

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001316-MR  
and  
NO. 1997-CA-002362-MR

OTTO FRANK WILHITE

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, JUDGE  
ACTION NO. 94-CR-00480

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

COMBS, JUDGE: Otto Frank Wilhite appeals from orders of the Fayette Circuit Court denying his motions for post-conviction relief. Finding no error, we affirm.

In June 1994, the Fayette County Grand Jury indicted Wilhite on twelve counts of criminal possession of a forged instrument; one count of unauthorized use of a credit card; and one count of being a persistent felony offender in the first degree. Wilhite was arraigned on the charges and was represented by counsel.

On October 2, 1995, Wilhite entered a plea of guilty (pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970)), to one count of criminal possession of a forged instrument. Under the plea agreement, the Commonwealth recommended a sentence of one-year imprisonment to be probated for three years. The trial court sentenced Wilhite to five years' imprisonment to be probated for three years.

Following a hearing conducted on September 3, 1996, the trial court concluded that Wilhite had violated the terms of his probation. As a result, his probation was revoked. On September 5, 1996, the court sentenced Wilhite to a maximum term of one-year imprisonment. On September 23, 1996, the trial court amended the sentence to a maximum term of five-years' imprisonment. Wilhite did not appeal.

On October 10, 1996, Wilhite filed a RCr 11.42 motion alleging ineffective assistance of counsel. He also requested the appointment of counsel and an evidentiary hearing on the motion. On September 8, 1997, the trial court denied the motion without a hearing. Days later, Wilhite filed his notice of appeal.<sup>1</sup>

On April 1, 1998, Wilhite filed a motion to alter, amend or vacate judgment pursuant to CR 59.05. In his motion, Wilhite alleged that the trial court erred by amending the judgment of conviction eighteen (18) days after entry of the

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<sup>1</sup>On September 16, 1997, this court permitted the withdrawal of Wilhite's appointed counsel. On January 6, 1998, this court authorized the withdrawal of the Department of Public Advocacy. Wilhite was permitted to proceed pro se.

final judgment. On April 8, 1998, the trial court denied this motion.

On April 17, 1998, Wilhite filed another motion. This motion was designated as having been filed pursuant to KRS 419.020, RCr 11.42, and CR 60.02(a). In this motion, Wilhite admitted that his earlier CR 59.05 motion had been filed in error. The appellant maintained that the relief he sought was instead available under KRS 419.020, RCr 11.42, and CR 60.02(a). On April 28, 1998, the trial court denied this motion.

On May 5, 1998, Wilhite filed a motion requesting the trial court to enter findings of fact with respect to the denial of the motion. On May 18, 1998, the trial court entered its order explaining that the latest motion had been denied on several grounds. The trial court determined that relief pursuant to the *habeas corpus* provisions (KRS 419.020) was unavailable in this case, that the motion filed pursuant to RCr 11.42 was barred as successive, and that the provisions of CR 60.02(a) can be invoked only within one year of the judgment. Wilhite's second notice of appeal followed.<sup>2</sup> For convenience, the two appeals have been considered together.

RCr 11.42 allows persons in custody under sentence to raise a collateral attack on a criminal judgment entered against them. RCr 11.42(5) authorizes the trial judge to dismiss the motion without a hearing unless there is a material issue of fact that cannot be determined on the face of the record. See also

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<sup>2</sup>On August 6, 1998, the Department of Public Advocacy was again permitted to withdraw as Wilhite's counsel. Wilhite proceeds pro se.

Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998). Our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967); Sanborn v. Commonwealth, Ky., 976 S.W.2d 905, 904 (1998).

Wilhite argues that his guilty plea is invalid because he received ineffective assistance of counsel. In essence, he contends that counsel was ineffective for recommending that he plead guilty.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When an appellant challenges a guilty plea based upon ineffective counsel, he must satisfy both components of the two-part test. Not only must he demonstrate that counsel made serious errors outside the wide range of reasonably professional competent assistance (McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1976)); but he must also show that the deficient performance so seriously prejudiced the outcome of the plea process that – but for the errors of counsel – there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 80

L.Ed.2d 203 (1985); accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

A review of the record indicates that Wilhite's complaint is without merit. Wilhite had been charged in a fourteen-count indictment with thirteen Class D felonies – as well as with being a persistent felony offender in the first degree. Had he insisted upon trial, Wilhite faced a substantial prison term. Instead, counsel negotiated a favorable plea agreement and also succeeded in obtaining probation for Wilhite on the remaining charge.<sup>3</sup>

During the plea proceedings, the trial judge carefully explained to Wilhite that he was waiving important constitutional rights. Wilhite specifically acknowledged that were he to go to trial, the Commonwealth's evidence against him would be sufficient to convict him of the charges. He declared that this plea was "knowing and voluntary." Wilhite's attorney certified to the court that Wilhite's plea was being entered voluntarily and with understanding.

An attorney, acting in good faith and in the exercise of reasonable judgment, may properly recommend that his client plead guilty. Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234 (1970). In these circumstances, counsel was not ineffective by advising Wilhite to plead guilty. There was neither error by

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<sup>3</sup>Wilhite explains in his brief that he considered a plea because "it was no secret that [he] had a long criminal history in and around Fayette County. . . ." Moreover, he had been offered a job in Detroit and "was anxious to have the matter out of the way so that he might be allowed to accept the position which had been offered."

counsel nor prejudice to Wilhite. Consequently, the trial court did not err by denying the RCr 11.42 motion.

Next, Wilhite argues that the trial court erred by denying his separate motions filed pursuant to CR 59.05 and pursuant to KRS 419.020, RCr 11.42, and CR 60.02(a). We disagree.

As Wilhite himself noted in his latest motion, the provisions of CR 59.05 can afford him no relief in this matter. CR 59.05 requires that a motion to alter or amend a judgment be served not later than 10 days following entry of the final judgment. And as the trial court noted, neither KRS 419.020 nor a successive RCr 11.42 motion can provide relief at this point. Kentucky's *habeas corpus* provisions are inapplicable where the procedure provided in RCr 11.42 is adequate to address the legality of inmate's detention. Ayers v. Davis, Ky., 377 S.W.2d 154 (1964). Successive RCr 11.42 motions are not authorized. RCr 11.42(3). Finally, motions pursuant to CR 60.02(a) must be made not more than one year after the judgment was entered.

Based upon the foregoing, we affirm the orders of the Fayette Circuit Court.

ALL CONCUR.

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