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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001859-MR

ANTHONY HAWKINS — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 03-CR-00160

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

VANMETER, JUDGE: Anthony Hawkins appeals from the Harlan Circuit Court's order denying his motion for relief pursuant to RCr[1] 11.42 after an evidentiary hearing. For the following reasons, we affirm.

I. FACTS[2]

[1] Kentucky Rules of Criminal Procedure.

[2] We adhere to the organization of Hawkins' brief.

Based upon allegations that he sold crack cocaine to an informant in controlled drug buys on December 16 and 27, 2002, Hawkins was indicted for two counts of first-degree trafficking in a controlled substance (cocaine). He was also indicted for being a first-degree persistent felony offender (PFO). Hawkins pled not guilty and the matter proceeded to trial, where the Commonwealth called the informant and played videotapes recorded on a camera hidden in the informant's automobile during the two alleged buys.

After the presentation of this evidence, Hawkins moved to enter a guilty plea pursuant to the Commonwealth's offer to recommend that the court sentence him to concurrent terms of ten years' imprisonment on each of the first-degree trafficking charges, enhanced to fifteen years' imprisonment on each charge, with no parole eligibility for ten years pursuant to KRS 532.080(7).[3] The trial court accepted Hawkins' guilty plea and eventually entered a judgment sentencing him according to the Commonwealth's recommendation.

Hawkins subsequently filed a motion for relief pursuant to RCr 11.42, which the trial court denied following an evidentiary hearing. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Hawkins argues that the trial court erred by denying his motion for relief pursuant to RCr 11.42 because he was afforded the ineffective assistance of counsel. We

[3] KRS 532.080(7) provides, in part, that a first-degree PFO who presently stands convicted of a Class A, B, or C felony "shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years, unless another sentencing scheme applies." First-degree trafficking in a controlled substance is, at minimum, a Class C felony. *See* KRS 218A.1412(2).

will address each of Hawkins' concerns, keeping in mind that a defendant who alleges that he was afforded the ineffective assistance of counsel in deciding to enter a guilty plea must prove "(1) that counsel made errors so serious that [his] 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." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001).

A. Discovery

First, Hawkins argues that he was afforded the ineffective assistance of counsel because his counsel advised/assisted him in pleading guilty without having obtained any discovery from the Commonwealth. We disagree.

Attached as Exhibit A to Hawkins' motion for RCr 11.42 relief was a letter to his defense counsel from the prosecuting attorney. The letter, dated October 14, 2003, stated in part:

> Enclosed is the Discovery regarding the Anthony W. Hawkins case set for Trial on January 27, 2004, consisting of the grand jury tape and Det. Roy Pace's official investigative report and attachments, which includes the Lab Report and informant information.

Thus, it appears that Hawkins' counsel obtained at least some "discovery" from the Commonwealth by the time he assisted Hawkins in pleading guilty to the charges against

him. As such, the trial court did not err by denying Hawkins' motion for relief pursuant to RCr 11.42 in this regard.

The fact that the "discovery" discussed in the October 2003 letter was not in the Harlan Circuit Court's record does not compel a different result, as the parties' Agreed Discovery Order required the parties to submit the discovery only to each other, and not to the court. Again, as evidenced by the above-referenced letter, it appears that the Commonwealth did in fact submit at least some discovery to Hawkins' counsel.

To the extent that Hawkins argues that the Harlan Circuit Court Clerk and/or his trial counsel erred by failing to give him a copy of their files pertaining to the matter, we state only that an RCr 11.42 proceeding is not the appropriate avenue for seeking such relief. *See Hiatt v. Clark*, 194 S.W.3d 324, 330 (Ky. 2006) (writ of mandamus issued to circuit judge to order criminal defendant's trial counsel to give defendant work product, where defendant needed his file in seeking post-conviction relief alleging ineffective assistance of counsel).

B. The Alleged Controlled Substances

Next, Hawkins argues that he was afforded the ineffective assistance of counsel because his counsel failed to adequately investigate the evidence in the matter, i.e., the alleged controlled substances. More specifically, Hawkins argues that had his counsel adequately investigated the substances, he would have discovered that Kentucky State Police (KSP) forensic examiner Henry Hays was "unwilling" to testify at Hawkins'

trial, and further that the chains of custody regarding the substances were inadequate. We disagree.

Because Hawkins' trial date was continued several times, Henry Hays was served with four subpoenas duces tecum, including one served on June 21, 2004, for the trial which commenced on July 1.[4] Before voir dire began, the Commonwealth Attorney informed the court that Hays, who had resigned his position effective that day to attend dental school, had not shown to testify. As Hays had been served with a subpoena duces tecum, the court issued a warrant for his arrest. Before opening statements the court withdrew the arrest warrant, explaining that it had been informed by Hays' friend that Hays was on his way to the court. Accordingly, Hays was available to testify and the trial court did not err by denying Hawkins' motion for relief pursuant to RCr 11.42 in this regard.

As it relates to Hawkins' argument regarding chains of custody, a party offering physical evidence must establish "that the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission." *Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004). It is unnecessary to establish a perfect chain of custody for drugs "or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not

[4] Technically, the subpoenas duces tecum were served upon the KSP Southeastern Regional Laboratory.

been altered in any material respect.'" *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998) (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)).

Here, Hawkins attached to his appellate brief documents from the KSP detective who set up the controlled drug buys which produced the alleged controlled substances, as well as from the KSP lab which analyzed the substances. These documents, if introduced through Hays' testimony, would have established sufficient chains of custody to admit the evidence as any gaps in the chains would have gone to the weight of the evidence rather than to its admissibility, *Rabovsky*, 973 S.W.2d at 8. Thus, the trial court did not err by denying Hawkins' motion for relief pursuant to RCr 11.42 in this regard.

Hawkins argues that discrepancies throughout these documents in the descriptions of the substances, including the weight of the substances, renders the evidence inadmissible. However, while the descriptions of each substance are not exactly the same, they are consistent. For example, the first substance is referred to at various times as "a white colored powder substance," "a white substance," and a "white colored powder." The descriptions of the second substance are similarly consistent. Further, when "evidence otherwise establishes to a reasonable probability that the substances introduced at trial are the same as the substance seized, a discrepancy in the weight of the substances goes to the credibility of the evidence, not its admissibility." *Penman v. Commonwealth*, 194 S.W.3d 237, 244 (Ky. 2006) (quoting *Hancock v. State*, 587 So.2d 1040, 1045 (Ala. Crim. App. 1991)). Such is the case here, where the KSP detective

noted that the informant attempted to purchase a gram and then a "cookie" (approximately 3.5 grams) of crack cocaine, while the KSP tested approximately 0.263 gram and then 0.853 gram of substance, respectively.

Finally, Hawkins' argument that his counsel erred by failing to request this evidence prior to trial lacks merit as the Commonwealth Attorney's discovery letter to Hawkins' trial counsel specifically indicated that the discovery included the detective's "official investigative report and attachments, which includes the Lab Report and informant information."

C. Speedy Trial

Hawkins' next argument is that he was afforded the ineffective assistance of counsel because his counsel failed to file a motion for a speedy trial. We disagree.

Assuming without deciding that the nearly ten months between Hawkins' indictment and trial was presumptively prejudicial, *see Barker v. Wingo*, 407 U.S. 514, 530-31, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), his counsel's failure to assert his right to a speedy trial is only one factor in an inquiry into the deprivation of his right to a speedy trial, 407 U.S. at 528, 92 S.Ct. at 2191. Other factors include the reason for the delay and the prejudice to the defendant. 407 U.S. at 530, 92 S.Ct. at 2192. Here, the trial court's orders reflect that Hawkins' trial was continued once by agreed order because the KSP evidence custodian was hospitalized and Hawkins had "not kept in touch with his attorney so that the defense cannot announce ready[.]" Hawkins' trial was continued a second time by agreed order for a reason not specified by the order, and a third time by

agreed order because Hawkins' counsel was ill. Further, Hawkins has not identified any ways he was prejudiced by the delay between his indictment and trial. Under these circumstances, the trial court did not err by holding that Hawkins was not entitled to relief pursuant to RCr 11.42 based on his allegation that he was afforded the ineffective assistance of counsel when his counsel did not move for a speedy trial.

D. The Informant

Next, Hawkins argues that he was afforded the ineffective assistance of counsel because his counsel failed to inform him that he could use the informant's prior indictment on drug offenses for impeachment purposes. We disagree.

Hawkins' motion to enter a guilty plea included his counsel's certification that he had explained to Hawkins, and Hawkins understood, the charges against him and any possible defenses. We are unaware of any authority which further requires defense counsel to inform a criminal defendant of every piece of evidence, including impeachment evidence, that could be favorable to his defense. Indeed, a knowing, intelligent, and voluntary waiver of one's rights in conjunction with a guilty plea "does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea." *Turner v. Commonwealth*, 647 S.W.2d 500, 500-01 (Ky.App. 1982). In any event, the fact that the informant had previously been indicted on drug offenses would not have much weight on the issue of whether Hawkins was guilty of trafficking in a controlled substance since the Commonwealth had good

quality videotapes of the transactions to support the informant's testimony. Accordingly, the trial court did not err by denying Hawkins' motion for RCr 11.42 relief in this regard.

III. GUILTY PLEA

Next, Hawkins argues that the trial court erred by denying his motion for RCr 11.42 relief insofar as he argued that his guilty plea did not satisfy the standard set forth in *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 1713, 23 L.Ed.2d 274 (1969), which requires a guilty plea to be entered "voluntarily and understandingly[.]" We disagree.

This court explained in *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986), that the test for determining the validity of a guilty plea

> is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it."

(Internal citations omitted.) Here, Hawkins filed a written motion to enter a guilty plea after the Commonwealth presented some testimony from its first witness, the informant who allegedly bought drugs from Hawkins during the controlled drug buy. During an extensive colloquy between the trial court, Hawkins, and his defense counsel, Hawkins confirmed that he understood he was giving up several rights, including his rights to proceed with the jury trial and to confront and cross examine the witnesses against him. Ultimately, the trial court accepted Hawkins' guilty plea, after finding that it was "freely,

knowingly, and voluntarily made and made from a position of full understanding of his rights and how they are affected by his decision to plead guilty."

Still, Hawkins argues that his plea was not knowing and voluntary because if he did not accept the Commonwealth's offer, the Commonwealth would seek a harsher sentence. However, a guilty plea "is not involuntary because it may be brought about 'by fear of the possibility of a greater penalty upon conviction after a trial.'" *Jones v. Parke*, 734 F.2d 1142, 1147 (6th Cir. 1984) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978)). Hawkins further contends that his plea was not knowing and voluntary because during the trial, his counsel advised him to take the offer "because it didn't look good[.]" However, a criminal defense attorney does not provide ineffective assistance by advising a client to plead guilty in order to obtain a lesser sentence. *Commonwealth v. Campbell*, 415 S.W.2d 614, 616 (Ky. 1967). Additionally, contrary to Hawkins' assertions, the Commonwealth did not offer to dismiss the PFO count. In sum, these arguments simply do not overcome the presumption that Hawkins' guilty plea was voluntary. *See Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001) (presumption of voluntariness arises from a proper plea colloquy). Moreover, because the trial court did not err by holding that Hawkins' guilty plea was voluntary, it also did not err by failing to permit him to withdraw his guilty plea at sentencing. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287-88 (Ky.App. 2004) (trial court may grant or deny motion to withdraw voluntary guilty plea at its discretion).

IV. EVIDENTIARY HEARING

Finally, Hawkins argues that his due process rights were violated during the evidentiary hearing. However, in support of this argument Hawkins appears to simply reiterate many of the arguments already presented in his brief, which we have already considered and rejected above. Accordingly, we find no merit to this argument.

The Harlan Circuit Court's order denying Hawkins' motion for relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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