

RENDERED: May 8, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-1299-MR

CECIL ALLEN BUFORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES E. KELLER, JUDGE  
ACTION NO. 95-CR-244

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, HUDDLESTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE. Cecil Allen Buford (Buford) appeals pro se from a May 14, 1997 order of the Fayette Circuit Court denying his motion for relief from a criminal judgment. Buford brought his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He claims that he was denied effective assistance of counsel. We affirm.

On June 15, 1995, a jury convicted Buford of two counts of trafficking in a simulated controlled substance (Kentucky Revised Statutes (KRS) 218A.350) and one count of trafficking in a controlled substance in the first degree (KRS 218A.1412).

Buford then entered a plea of guilty to being a persistent felon in the first degree (PFO I). Buford was sentenced to prison for a term of ten years.

On three separate occasions in 1994 (November 23, 28, and 29), Buford sold a substance to undercover officers of the Kentucky State Police. These three transactions were recorded on video tape. The substance purchased on November 23 tested positive for cocaine. The substances purchased on November 28 and 29 were determined to be a waxy substance consisting mostly of paraffin.

Buford testified at trial that he always sold a simulated substance called "flick" and that he never sold cocaine. During the first encounter he did not have enough "flick" to sell, so he obtained some from a neighbor. It was his theory of the case that the cocaine was inadvertently obtained from his neighbor. His counsel argued that Buford did not have the requisite intent to sell cocaine; thus, he should have been found guilty of only the misdemeanor charges.

On direct appeal, counsel argued that Buford was entitled to a directed verdict because the Commonwealth did not prove that he knowingly sold cocaine. He also argued that his sentence for two counts of trafficking in a simulated controlled substance in violation of KRS 218A.350 should have been vacated on the ground that the statute was unconstitutional. Both arguments were rejected by this Court in Buford v. Commonwealth, Ky.App., 942 S.W.2d 909 (1997).

On March 7, 1997, Buford filed a pro se motion to vacate his sentence pursuant to RCr 11.42. On May 14, 1997, the trial court denied the motion without a hearing. This appeal followed.

RCr 11.42 provides persons under sentence with a procedure to raise collateral attacks on the judgments entered against them. When, as here, the circuit court has based its decision exclusively on the record, we review the decision anew, asking whether the record refutes Buford's factual allegations and whether his unrefuted allegations, if true, would invalidate his conviction. See Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985). To be entitled to relief from the judgment on the ground that his counsel was ineffective at trial, Buford must show both that counsel erred, in the sense of having abused his professional discretion, and that it is reasonably likely that the error produced an unfavorable result. 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, Buford argues that his counsel was ineffective for failing to request public funds to provide for an independent lab test of the alleged cocaine. We disagree.

The crux of Buford's defense was that the cocaine obtained from his neighbor was obtained unknowingly and that he intended to sell only "flick." Under this defense theory,

Buford's counsel concentrated on Buford's contention that he believed that the cocaine received from his neighbor was "flick." This, coupled with the fact that there was no evidence that the state police lab's procedures were suspect, supports Buford's counsel's decision in not requesting testing by an independent lab. Defense counsel's tactics were appropriate trial strategy and did not amount to ineffective assistance of counsel. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986).

Second, Buford argues that his counsel was ineffective for not calling his girlfriend as a witness. Buford alleges that his girlfriend would have testified that she saw him prepare the "flick" and that there was no cocaine involved. While this testimony would have corroborated Buford's testimony, the witness was not crucial to his defense. Whether to add cumulative evidence in a trial is best left to trial counsel rather than second guessing by this Court. Id.

Third, Buford contends that his counsel improperly advised him to plead guilty to the PFO I charge, because his counsel failed to determine the validity of his underlying convictions. We disagree.

In Eggerson v. Commonwealth, Ky. App., 656 S.W.2d 744, 746 (1983), this Court stated that "we do not believe that counsel's failure to object to a guilty plea conviction which on its face was perfectly valid, and to which there is no indication that he was apprised by appellant that the guilty plea was involuntary or otherwise improper, renders his assistance less

than reasonable." Thus, to attack defense counsel's failure to investigate an underlying conviction to a PFO charge, Buford must have advised his counsel during the proceedings below that his earlier plea was somehow invalid. Buford failed to do so. There is nothing in the record to indicate that defense counsel was aware of or was alerted to a reason to believe that an underlying felony conviction to the PFO charge was improper. Buford's contention is therefore without merit.

Lastly, Buford argues that the trial court erred in dismissing his motion without an evidentiary hearing. We disagree.

A hearing is required only if the motion "'raises a material issue of fact that cannot be determined on the face of the record.'" Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743 (1993) quoting RCr 11.42(5). As Buford's allegations were properly disposed of based on the record, a hearing was not necessary.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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