RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000725-MR
&
NO. 2011-CA-000029-MR

JEFFREY HARLOW — APPELLANT

v.

APPEALS FROM BARREN CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
ACTION NO. 04-CR-00291

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: Jeffrey Harlow appeals an order of the Barren Circuit Court denying his motions for relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 and Kentucky Rule[s] of Civil Procedure (CR) 60.02. After our careful review, we affirm.

In November 2006, Harlow pled guilty to complicity to burglary in the first degree, complicity to robbery in the first degree, and complicity to theft by unlawful taking over $300.[1] He received a sentence of ten-years' imprisonment to be probated for five years. On September 24, 2008, Harlow was arrested for a probation violation following positive drug tests and the discovery of alcohol and ammunition in his home. At a revocation hearing in January 2009, the trial court amended – rather than revoked – Harlow's probation to include enrollment in residential rehabilitation and completion of Barren County Drug Court.

Harlow completed twenty-eight days of treatment in residential rehabilitation in February 2009 and enrolled in Drug Court. On May 7, 2009, he reported for Drug Court and tested positive for amphetamines and methamphetamines. He denied having used drugs. But, four days later, Harlow signed a form admitting that he both had used drugs and had lied about using them. As a result, his probation officer requested that a probation violation warrant be issued for Harlow.

At a probation revocation hearing on June 12, 2009, the trial court found that Harlow had violated his probation by using drugs and alcohol and by failing to complete Drug Court. It ordered him to serve the ten-year sentence. In November 2009, Harlow, through counsel, filed a motion to vacate the sentence pursuant to CR 60.02 and RCr 11.42. On February 22, 2010, the trial court denied Harlow's motion. This appeal, *pro se*, follows.

[1] In 2006, theft by unlawful taking over $300 was a felony offense; in 2009, the statute was amended to raise the felony threshold to $500. Kentucky Revised Statute[s] (KRS) 514.030.

We first examine Harlow's motion pursuant to RCr 11.42. He argues that his sentence should be vacated because he received ineffective assistance of counsel, allowing the trial court to commit error. We disagree.

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States, which has prescribed a two-pronged test describing the defendant's burden of proof:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied.

The Supreme Court refined the *Strickland* test in the context of guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), in which it held that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59.

We first note that RCr 11.42(2) mandates that the motion *shall* be signed and verified by the movant and that "[f]ailure to comply with this section shall warrant a summary dismissal of the motion." Our Supreme Court has held that absolute –

not substantial – compliance is necessary regarding RCr 11.42 motions. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). Therefore, the trial court should have dismissed Harlow's motion. Although it did not, we will nonetheless examine the merits of Harlow's appeal because we may affirm the trial court's findings for any reason. *Martin v. Ohio County Hosp. Corp*., 295 S.W.3d 104, 112 (Ky. 2009).

Harlow first argues that his counsel was ineffective for not consulting him before filing his RCr 11.42 motion. The trial court held that this claim is unavailable to Harlow since it relates to his *post-conviction* counsel. Soon after the trial court's order, our Supreme Court held that a cause of action is amenable to claims of ineffective assistance of appellate counsel. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436-37 (Ky. 2010). However, *Hollon* holds that RCr 11.42 may be utilized for claims of ineffective assistance of post-conviction counsel solely in the context of *direct* appeals. The Court emphatically stated that "there is no counterpart for counsel's performance on RCr 11.42 motions or other requests for post-conviction relief." *Id*. at 437.

While the briefs did not cite *Hollon*, we have raised it *sua sponte* because we are mindful that the Kentucky Supreme Court has remanded cases procedurally similar to the one before us in order to be analyzed in light of *Hollon*. For the sake of judicial economy, we have undertaken our own *Hollon* analysis.

Harlow also argues that his counsel failed to persuade the court not to impose sanctions against him for violating terms of Drug Court. We cannot agree

that any error occurred. Harlow was found in violation of his Drug Court agreement after he tested positive for drugs. It is clear in the record that one of the conditions of his probation – even before it was amended to include the terms of Drug Court – required him to refrain from using drugs and alcohol. He had been aware of that requirement since his initial guilty plea in 2006. Harlow controlled his own opportunity to remain on probation. He even acknowledged in his RCr 11.42 motion that he would not be in prison if he had complied with the conditions of probation. We conclude that neither the court nor Harlow's counsel committed error as to this issue.

Harlow next contends that he received ineffective assistance of counsel because his attorney failed to object to his being sentenced to probation when he was not actually eligible for probation. We agree that Harlow was not actually eligible for probation in 2006. KRS 439.3401(2). However, he enjoyed a windfall rather than suffering prejudice as a result of this sentence. He enjoyed three years of freedom with the option of never returning to prison if he had complied with the terms of his probation for two more years. Although error occurred, it was not demonstrably prejudicial.

Harlow also argues that his sentence should be vacated because his trial counsel did not inform him that he would be required to serve 85% of his sentence before being eligible for parole. However, we have held that a lack of knowledge of parole consequences is not a reason to vacate a judgment under CR 11.42. *Turner v. Commonwealth*, 647 S.W.2d 500, 502 (Ky. App. 1982). In that case, the

court examined *Boykin v. Alabama*, 395 U.S. 238 (1969), which provides guidelines for the constitutionality of guilty pleas. According to *Boykin*, the trial court must engage in a colloquy with the defendant to insure that he enters his plea knowingly, voluntarily, and intelligently. However, *Boykin* does not impose the additional duty of informing the defendant of parole consequences and possibilities.

Harlow does not present any argument or evidence that suggests that he did not enter this plea other than knowingly, voluntarily, or intelligently. Therefore, we are not persuaded that reversible error occurred.

Harlow contends that his sentence should be vacated because the court did not consider an updated pre-sentence investigation (PSI) at the time that it revoked his probation. The record shows that at the time of his guilty plea, Harlow waived a new PSI because a recent one had been filed with the court. Harlow has not offered any authority for the premise that a PSI must be considered at a probation revocation hearing, and we are not aware of any. The statute that governs probation revocation requires a hearing and notice of that hearing to the defendant; it is silent regarding the necessity of a PSI. KRS 533.050. Therefore, the trial court did not commit error by not acquiring a new PSI.

Harlow's final argument in support of his RCr 11.42 motion is that his sentence should be vacated due to the accumulation of multiple errors by his trial counsel. We are not persuaded that any error was committed – much less numerous ones.

We now turn to Harlow's appeal of the trial court's denial of his CR 60.02 motion. CR 60.02 is meant to provide relief only for extraordinary reasons. Harlow's basis for his CR 60.02 motion is that the trial court denied his RCr 11.42 motion without an evidentiary hearing.

RCr 11.42(5) provides that an evidentiary hearing is necessary if there is any "material issue of fact that cannot be determined on the face of the record." All of Harlow's issues were resolved by the record. He has not presented any material issue of fact that warranted an evidentiary hearing.

Therefore, we conclude that the trial court did not err by denying Harlow's motion. We affirm the Barren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey Harlow, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky