

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002915-MR

REGGIE BALLARD

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 96-CR-000223

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: HUDDLESTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: This is an appeal of an order of the McCracken Circuit Court denying appellant's RCr 11.42 Motion to Vacate his conviction. Appellant pled guilty on October 25, 1996 to two counts of trafficking in a controlled substance in the first degree, one count of possession of drug paraphernalia, and to being a persistent felony offender in the second degree.

On July 25, 1997, appellant filed a pro se Motion to Vacate and Set Aside Sentence in the McCracken Circuit Court, alleging prosecutorial vindictiveness and ineffective assistance of counsel, and requesting an evidentiary hearing. The

Commonwealth responded to appellant's motion. On October 31, 1997, the trial court entered an order denying appellant's motion to vacate. We affirm the order of the trial court.

On appeal, appellant raises a mixed bag of alleged errors in the lower court. Mostly, appellant wishes to challenge the sufficiency of the evidence supporting his indictment and conviction. Having pled guilty, appellant has waived a claim of insufficient evidence, and may not raise it in a post-conviction motion. King v. Commonwealth, Ky., 408 S.W.2d 622, 623 (1966). Furthermore, appellant has admitted the factual validity of the charges against him by pleading guilty. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 225 (1986).

Appellant's first claim of error is that the Commonwealth demonstrated prosecutorial vindictiveness by bringing multiple charges which were not supported by sufficient evidence. The Commonwealth correctly asserts that this claim of error is not cognizable on RCr 11.42 review. Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990). A valid guilty plea waives all defenses except that the indictment does not charge an offense. Bush v. Commonwealth, Ky., 702 S.W.2d 46 (1986). The trial court correctly declined to consider the allegation of prosecutorial vindictiveness.

Appellant's second claim of error was that his counsel was constitutionally ineffective. In alleging ineffective assistance of counsel for recommending a guilty plea, a defendant must prove that his counsel's performance was deficient, and that he was prejudiced thereby such that there is a reasonable

probability that, but for counsel's errors, he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 80 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). Appellant alleges that his counsel failed to investigate. However, he does not point to any exculpatory evidence a further investigation would have uncovered. Thus, he has not shown that his attorney was ineffective, or that he would have chosen to go to trial.

Appellant additionally claims that his counsel was ineffective for not filing a motion to suppress. Appellant did not raise this issue in his RCr 11.42 in the trial court, but only alleged that his counsel was ineffective for failing to investigate and advising him to plead guilty. An issue of ineffective assistance raised on appeal for the first time, and not presented to the lower court, is not properly before the appellate court. Nickell v. Commonwealth, Ky., 565 S.W.2d 145, 149 (1978). As a result, we will not address the issue.

Appellant further alleges that his attorney coerced him into pleading guilty by telling appellant that he did not have a defense, and that he would likely receive the maximum sentence if he went to trial. There is no coercion in advising a client to plead guilty if the decision is based on reasonable judgment. Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1983). Since appellant has not identified any defense he would have had at trial, it appears that his attorney gave him reasonable legal advice. We find no coercion was involved in appellant's decision to plead guilty.

Finally, appellant argues that the trial court should have conducted an evidentiary hearing on the allegations raised in his motion to vacate. Where the allegations of the motion to vacate are refuted on the face of the record, there is no requirement of an evidentiary hearing. Sparks v. Commonwealth, Ky., 721 S.W.2d 726 (1986). Appellant's allegations did not raise any questions of fact and were readily refuted by the record. Therefore, the trial court correctly denied his motion to vacate without a hearing.

For the foregoing reasons, the order of the McCracken Circuit Court denying appellant's RCr 11.42 Motion to Vacate is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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