controls. In *Burge*, the Supreme Court returned to the *Blockburger* analysis to determine double jeopardy issues. The *Burge* Court reiterated that double jeopardy does not bar multiple offenses arising from the same event if each statute requires proof of a fact that the other does not. *Id*. "Put differently, is one offense included within another?" *Id*.

In the present case, McCormick was indicted for complicity to manufacture methamphetamine and engaging in organized crime predicated upon the manufacturing of methamphetamine. According to KRS 502.020, a person is guilty of complicity when he or she intentionally promotes or facilitates another person in the commission of a crime by soliciting, commanding or conspiring with the other person to commit the offense; or by aiding, counseling or attempting to aid the other person in planning or committing the offense; or by failing to make a proper effort to prevent the commission of the offense if having a legal duty to do so.

Pursuant to KRS 506.120, a person is guilty of engaging in organized crime when he or she (1) purposely (2) establishes or maintains a (3) criminal syndicate or facilitates its activities. A criminal syndicate is comprised of five or more persons collaborating to promote or engage on a continuing basis: extortion, prostitution, human

trafficking, theft, gambling, or illegal trafficking in controlled substances as prohibited by KRS Chapter 218A.

To convict a defendant of complicity, the Commonwealth must prove the commission of an offense by the defendant and another person. However, this element is not included in the organized crime statute. Therefore, complicity requires proof of a fact that engaging in organized crime does not. Turning to engaging in organized crime, the Commonwealth must prove the existence of a criminal syndicate. As can be seen, criminal syndicate is not an element of complicity. Thus, engaging in organized crime requires proof of a fact that complicity does not. Because each offense requires proof of a fact that the other does not, double jeopardy does not bar a conviction for both. Because double jeopardy does not prohibit a conviction for both offenses, Woodall did not render ineffective assistance of counsel regarding this issue.

Finally, McCormick presents for the first time on appeal numerous unpreserved arguments. "It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court." *Marksberry v. Chandler,* 126 S.W.3d 747, 753 (Ky. App. 2003). McCormick did not raise any of these other assignments of errors before the trial court; thus, denying the trial court an opportunity to rule on them and failing to preserve these issues for appellate review. Because these issues were not preserved, we decline to address them. *See Commonwealth v. Maricle,* 15 S.W.3d 376, 379-380 (Ky. 2000) (Addressing unpreserved errors "is utterly contrary to the general

and sound rule that this Court is limited to the review of those issues that were raised and ruled on by the trial court.").

In conclusion, because McCormick's claims did not constitute ineffective assistance of counsel, the trial court did not act clearly erroneously when it determined that McCormick's plea was voluntarily entered, nor did it abuse its discretion in denying his motion to withdraw his guilty plea. Thus, the trial court's decision is affirmed.

ALL CONCUR.

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