

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002611-MR

RONALD LEE HEARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 03-CR-00295-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel for failure to investigate and discover that one of appellant's prior felony convictions (for persistent felony offender purposes) was actually a misdemeanor for which appellant had served out his sentence more than five years before commission of the present offenses. Because the record

refutes appellant's allegation that the prior conviction was a misdemeanor and because only one prior felony conviction needs to be within five years of the present offense pursuant to KRS 532.080(3)(c)1, we affirm the denial of the RCr 11.42 motion without a hearing.

On March 17, 2003, appellant, Ronald Heard, was indicted for possession of a controlled substance in the first degree, possession of marijuana, possession of drug paraphernalia, and for being a persistent felony offender in the first degree ("PFO I"). According to the indictment, the offenses were committed on January 25, 2003. In support of the PFO I charge, the indictment alleged that Heard had previously been convicted of the felony offenses of burglary in the third degree in 1982, possession of cocaine in 1992, and flagrant nonsupport in 2001.

On May 2, 2003, Heard pled guilty to all of the charged offenses in exchange for the Commonwealth's recommendation that he be sentenced to a total of ten years on all the counts. Heard was subsequently sentenced to one year on the first-degree possession of controlled substance charge, enhanced to ten years on the PFO I charge, and twelve months on each of the misdemeanor charges to be served concurrently with the ten-year sentence.

On September 29, 2003, Heard filed a motion pursuant to RCr 11.42 to vacate or set aside his conviction. In this motion, Heard alleged that his counsel on the guilty plea rendered ineffective assistance of counsel when he failed to discover that one of the prior felony convictions underlying the PFO I charge, the 1992 conviction for possession of cocaine, was actually a misdemeanor for which he had served out his sentence in 1994. Heard insisted that had his counsel discovered and informed him of this fact, he would not have pled guilty to the PFO I charge. In the alternative, Heard contended that had his counsel objected to the PFO I charge because the 1992 conviction was a misdemeanor, the charge would have been dismissed altogether. The trial court denied the RCr 11.42 motion without an evidentiary hearing, and this appeal followed.

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for the deficient performance, the defendant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). A hearing on an RCr 11.42 motion is not necessary if the record on its face refutes the movant's allegations. Hopewell v. Commonwealth, 687 S.W.2d 154 (Ky. App.1985).

As to Heard's claim that one of the felony convictions underlying his PFO I conviction was actually a misdemeanor, Heard did not include any of the record of the prior conviction in the record on appeal before us. Nor did he even attach a copy of the final judgment of conviction in that case to his RCr 11.42 motion. There is simply nothing in the record before us to support Heard's claim except his unsubstantiated self-serving allegation. In fact, the record in the present case refutes Heard's allegation that the prior conviction at issue was for a misdemeanor.

During the plea colloquy in the instant case, Heard admits to having two prior felony convictions, one being in 1992. Also, the indictment in the case at bar states that the 1992 conviction for possession of cocaine, which served as a basis for the PFO I charge, was a felony. Finally, in the court's opinion and order denying the RCr 11.42 motion, the court takes judicial notice of the Fayette Circuit Court record 91-CR-050 in which Heard was convicted of the felony of possession of cocaine.

Heard next argues that since he served out his sentence on the 1992 conviction in 1994, it could not serve as the basis for the PFO I charge pursuant to KRS 532.080(3)(c)1. Thus, his counsel on the guilty plea was ineffective for advising and allowing him to plead guilty to the PFO I charge.

KRS 532.080(3)(c)1 provides that a PFO I offender must have "[c]ompleted service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted." (emphasis added). That subsection has been interpreted so as to require only that completion of service of sentence or discharge from probation or parole on any, not each, of the prior convictions be within five years of the commission of the current offense. Howard v. Commonwealth, 608 S.W.2d 62 (Ky. App. 1980). Since it was undisputed that completion of the sentence on the 2001 conviction for flagrant nonsupport was within five years of the current offense, it is immaterial when Heard served out his sentence on the 1992 conviction. Hence, Heard's counsel was not ineffective for advising and/or allowing him to plead guilty to the PFO I charge.

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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