

RENDERED: February 13, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 96-CA-3195-MR

CLARENCE E. GREEN

APPELLANT

V. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE WILLIAM J. WEHR, JUDGE  
ACTION NO. 80-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: DYCHE, HUDDLESTON, and KNOPF, JUDGES.

KNOPF, JUDGE. Clarence Green, acting pro se, appeals an order of the Campbell Circuit Court entered on November 7, 1996, denying his motion to vacate, set aside or correct judgment brought pursuant to Rule of Criminal Procedure (RCr) 11.42, wherein he sought an amended sentence. We affirm.

On February 29, 1980, the Campbell County Grand Jury indicted Green in Case No. 80-CR-035 on one (1) felony count of capital murder (KRS 507.020). On August 26, 1980, Green entered a guilty plea to the amended charge of first-degree manslaughter (KRS 507.030) pursuant to a plea agreement with the Commonwealth, according to which the Commonwealth recommended a sentence of

fifteen (15) years. On September 8, 1980, the circuit court sentenced Green to serve fifteen (15) years in prison consistent with the plea agreement. At the time of the guilty plea and sentencing, Green was on probation in Case No. 79-CR-158 for a 1979 conviction in Kenton County involving first-degree sodomy for which he received a suspended twenty-year (20) sentence.

In October 1986, Green filed an RCr 11.42 motion challenging the manslaughter guilty plea in Case No. 80-CR-035 based on ineffective assistance of counsel and insufficient evidence. On December 18, 1986, the circuit court denied the motion and Green appealed. In August 1987, Green filed a motion to withdraw his appeal. On October 6, 1987, this court issued an order granting his motion to withdraw and dismissed the appeal. On October 2, 1996, Green filed a second RCr 11.42 motion, titled "Motion to Correct Sentence," seeking to have the fifteen-year (15) sentence in Case No. 80-CR-035 run concurrently with the twenty-year (20) sentence in Case No. 79-CR-158. On November 7, 1996, the circuit court denied the RCr 11.42 motion. This appeal followed.

Green argues the trial court erred by failing to designate explicitly in the final judgment in Case No. 80-CR-05 whether the manslaughter sentence would run concurrently or consecutively with any other sentence as required by RCr 11.04. He further contends that the trial court and defense counsel should have stated clearly to him "how the sentence would or could be served in relation to any other sentence he may have

been serving or was to serve." Green asserts that his prospects for parole have been detrimentally affected by the alleged ambiguity in the judgment as to sentencing because the Department of Corrections has determined the manslaughter and sodomy sentences should run consecutively.

Green's first argument that the judgment is erroneous because it fails to explicitly state whether the manslaughter sentence would run concurrently or consecutively with any other sentence is clearly without merit. As the trial court indicated, Green's reliance on RCr 11.04 is misplaced. RCr 11.04 states in relevant part: "A judgment of conviction shall set forth . . . the adjudication and sentence . . . . If two (2) or more sentences are imposed, the judgment shall state whether they are to be served concurrently or consecutively." In October 1979, the Kenton Circuit Court suspended the twenty-year (20) sentence on sodomy and placed Green on probation for a period of five (5) years. Green's probation was revoked and the twenty-year (20) sentence was reinstated on November 18, 1980, only after he had been sentenced in the manslaughter case. The only offense involved in Case No. 80-CR-035 was the manslaughter conviction. Consequently, RCr 11.04 did not apply to the judgment in Case No. 80-CR-035, and the trial court committed no error in failing to designate whether the sentence would run concurrently or consecutively with any other sentence.

Moreover, as a matter of law, Green would not be entitled to have the manslaughter and sodomy sentences run

concurrently. Under KRS 533.060(2), the sentence for a felony committed while a person is on probation for conviction of another felony may not run concurrently with any other sentence. As a result, this statute mandates that the fifteen-year (15) sentence for manslaughter in Case No. 80-CR-035 not run concurrently with the twenty-year (20) sentence for sodomy in Case No. 79-CR-158.

Green's second argument that the trial court erred by failing to inform him that the manslaughter sentence could run consecutive to other sentences equally is without merit. In Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990), the Court rejected a similar argument after the appellant challenged the validity of a guilty plea because the trial court failed to specifically tell him the ten-year (10) sentence on the guilty plea would have to run consecutively with other judgments against him. The Court stated, "A knowing, voluntary, and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea." 799 S.W.2d 55 (quoting Turner v. Commonwealth, Ky. App., 647 S.W.2d 500 (1982)). Similarly, the trial court was not required to inform Green on how the conviction and sentence would affect collateral issues such as his parole hearings, prison classification, or prison program participation.

Green's final argument involves a claim of ineffective assistance of counsel. A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of

counsel under the Sixth Amendment. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S. Ct. 366, 369, 80 L. Ed. 2d 203 (1985); Shelton v. Commonwealth, 928 S.W.2d 817 (1996). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Prejudice focuses on whether counsel's deficient performance renders the result of the proceeding unreliable or fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). Where appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970), and 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. Hill v. Lockhart, 474 U.S. at 58, 106 S. Ct. at 370; accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland v. Washington, 466

U.S. at 689, 104 S. Ct. at 2065; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993).

In the case sub judice, Green stated in the original RCr 11.42 motion that he was not arguing that his guilty plea was not entered knowingly and intelligently. First, we note that Green's discussion of this allegation is extremely ambiguous and lacks the specificity generally required for ineffective assistance claims under RCr 11.42. See, e.g., Bartley v. Commonwealth, Ky., 463 S.W.2d 321, 322 (1970); Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970). Even assuming without deciding that counsel's performance was deficient, Green has not established actual prejudice. He has not alleged that if counsel had provided more extensive information on the ramifications of his guilty plea on other convictions, he would not have pled guilty and would have gone to trial. See Hill v. Lockhart, 474 U.S. at 60, 106 S. Ct. at 371 (failure of petitioner to allege he would have insisted on going to trial if counsel had provided correct information on parole eligibility created lack of prejudice for ineffective assistance of counsel claim). Green has challenged only the sentencing portion of the conviction, and counsel's performance did not impact that aspect of the proceeding. Therefore, Green has not demonstrated that the result of the proceeding was unreliable in that it was reasonably likely the outcome would have been different. See Strickland, 466 U.S. at 696, 104 S. Ct. at 2069.

In addition, Green is not entitled to relief based on procedural grounds. In Gross v. Commonwealth, Ky., 648 S.W.2d 853, 857 (1983), the Court indicated that final disposition of an RCr 11.42 motion or waiver of the opportunity to make it acts to conclude all issues that reasonably could have been presented in a proceeding on that motion. The rule prohibiting successive RCr 11.42 motions is well established. See Caudill v. Commonwealth, Ky., 408 S.W.2d 182 (1966); Satterly v. Commonwealth, Ky., 441 S.W.2d 145 (1969). Concomitantly, RCr 11.42 requires petitioners to raise all grounds known to them at the time in a single motion. RCr 11.42(3) states:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

See also Shepherd v. Commonwealth, Ky., 477 S.W.2d 798 (1972) (fourth RCr 11.42 motion dismissed for failure to demonstrate reason why grounds for motion were not raised in earlier motions); Case v. Commonwealth, Ky. App., 467 S.W.2d 367 (1971). Moreover, failure to receive a decision on the merits upon appeal from an earlier RCr 11.42 motion does not preclude dismissal of a subsequent motion. In Szabo v. Commonwealth, Ky., 458 S.W.2d 167 (1970), the Court indicated that a petitioner who abandons the appeal of his initial RCr 11.42 motion is not entitled to relief on a second RCr 11.42 motion even though there has never been an appellate post-conviction review on the merits of his initial motion. See also Lycans v. Commonwealth, Ky., 511

S.W.2d 233 (1974) (when appeal is not perfected or is dismissed, petitioner is not permitted to file a subsequent RCr 11.42 motion).

In Green's first RCr 11.42 motion filed in October 1986, he raised a claim of ineffective assistance of counsel with respect to the guilty plea based on several grounds. Although he did not specifically discuss counsel's alleged failure to inform him of the possible consecutive sentencing, this issue could have been raised in the initial RCr 11.42 motion. The current appeal involves a second RCr 11.42 motion, and is subject to dismissal as a successive RCr 11.42 motion.

For the foregoing reasons, we affirm the order of the Campbell Circuit Court.

ALL CONCUR.



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