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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000397-MR

KEVIN HARRIS APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CR-00170

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Kevin Harris, appeals the September 24, 2008, order of the Christian Circuit Court, denying his motion to vacate judgment pursuant to RCr 11.42. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

[1] Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

On March 16, 2007, the grand jury of the Christian Circuit Court indicted Harris, charging him with sexual abuse in the first degree. On August 30, 2007, in accordance with a plea agreement, Harris appeared before the circuit court and pled guilty to the charge in return for the prosecutor's recommendation of a one-year period of imprisonment. As part of that agreement, however, Harris specifically agreed that if he were to fail to appear at the sentencing hearing, he would receive the maximum aggregate sentence allowed by law.

Thereafter, Harris failed to appear at his sentencing hearing. As a result, pursuant to the terms of the plea agreement, the circuit court entered judgment against Harris and sentenced him to imprisonment for five years. Subsequently, on September 2, 2008, Harris filed a motion to vacate judgment pursuant to RCr 11.42. That motion was denied by the trial judge on September 23, 2008, and entered by the clerk on September 24, 2008. It is from that order that Harris now appeals to this Court.

As his first basis for appeal, Harris argues that the trial court erred in refusing to grant an evidentiary hearing on his post-conviction motion.

Specifically, Harris asserts that his trial counsel failed to conduct a pretrial investigation of relevant facts and circumstances, or to establish a meaningful defense at trial because of a lack of investigation or knowledge of the relevant law. Harris further alleges that counsel never spoke with any witnesses,

whom Harris believes would have provided information establishing that his contact with the victim was not forcible. Finally, Harris asserts that he was coerced into pleading guilty, and that his plea was, accordingly, involuntary, unknowing and unintelligent.

In reviewing these issues, we note that the standard of review for denial of a motion for post-judgment relief under RCr 11.42 is clear. After the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, we are limited to a determination of whether the motion, on its face, states ground that are not conclusively refuted by the record, and which, if true, would invalidate the conviction. *See Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986).

Further, we note that generally, to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland,* the counsel's performance is judged by a standard of reasonable, effective assistance. It is the burden of the movant to establish that counsel's representation fell below the objective standard of reasonableness. In so doing, the movant must overcome the strong presumption that counsel's performance was adequate. *Jordan v. Com.,* 445 S.W.2d 878 (Ky. 1969); *McKinney v. Com.,* 445 S.W.2d 874 (Ky. 1969). Unless a

defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), our United States Supreme Court extended the test of *Strickland* to cases involving guilty pleas. In *Hill*, the Court ruled that, to satisfy the prejudice prong of the *Strickland* analysis, the convicted defendant must show that, but for counsel's unprofessional errors, the defendant would not have pled guilty, but instead, would have gone to trial. *See also Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986). Further, the mere fact that a defendant's plea was entered on the advice of counsel does not afford a sufficient basis upon which to find that it was coerced. *See Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). Finally, we note that our law is clear on the fact that a defendant is not automatically entitled to a hearing on an RCr 11.42 motion. *See Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). In *Hodge,* our Kentucky Supreme Court held that the dispositive inquiry on the issue of whether a hearing is required is whether the record refutes the allegations raised. *Id.*

In reviewing the record and arguments of the parties, we find that Harris entered his guilty plea knowingly, voluntarily, and intelligently, a finding which we believe is adequately supported by the record. During the course of that plea, he admitted openly that he committed the crime of sexual abuse in the first degree. A review of the record reveals that during the course of the proceedings, Harris engaged with the circuit court in a full colloquy concerning his rights, and his understanding of his plea. During the course of that colloquy, Harris

specifically stated that he was completely satisfied with the services of his counsel, and needed no additional time to consult with him. Further, Harris stated that no one had scared or coerced him into pleading guilty and that he was pleading guilty because it was in his best interests. Indeed, the trial court specifically found that Harris's guilty plea was both voluntary and intelligent.

Having reviewed the record, we find that the plea entered by Harris complied with the mandates of *Boykin v. Alabama*, 395 U.S. 238 (1969). Indeed, our own Kentucky Supreme Court, in *Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990), ruled that when a defendant had signed the AOC form "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," which contained a certificate of counsel and a waiver signed by the defendant, the signed form and certificate, combined with a videotape of the plea, satisfied the requirements of *Boykin*. The same is true of the matter *sub judice*.

Having made a voluntary, intelligent plea and having openly and freely admitted in court that he committed the crime of sexual abuse in the first degree, Harris cannot now claim that counsel failed to adequately investigate the facts of his case, or that counsel failed to advise him of the applicable law. Accordingly, we believe that an evidentiary hearing is not necessary, both in light of Harris's knowing and voluntary plea, and in light of the fact that he has failed to establish that but for counsel's advice, he would not have pled guilty and would have gone to trial.

Wherefore, for the foregoing reasons, we hereby affirm the September 24, 2008, order of the Christian Circuit Court, the Honorable John L. Atkins, presiding.

ALL CONCUR.

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