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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001769-MR

RICHARD LEE HOUP — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 02-CR-00978

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

HENRY, JUDGE: Richard Lee Houp appeals pro se from an August 24, 2004 opinion and order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to RCr[2] 11.42. Upon review, we affirm.

On September 16, 2002, Houp was indicted by the Fayette County Grand Jury on a count of obtaining or attempting

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

to obtain a controlled substance prescription by fraud, a Class D felony, and a count of being a first degree persistent felony offender.[3] A uniform citation issued by the arresting police officer indicates that he was notified by the Walgreen's Pharmacy at 260 East New Circle Road in Lexington that Houp had attempted to obtain Lortab and Valium via forged prescriptions in the name of "Melissa Jo Jewitt." The citation further states that when Houp was asked for proper identification by the pharmacist, he immediately left the pharmacy's drive-thru and proceeded south on Bryan Avenue. While Houp was stopped by another officer, the arresting officer verified that the prescription was a fake, and Houp was arrested. Houp was subsequently arraigned on the aforementioned charges and entered a plea of not guilty to the indictment.

On January 10, 2003, Houp filed a petition to enter a guilty plea to the pending charges. His attorney filed a certificate of counsel therewith. After a lengthy plea colloquy in open court with Houp and his attorney, the trial court entered judgment in accordance with the guilty plea and, on March 11, 2003, sentenced Houp to one (1) year imprisonment on the fraud count enhanced to ten (10) years as a result of the

[3] The PFO I count of the indictment specifically referenced Houp's previous convictions for theft by unlawful taking over $300, a Class D felony under Kentucky Revised Statute ("KRS") 514.030(2), and for selling a controlled substance to a minor, a Class B or C felony under KRS 218A.1401.

first degree persistent felony offender count, consistent with the Commonwealth's recommendation.

On January 5, 2004, Houp filed a motion to vacate judgment and sentence on a plea of guilty, pursuant to RCr 11.42. As grounds for this motion, Houp argued that his guilty plea was not entered knowingly, voluntarily, and intelligently because it resulted from the erroneous advice of his counsel as to the potential minimum amount of time Houp would be imprisoned following a conviction and as to the availability of parole, and from his belief that his attorney had done nothing to prepare for trial, making his conviction a near certainty. He also contended that his attorney refused to represent him at trial because of Houp's lack of financial resources. Houp further argued that his counsel was ineffective because he failed to conduct a properly thorough investigation into the facts of Houp's case, because he failed to consult with Houp as to trial strategy, and because he failed to present a defense.

Following the Commonwealth's response to this motion, the trial court entered an opinion and order on August 24, 2004 overruling Houp's motion without an evidentiary hearing. As grounds for this decision, the trial court found that Houp's ineffective assistance of counsel claims were without merit and were made moot because the trial court record clearly showed that Houp's guilty plea was made intelligently, freely, and

voluntarily, and with full knowledge of his possible defenses and constitutional rights. The trial court also noted that Houp had expressed satisfaction with the representation and advice afforded to him by his counsel.[4] This appeal followed.

On appeal, Houp raises the same issues that he presented to the trial court. The Commonwealth counters with contentions that Houp's RCr 11.42 motion was not properly verified, and that Houp affirmatively waived his defenses during the plea colloquy with the trial court.

As an initial matter, the Commonwealth provides us with no specific factual details as to why the verification filed by Houp in connection with his motion is improper. Moreover, the case law referenced by the Commonwealth provides nothing of a particular nature to support its general argument. We further note that this argument was not presented to the trial court, and the trial court made no comment as to whether or not Houp's verification was proper or improper. Consequently, we will not consider this particular argument any further.

In determining whether counsel rendered ineffective assistance in connection with a defendant's guilty plea, this court has stated:

[4] On August 25, 2004, the trial court entered an amended opinion and order as to Houp's motion. However, this opinion and order did not differ in any significant way from the one originally entered by the court, so it will not be addressed in any further detail here.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986), citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); see also Russell v. Commonwealth, 992 S.W.2d 871, 874 (Ky.App. 1999). "The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and 'caused the defendant to lose what he otherwise would probably have won.'" Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001), quoting Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000), overruled on other grounds by Stopher v. Conliffe, _____S.W.3d_____(Ky. 2005). It also requires an evaluation of "whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Id., quoting Foley, supra. The voluntariness of a guilty plea can only be determined by examining the "totality of the circumstances surrounding the guilty plea." Id. at 486; see

also Rodriquez v. Commmonwealth, 87 S.W.3d 8, 10-11 (Ky. 2002). "These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." D.R. v. Commonwealth, 64 S.W.3d 292, 294 (Ky.App. 2001) (Citations omitted).

We further note our Supreme Court's mandate that "[j]udicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect." Hodge v. Commonwealth, 116 S.W.3 463, 469 (Ky. 2002), citing Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Moreover, simply advising a client to plead guilty, in and of itself, is not evidence of ineffective assistance of counsel. Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky.App. 2004), citing Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983).

In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), our Supreme Court summarized the procedure for trial courts to follow in determining whether or not to conduct an evidentiary hearing under RCr 11.42. "After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an

evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Id. at 452, citing Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (Ky. 1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967).

Our courts have further held that "a defendant is not entitled to an evidentiary hearing to simply fish for claims, and such is not warranted if the record resolves all issues raised in the RCr 11.42 motion." Baze v. Commonwealth, 23 S.W.3d 619, 628 (Ky. 2000), citing Glass v. Commonwealth, 474 S.W.2d 400 (Ky. 1972); Ford v. Commonwealth, 453 S.W.2d 551 (Ky. 1970). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002), citing Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998).

Houp cites Sparks v. Sowders, 852 F.2d 883 (6th Cir. 1988) for the proposition that "gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." Id. at 885. In Sparks, the petitioner alleged that he was told by his attorney that he could receive a life

sentence without parole if he were convicted of murder; however, in reality, the petitioner would have been eligible for parole even if he were given a life sentence. Id. The petitioner further alleged that had he been given the correct information concerning parole, he would not have pled guilty and would have proceeded to trial. Id. The Court concluded that these allegations were sufficient to necessitate an evidentiary hearing and remanded the case to be conducted accordingly. Id.

Houp alleged in his RCr 11.42 motion, and again here, that his trial counsel incorrectly advised him that "if he went to trial he would be convicted and sentenced to the maximum having to serve 10 years [without the eligibility of parole] upon conviction as a Persistent Felony Offender First Degree." KRS 532.080(6)(b) clearly provides, however, that if the offense for which a defendant stands convicted is a Class D felony, "a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years." (Emphasis added). Moreover, KRS 532.080(7) provides: "A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a

person, in which case probation, shock probation, or conditional discharge may be granted." (Emphasis added).

The record here shows that the previous standing felony convictions cited in Houp's indictment as grounds for a PFO I charge included a conviction for selling a controlled substance to a minor, a Class B or C felony under KRS 218A.1401. It is well established that interpretation and construction of a statute is a matter of law for the court. Floyd County Board of Education v. Ratliff, 955 S.W.2d 921, 925 (Ky. 1997). We must interpret statutes according to their plain meaning and in accordance with the intent of the legislature. Id. We interpret the phrase "unless all offenses for which the person stands convicted are Class D felony offenses" as specifically including those offenses for which the defendant has previously been convicted. In reaching this conclusion, we point to subsequent statutory language in KRS 532.080(7) that reads, "[i]f the offense the person presently stands convicted of..." By utilizing the word "presently," the legislature has indicated that only an offense for which the defendant is currently convicted is to be considered. If the legislature had so intended, it could have utilized the word "presently" and required only "present" convictions to be considered for probation purposes where Class D felony offenses are involved. Therefore, we are of the opinion that Houp was ineligible for

probation under KRS 532.080(7). Assuming, arguendo, that Houp is correct in asserting that he was provided the legal advice noted above, we cannot conclude that his attorney was in error in doing so. Therefore, Houp's argument that this ground entitles him to RCr 11.42 relief is without merit.

Houp's other arguments as to the ineffectiveness of his counsel are equally without merit. As noted above, the trial court conducted a lengthy colloquy with Houp, who was placed under oath, during the guilty plea proceedings in order to verify that his guilty plea was being given voluntarily and intelligently. In particular, Houp stated under oath that he had discussed the defenses available to him in his case with his attorney, and that he was satisfied with the representation and advice that his attorney had given him. When advised by the trial court during the plea colloquy that he had defenses available to him under the specific facts of his case, Houp told the court that he was aware of these defenses but wanted to proceed with his guilty plea. He further stated that he understood all of his rights and that by pleading guilty he was giving up those rights, including his right to an appeal.[5]

Accordingly, the trial record, particularly Houp's assurances that he was satisfied with the representation of his

[5] We further note that Houp had previously signed and filed a petition to enter a guilty plea as to the pending charges, in which he expressed the same sentiments, including satisfaction with the representation of his counsel.

counsel, clearly refutes the allegations made in Houp's RCr 11.42 motion; moreover, we are satisfied that the trial court's colloquy with Houp, and the trial court record as a whole, establishes that his guilty plea was voluntary, knowing, and intelligent. Therefore, we find that no evidentiary hearing was required. Allen v. Commonwealth, 668 S.W.2d 556, 557 (Ky.App. 1984), citing Newsome v. Commonwealth, 456 S.W.2d 686 (Ky. 1970); Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965); see also Ford, 453 S.W.2d at 551-52.

Consequently, the decision of the Fayette Circuit Court overruling Houp's RCr 11.42 motion is affirmed.

ALL CONCUR.

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