

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001419-MR

GERALD HUGHES

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NOS. 03-CR-00245, 05-CR-00054, & 07-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Gerald Hughes (Hughes) appeals *pro se* from an order of the Henderson Circuit Court denying his post-conviction Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. For the reasons set forth below, we affirm the trial court's order.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTS

Hughes filed his RCr 11.42 motion in connection with three criminal cases. The last case, 07-CR-00097,² was based on a controlled buy using a confidential informant (C.I.). The buy took place on December 11, 2006, in Henderson, Kentucky. Detective Preston Herndon (Detective Herndon) met a C.I., searched him, equipped him with a video recording device, and provided him with \$40.00. The C.I. subsequently went to Hughes's apartment to purchase crack cocaine. Shortly thereafter, the C.I. returned and provided Detective Herndon with a quantity of suspected crack cocaine, which field-tested positive for cocaine. The C.I. also returned the video equipment. Detective Herndon reviewed the recording and identified Hughes as the man selling the cocaine.

Hughes was indicted for trafficking in a controlled substance and for being a first-degree persistent felony offender. In exchange for his plea of guilty, the Commonwealth agreed to reduce the persistent felon enhancement to second degree. Hughes pled guilty to the amended charge. Hughes signed the Commonwealth's formal plea offer and filed a standard motion to enter a guilty plea.

At the sentencing hearing, the trial court conducted an extensive plea colloquy in which it questioned Hughes as to the voluntariness of his plea. The trial court found that Hughes affirmatively answered all of its questions; that Hughes knowingly, freely, and voluntarily pled guilty, and that he knowingly and

² Because Hughes did not cite any error in his 2003 and 2005 convictions (03-CR-00245; 05-CR-00054), the trial court was correct in concluding that it was not in a position to vacate them.

intelligently waived his rights. Thus, in accordance with the Commonwealth's recommendation, the Henderson Circuit Court sentenced Hughes to ten years in prison. This sentence led to the revocation of his parole in his two previous cases, 03-CR-00245 and 05-CR-00054.

On June 5, 2008, Hughes filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42 arguing that he received ineffective assistance of counsel in his 2007 case. The Henderson Circuit Court denied Hughes's motion on July 15, 2008, and this appeal followed.

STANDARD OF REVIEW

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that, but for the alleged errors of counsel, there is a reasonable probability that he would not have entered a guilty plea, but

rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.E.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 U.S. at 694, 104 S.Ct. at 2068.

ANALYSIS

Although it is unclear from Hughes's brief what he is arguing on appeal, it appears that Hughes is contending that he received ineffective assistance of counsel because: (1) his counsel failed to investigate the reliability of the C.I. and failed to suppress the evidence obtained by the C.I., and (2) his counsel failed to challenge the excessiveness of his sentencing. Hughes also argues that the cumulative effect of these errors resulted in the denial of effective assistance of counsel.

First, we note that Hughes has failed to assert that absent the alleged errors of his counsel, he would not have pled guilty. As concluded by this Court in

Sparks, 721 S.W.2d 726, a defendant must demonstrate that, but for the alleged errors of counsel, there is a reasonable probability that he would not have entered a guilty plea, but rather would have insisted on proceeding to trial. Because Hughes fails to argue in his 11.42 motion that there is a reasonable probability that he would not have entered a guilty plea, his claims for ineffective assistance of counsel must fail.

Further, we are of the opinion that Hughes's responses during the plea colloquy conclusively refute any assertion that he would not have pled guilty but for the supposed failures of his counsel. A review of the plea proceeding reveals that Hughes's plea was made knowingly and voluntarily. Moreover, it is clear that Hughes was satisfied with his attorney's services and that he agreed that his attorney did everything he asked him to do in representing him. Additionally, the certificate of counsel on the written motion to enter the guilty plea confirmed that Hughes's counsel discussed the charges and all possible defenses with him.

However, even if Hughes did claim that he would not have pled guilty absent his counsel's alleged errors, we conclude that his claims of ineffective assistance of counsel would still fail. Hughes's first argument is that he received ineffective assistance of counsel because his counsel failed to investigate the reliability of the C.I. and failed to move to suppress the evidence obtained from the C.I. We disagree.

In order to support probable cause, the allegations of an informant must either be supported by indicia of that informant's reliability or corroborated

by independent police investigation. *Commonwealth v. Baldwin*, 199 S.W.3d 765, 769 (Ky. App. 2006). Hughes's counsel was not unreasonably ineffective in failing to move to suppress the evidence obtained by the C.I. due to the unreliability of the C.I. because the information was otherwise corroborated. Specifically, the police had a video recording of the controlled buy which identified Hughes as the man selling the cocaine. Thus, it was not necessary to verify the C.I.'s reliability because the police independently confirmed the information they received from the C.I. by watching the video recording. Therefore, Hughes's counsel was not ineffective in failing to file an unnecessary and futile motion to suppress the evidence obtained from the C.I. based on the C.I.'s alleged unreliability.

Hughes's second argument is that his counsel was ineffective for failing to argue that his sentence was excessive under the Anti-Drug Abuse Act of 1986. Under the Federal Sentencing Guidelines and the Anti-Drug Abuse Act of 1986, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine. In *Kimbrough v. United States*, the United States Supreme Court held that federal sentencing judges are not bound by the Federal Sentencing Guidelines' 100:1 crack-to-powder ratio. 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007).

However, Hughes's argument is flawed in that the trial court did not sentence Hughes under the Federal Sentencing Guidelines. Instead, Hughes was sentenced under Kentucky's penal code, which does not recommend different

sentences for crack and powder offenses. Therefore, Hughes's counsel was not ineffective for failing to argue that Hughes's sentence was excessive under the Anti-Drug Abuse Act of 1986 and the Federal Sentencing Guidelines.

Finally, as we can find no error in the trial court's decision to deny the motion for post-judgment relief pursuant to RCr 11.42, there is no basis for Hughes's claim that the cumulative effect of all the errors resulted in a denial of effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the Henderson Circuit Court's order denying Hughes RCr 11.42 relief is affirmed.

ALL CONCUR.

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