

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001139-MR

ELDRIDGE PALMER

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA H. ADAMS, JUDGE
ACTION NO. 97-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, EMBERTON, and McANULTY, Judges.

COMBS, JUDGE. Eldridge Palmer (Palmer) appeals from an order of the Clark Circuit Court denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

On the early morning of January 29, 1997, Officer Kevin Todd stopped the vehicle being driven by Palmer because of an expired license plate tag. Before Officer Todd could exit his vehicle, Palmer got out of his car and walked toward the driver's side of the police cruiser. As Palmer approached, Officer Todd heard a crunching sound and noticed a plastic snack-food bag

protruding from Palmer's trousers at the waist area. Inside the snack-food bag, the officer also saw what he believed to be several smaller clear plastic baggies containing a white substance resembling crack cocaine. Officer Todd then conducted a pat-down Terry search and found a crack pipe and some pills in Palmer's trousers pocket. Officer Todd seized the snack-food bag and discovered nine sandwich baggies containing numerous pieces of a substance later established to be crack cocaine.

In April 1997, the Clark County Grand Jury indicted Palmer on one felony count of first-degree trafficking in a controlled substance (cocaine) (KRS 218A.1412) and one misdemeanor count of possession of drug paraphernalia (KRS 218A.500(2)). Following arraignment, Palmer's attorney filed a motion to suppress the evidence seized by the police. Counsel argued that the recovery of the snack-food bag constituted an illegal search and seizure in violation of the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. Counsel further maintained that the police did not have probable cause to arrest Palmer; thus, the search was not authorized as a search incident to arrest.

On June 5, 1997, the trial court conducted an evidentiary hearing on the motion to suppress pursuant to RCr 9.78. Both Officer Todd and Palmer testified on the facts surrounding the traffic stop, the search of Palmer, and the seizure of the drug evidence. Officer Todd stated that Palmer appeared nervous as he approached the officer. He also said that he saw several smaller bags of what appeared to be cocaine within

the snack food bag protruding from Palmer's trousers. Palmer admitted that the license plate on the back of the car that he was driving had expired; he also stated that he had placed several baggies of cocaine in the snack food bag prior to placing it in his trousers. However, he disputed the fact that the cocaine was plainly visible to Officer Todd.

During cross-examination of Officer Todd, defense counsel questioned the officer on alleged discrepancies between his testimony at the hearing and his prior testimony both before the grand jury and at the probable cause hearing in district court. At the conclusion of the hearing, the trial court found Officer Todd's testimony credible and sustained the validity of the warrantless search and seizure of the drug evidence under the plain view exception to the warrant requirement of the Fourth Amendment.

On June 10, 1997, pursuant to a plea agreement, Palmer entered a plea of guilty to first-degree trafficking in cocaine and possession of drug paraphernalia. Under the agreement, the Commonwealth recommended a sentence of seven years on the trafficking offense and twelve months on the drug paraphernalia offense. On June 19, 1997, the trial court sentenced Palmer to serve a total of seven years in prison.

In March 1998, Palmer filed a motion to vacate sentence pursuant to RCr 11.42 and requested an evidentiary hearing on the motion. In April 1998, the trial court issued an order denying the motion without a hearing because Palmer failed "to allege the

required factual grounds necessary to challenge the representation of trial counsel." This appeal followed.

Palmer seeks to vacate his conviction under RCr 11.42 based on ineffective assistance of counsel. More specifically, he challenges the trial court's denial of the pretrial motion to suppress the drug evidence because of ineffective assistance of counsel. 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 proceeding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). When an appellant challenges a guilty plea based on 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, 771, 90 S.Ct. 1441, 1449, 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 and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 446 U.S. at 689, 104

S.Ct. at 2065; Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 873 (1998).

RCr 11.42 allows persons in custody under sentence to raise a collateral attack on a criminal judgment 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 Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1263, 143 L.Ed.2d 359 (1999). Our review of the trial court's denial of Palmer's RCr 11.42 motion without a hearing 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., 975 S.W.2d 905, 909 (1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999).

However, RCr 11.42(2) also requires that the movant:

state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

It is well-established that merely conclusory allegations of ineffective assistance of counsel are insufficient to justify post-conviction relief. Brooks v. Commonwealth, Ky., 447 S.W.2d 614, 617 (1969). The courts have consistently held that a bare allegation of ineffective assistance of counsel does not state grounds for relief under RCr 11.42 unless the petition presents sufficient facts to show that counsel's representation was

inadequate. Thomas v. Commonwealth, Ky., 459 S.W.2d 72, 72 (1970).

In the case before us, Palmer asserts "that he was afforded ineffective assistance of counsel when the trial judge denied his motion to suppress the evidence that was being used in his case that was pending in court." Palmer argues that the search and seizure of the drug evidence was illegal because Officer Todd's search exceeded the established exceptions for a warrantless search recognized by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (pat-down search for weapons) and Arizona v. Hicks, 480 U.S. 323, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (plain view exception).

Palmer has provided no specific facts or allegations concerning the conduct of defense counsel to support his claim of ineffective assistance. He does not identify any act or omission of counsel that could have constituted deficient performance. Palmer's dissatisfaction with the refusal of the trial court to exclude the drug evidence has translated into an allegation that his counsel was automatically defective for having failed to persuade the court otherwise. He has failed (both logically and legally) to meet the specific requirement of RCr 11.42.

Moreover, a review of the record reveals that defense counsel provided both adequate and competent legal assistance. Counsel filed a motion to suppress the evidence prior to trial. During the suppression hearing, defense counsel thoroughly cross-examined Officer Todd on his prior statements before the grand jury and at the probable cause hearing in district court.

Counsel also conducted a thorough examination of Palmer. At the conclusion of the hearing, counsel vigorously argued that Officer Todd's actions were not justified under the various search and seizure exceptions – including a pat-down search, the plain view doctrine, or a search incident to arrest. The fact that the trial judge rejected these arguments in no way suffices to establish deficient performance by counsel. The record was sufficient on its face, and the trial court did not err in denying the RCr 11.42 motion without an evidentiary hearing.

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

ALL CONCUR.

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