

RENDERED: April 3, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3249-MR

YUSUF A. ALIM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 95-CR-1048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

*** *** *** ***

BEFORE: BUCKINGHAM, KNOX, and MILLER, Judges.

MILLER, JUDGE: Yusuf A. Alim brings this appeal from a November 21, 1996 order of the Jefferson Circuit Court. We affirm.

On March 12, 1996, appellant pled guilty to two counts of illegal possession of cocaine and one count of illegal possession of heroin. He was sentenced to twelve years' imprisonment.

On July 5, 1996, appellant filed an Ky. R. Crim. P. (RCr) 11.42 motion to vacate, set aside, or correct sentence. Appellant contended that he received ineffective assistance of counsel because trial counsel failed to tender an alternative

sentencing plan. On November 21, 1996, the circuit court denied appellant's motion without conducting an evidentiary hearing. This appeal followed.

Appellant contends the circuit court committed reversible error by denying his RCr 11.42 motion without an evidentiary hearing. It is well established that when the allegations raised in an RCr 11.42 motion are refuted upon the face of the record, an evidentiary hearing is not required. In the case sub judice, appellant contends that trial counsel was ineffective because of failure to proffer an alternative sentencing plan to the court. In order to prevail, appellant must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). First, he must demonstrate that the performance of counsel was deficient, and, second, that the deficiency resulted in actual prejudice. In essence, we believe there exists no reasonable probability that the result of the sentencing proceedings would have been different, that is appellant would have been granted probation.

In the judgment of conviction and sentence, the circuit court specifically concluded as follows:

. . . [T]he Court is of the opinion that probation or probation with an alternative sentencing plan, should be denied for the following reasons:

- XX A. There is substantial risk that defendant will commit another crime during any period of proba-

tion, probation with an alternative sentencing plan, or conditional discharge.

- XX B. The defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institute.

- XX C. Probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

Upon the foregoing, it is clear that the court's decision to deny appellant "probation or probation with an alternative sentencing plan" was based upon the likelihood of appellant recidivism and the need for institutional correctional treatment. Moreover, the court specifically found that probation with an alternative sentencing plan would "unduly depreciate the seriousness of the . . . [appellant's] crime." We think the record plainly demonstrates that trial counsel's alleged failure to proffer an alternative sentencing plan did not result in actual prejudice to appellant. Hence, we cannot say that the circuit court committed reversible error by denying appellant's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

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