

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001808-MR

EUGENE WOODARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH H. ABRAMSON, JUDGE  
ACTION NOS. 97-CR-000635 & 97-CR-002116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM and KNOFF, Judges, and MARY COREY, Special Judge.<sup>1</sup>

BUCKINGHAM, JUDGE: Eugene Woodard appeals from an order of the Jefferson Circuit Court denying his RCr<sup>2</sup> 11.42 motion to vacate his conviction and sentence. We affirm the order of the trial court.

As a result of a consent search of a residence in Jefferson County on December 28, 1996, Woodard was indicted by a grand jury and charged with first-degree trafficking in a

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<sup>1</sup> Senior Status Judge Mary Corey, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

controlled substance (cocaine) while in possession of a firearm, trafficking in marijuana while in possession of a firearm, and illegal use or possession of drug paraphernalia while in possession of a firearm. Pursuant to a plea agreement with the Commonwealth, Woodard entered an Alford plea of guilty to the crimes. The guilty pleas were entered before the trial court on May 14, 1997, and the plea agreement provided for a sentence of ten years on the cocaine charge, one year on the marijuana charge, and one year on the drug paraphernalia charge. The agreement further stated that all sentences should run concurrently and that the Commonwealth had no objection to Woodard receiving probation provided he received no new charges before sentencing.

On June 14, 1997, Woodard appeared before the trial court for sentencing. The court sentenced Woodard to ten years' imprisonment in accordance with the plea agreement and probated his sentence for a period of five years. The probation was subject to various conditions, including that Woodard refrain from violating the law, comply with the regulations and supervision of his probation officer, and serve six months in the county jail with work release allowed.

On July 2, 1997, Woodard failed to return to jail after being out on work release. On July 19, 1997, he was apprehended by law enforcement officers and was subsequently charged with second-degree escape, possession of a handgun by a convicted felon, and third-degree assault on a police officer. On September 2, 1997, he appeared with counsel before the trial court and pled guilty to the three charges pursuant to a plea agreement with the

Commonwealth. He waived the preparation of a presentence investigation report and consented to final sentencing at that time. Pursuant to the plea agreement, Woodard was sentenced to one year on the escape charge and five years on the handgun charge. The sentences were ordered to run consecutively for a total sentence of six years and were also ordered to run consecutively with the ten-year sentence received in this case. The handgun charge was dismissed by agreement. Further, Woodard acknowledged to the trial court that the new crimes and convictions constituted a violation of his probation, and he stipulated that his probation should be revoked. Consequently, the court entered an order revoking his probation in this case and reinstating his ten-year sentence.

On February 23, 1998, Woodard filed a motion to vacate the judgment pursuant to RCr 11.42. He also moved the court to grant him an evidentiary hearing. By order entered by the trial court on June 27, 2000, the motions were denied. This appeal followed.

Woodard's first argument is that the trial court lacked jurisdiction to revoke his probation. He claims that he was given no notice of a probation revocation hearing, no hearing, no fact findings, no opportunity to present witnesses and cross examine witnesses, and no assignment of counsel prior to his probation being revoked. In support of his argument, Woodard cites KRS<sup>3</sup> 533.050(2) which states that "[t]he court may not revoke or modify the conditions of a sentence of probation or

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<sup>3</sup> Kentucky Revised Statutes.

conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.”

We reject Woodard’s argument for two reasons. First, if Woodard was aggrieved by the trial court’s actions in revoking his probation, he had an available avenue to seek relief by directly appealing the revocation order. RCr 11.42 is not a vehicle for seeking relief that was accessible by direct appeal. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Second, Woodard’s assertion that the trial court’s failure to adhere to KRS 533.050(2) deprived the court of jurisdiction to revoke his probation is also without merit. The obvious purpose of the statute is to give a defendant notice of the grounds for revocation, an opportunity to consult with counsel, and a hearing after proper notice. When Woodard pled guilty to the escape and assault charges, he acknowledged that those convictions were sufficient to revoke his probation. In fact, he stipulated that his probation should be revoked. Furthermore, he was represented by counsel. As in Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988), he “cannot now be heard to complain”. Id. at 874.

Woodard’s second argument is that he received the ineffective assistance of counsel because counsel allowed him to plead guilty before properly investigating the facts of his case. He claims that the residence in which the cocaine, marijuana, and drug paraphernalia were found was not his residence and that he had no control of those items. He asserts that had counsel fully investigated these matters and requested a suppression hearing, the result of his case may have been different.

In demonstrating the ineffective assistance of counsel in connection with a defendant pleading guilty, the defendant must show that counsel's performance was deficient and that the deficient performance so effected the outcome of the proceedings that "but for the errors of counsel, there was a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). Woodard claims that he would not have pled guilty under the circumstances but for the advice of his counsel who had not fully investigated the facts of the case. Specifically, he claims that the apartment was not his residence but was the residence of his cousin, Jacky Woodard.

Prior to trial, the Commonwealth filed a discovery compliance document with the trial court that contained several documents. There was a copy of a residential lease that indicated the apartment was leased by Woodard's cousin, Jacky. However, there was also a statement in the record from Woodard's cousin, Carolyn Jones, that Jacky Woodard was not living in the residence and had obtained the apartment for the appellant as a favor so he (appellant) could live there. Further, the discovery compliance by the Commonwealth revealed photographs of the residence that were taken by the police officers during the search. One of the photographs is of an envelope addressed to Woodard at the apartment's address. Another photograph shows Woodard's high school diploma on display in the apartment.

In its order denying Woodard's RCr 11.42 motion, the trial court accurately notes that there is substantial evidence in the record to refute Woodard's argument that he did not live

in the apartment. Although Woodard claims his counsel's performance was deficient in advising him to plead guilty without further investigation, it is apparent that there was considerable evidence that Woodard resided in the apartment. Advising Woodard to plead guilty and receive a probated sentence appears to us to be sound advice by counsel rather than ineffective assistance. "When an attorney, after making an adequate investigation, in good faith and in the exercise of reasonable judgment induces his client to take this course, we cannot discern in what respect this constitutes ineffective representation." Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

Woodard's last argument is that the trial court erred in denying him an evidentiary hearing. "[A] hearing is required only if there is an issue of fact which cannot be determined on the face of the record." Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993). The trial court in this case correctly determined that an evidentiary hearing was not required.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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