

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001510-MR

PATRICK B. SEEWRIGHT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 97-CR-02150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, JOHNSON, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Patrick B. Seewright (Seewright), appeals from the judgment of the Jefferson Circuit Court denying his motion pursuant to RCr 11.42 to amend his conviction and correct his sentence. Finding no error on appeal, we affirm the order of the circuit court.

On September 15, 1997, Seewright pleaded guilty to trafficking in a controlled substance in the first degree, wanton endangerment in the first degree, and persistent felony offender in the second degree. In accordance with the Commonwealth's recommendations, the court sentenced Seewright to a total of fifteen-years' imprisonment. Subsequently, he filed a motion

pursuant to RCr 11.42 to amend his conviction and correct his sentence. Seewright alleged in his motion that he was denied effective assistance of counsel. He also filed motions requesting an evidentiary hearing and appointment of counsel. Without appointing counsel or conducting an evidentiary hearing, the court denied Seewright's RCr 11.42 motion, stating that record the clearly refuted his allegations. This appeal followed.

Seewright first argues on appeal that the court erred in failing to conduct an evidentiary hearing on his RCr. 11.42 motion. The court is not required to conduct an evidentiary hearing unless "the answer raises a material issue of fact that cannot be determined on the face of the record. . . ." RCr 11.42(5). "If the record refutes the claims of error, there is no need for an evidentiary hearing." Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998). Thus, in order to determine whether the court erred in failing to hold a hearing, we must examine whether the record refuted Seewright's claim of ineffective assistance.

In Hill v. Lockhart, 474 U.S. 522, 106 S.Ct. 366, 80 L.Ed.2d 203 (1985), the United States Supreme Court set forth a two-part test for considering an claim of ineffective assistance arising out of the context of a guilty plea. Under this test, the movant must first show that counsel made errors so serious that his or her performance fell outside the wide range of professionally competent assistance. Second, the movant must demonstrate that counsel's allegedly deficient performance so

seriously affected the outcome of the plea process that, but for the errors of counsel, there is reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial.

In the case before us, Seewright failed to meet either of the two components of this test. In his RCr 11.42 motion, he claimed that he was actually sentenced for a greater crime than that with which he had been charged or to which he had pled guilty and that his attorney was deficient in failing to object or to take any action in light of this error. However, the record indicates that Seewright was charged and sentenced correctly. On August 28, 1997, Seewright signed a "Waiver of Rights," which stated that he was waiving his right to be charged by indictment and that he understood that the Commonwealth would file an information charging him with trafficking in a controlled substance in the first degree, wanton endangerment in the first degree, and persistent felony offender in the second degree. The Commonwealth accordingly filed an information against Seewright charging him with the crimes enumerated in the Waiver of Rights. Seewright's motion to enter a plea of guilty and the document setting forth the Commonwealth's offer on a guilty plea both specified that he was pleading guilty to trafficking in a controlled substance in the first degree, wanton endangerment in the first degree, and persistent felony offender in the second degree.

The record reveals that before accepting Seewright's guilty plea, the court questioned Seewright extensively as to the

rights he was waiving, the consequences of entering a guilty plea, the charges to which he was pleading guilty, and whether he was satisfied with the performance of his attorney. Seewright indicated to the court that he fully understood the rights he was waiving and the charges against him and that he had been satisfied with his attorney. The record clearly refuted Seewright's allegations of ineffective assistance of counsel. Thus, the court did not err in failing to conduct an evidentiary hearing.

Seewright next contends that the court erred in failing to appoint counsel to represent and assist him with his RCr 11.42. We disagree. RCr 11.42 provides for appointment of counsel – when a hearing is required – to assist indigent movants. In Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), the Kentucky Supreme Court held that RCr 11.42(5) and KRS 31.110 create a right to assistance of counsel for the preparation of a motion as well as participation at a hearing. However, in Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984), the Court upheld (as harmless error) a denial of a request for counsel where the record showed that "application for RCr 11.42 relief . . . [was] an exercise in futility." Id. at 339. Subsequently, in Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985), this court held that "hearings and appointments [were] not necessary when the record refutes the movant's allegations." Having found that Seewright's allegations were refuted by the record, we find that appointment of counsel was not required.

Finally, Seewright asserts that the court erred in failing to make specific findings of fact and conclusions of law as to the reasons for its denial of his RCr 11.42 motion. We find this assertion to be without merit. Upon the court's denial of his RCr 11.42 motion, Seewright filed a motion requesting the court to make findings of fact as to its disposition of his RCr 11.42 motion. The court denied this motion, directing Seewright to see its notation on the June 5, 1998, order. The court made a notation on Seewright's motion itself denying the relief, finding that the record reflected effective assistance of counsel. Subsequently, on June 16, 1998, the court made a notation on Seewright's proposed order to appoint counsel, denying his request on the grounds that his motion was replete with errors and incorrect allegations. Although the court's notations were succinct and to the point, they nonetheless constituted adequate findings of fact.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Patrick B. Seewright
Eddyville, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, KY