RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002481-MR

BOBBY BECKLEY — APPELLANTS

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
INDICTMENT NOS. 78-CR-00001,
78-CR-00002 and 78-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge. Bobby Beckley appeals from a Henry Circuit Court order that denied his motion to vacate the judgments in three criminal cases in which he entered guilty pleas. We affirm.

In January 1978, a Henry County grand jury issued three indictments — 78-CR-001, 78-CR-002 and 78-CR-003 — each charging Beckley with one felony count of burglary in the third degree (Ky. Rev. Stat. (KRS) 511.040). The indictments charged that Beckley had unlawfully entered the homes of three individuals on three

different occasions in October and December 1977, and stolen property including furniture and firearms. On May 1, 1978, Beckley pled guilty to the three counts of burglary pursuant to a plea agreement. Under the plea agreement, the Commonwealth recommended sentences of one year on each count and did not oppose concurrent sentencing. After conducting a guilty plea hearing, the circuit court accepted Beckley's guilty pleas and postponed sentencing pending preparation and review of a Presentence Investigation Report (PSI). On October 30, 1978, the trial court sentenced Beckley to serve one year on each of the three counts of burglary in the third degree with the sentences to run consecutively for a total of three years.

Some nineteen years later, on September 25, 1997, Beckley filed a document entitled "Petition for Post-Conviction Relief" with an attached memorandum of law. In the petition he alleged that his guilty pleas were not entered knowingly, voluntarily and intelligently, and that his attorney rendered ineffective assistance in relation to the pleas. Beckley requested the circuit court to vacate the convictions because the guilty pleas were entered unconstitutionally. In an opinion and order dated July 13, 1998, Henry Circuit Court denied the petition treating it as a motion to vacate, set aside or correct sentence under Kentucky Rule of Criminal Procedure (RCr) 11.42. The court stated that Beckley was not entitled to relief on the merits because the record refuted his allegations. It denied the motion on procedural grounds as well on the ground that it was untimely. This appeal followed.

On appeal, Beckley disagrees with the circuit court's treatment of his post-conviction petition as an RCr 11.42 motion, and suggests — for the first time — that it should be treated as a petition for a writ of habeas corpus or a writ of coram nobis. We reject Beckley's characterization of his petition and agree with the circuit court that RCr 11.42 is a more appropriate avenue for collateral attack in this case than habeas corpus. Habeas corpus is available only when the defendant seeks immediate release from prison. See, e.g., Hudson v. Commonwealth, Ky., 932 S.W.2d 371, 373 (1996); Brumley v. Seabold, Ky. App., 885 S.W.2d 954, 956 (1994). Because Beckley is not currently incarcerated in a Kentucky state penal institution, a writ of habeas corpus is unavailable. See also Commonwealth v. Marcum, Ky., 873 S.W.2d 207, 211 (1994)(RCr 11.42 procedure is adequate for collateral attack by a prisoner in custody under a judgment which he believes is defective with habeas corpus being an exception available if the judgment by which he is detained is void ab initio); Fryrear v. Parker, Ky., 920 S.W.2d 519 (1996)(writ of habeas corpus is available to persons seeking release from detention or present physical custody).

Similarly, the common law writ of coram nobis is now embodied in Civil Rule 60.02. CR 60.02 is available in criminal cases only where a remedy under RCr 11.42 otherwise is not available. RCr 60.02 is not a separate avenue of appeal to be pursued in addition to RCr 11.42. As the Supreme Court said in McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), cert. denied, 521 U.S. 1130, 117 S. Ct. 2535, 138 L. Ed. 2d 1035 (1998):

> A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); Gross v. Commonwealth, [Ky., 648 S.W.2d 853, 855-56 (1983).

Id. at 416 (emphasis supplied). See also Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999). Beckley could and should have raised all the issues presented in his current petition while he was serving his sentence on the 1978 convictions. He cannot now utilize CR 60.02 as an alternative avenue to raise issues that reasonably could have been presented earlier by way of an RCr 11.42 motion.

The circuit court properly denied Beckley's motion on procedural grounds. RCr 11.42 is available only for "a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge . . . ." (Emphasis added). Beckley states in his appellate brief that he currently is incarcerated in the federal prison system on a federal criminal conviction. As the circuit court noted, he is not "in custody" on the sentence associated with the 1978 Kentucky burglary convictions or any state criminal conviction. The record suggests that Beckley has served out his three-year sentence on the 1978 convictions and is not on

probation or parole. Thus, relief under RCr 11.42 is not available. See Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966); Sipple v. Commonwealth, Ky., 384 S.W.2d 332 (1964)("RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody"). Cf. Maleng v. Cook, 490 U.S. 491, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)(per curiam)(defendant no longer "in custody" for purposes of habeas corpus after sentence for conviction had fully expired).

In addition to the procedural bar, Beckley's complaints are without substantive merit. On appeal, Beckley presents the following arguments: (1) he was denied effective assistance of counsel; (2) his guilty pleas were not entered voluntarily, knowingly and intelligently; (3) the trial court failed to establish a factual basis for the guilty pleas; (4) he was not informed of the consequences of his pleas; (5) he was not informed of the nature and elements of the offenses; (6) his pleas were obtained by an unkept plea bargain agreement; (7) he was denied his right to a direct appeal; (8) he was not informed of his constitutional rights to trial, to confront his accusers, to the assistance of counsel, to remain silent, to the presumption of innocence, and to be proven guilty beyond a reasonable doubt; and (9) he was not informed that his convictions could be used for enhancement purposes later.

Beckley's motion raises various complaints challenging the conduct of the circuit court and his attorney. The record clearly refutes his allegations concerning the actions of the trial

court. Despite his assertion to the contrary, Beckley did appear in person with his attorney and participate in the guilty plea hearing on May 1, 1978. The record contains a certified memorandum of the colloquy involving Beckley, his attorney and the court. During the colloquy, Beckley's attorney indicated that he and Beckley had fully discussed the indictment, his client's constitutional rights and the plea agreement. Beckley affirmatively acknowledged that his attorney had discussed and explained the indictment to him. The court also read the indictment and Beckley indicated that he understood the charges. The court also carefully and fully delineated his rights to a speedy trial, to remain silent, to confront all witnesses, to have the court compel witnesses to appear in court, to legal representation and to trial by jury. Beckley answered affirmatively when asked if he wanted to plead guilty, and whether he was entering the plea freely, voluntarily, and intelligently without coercion or under any mental impairment. The court told Beckley that he could receive up to five years on each burglary count and that the court was not bound by the Commonwealth's sentencing recommendation. The court also specifically asked: "Has anybody at all made a promise to you or suggested to you that if you plead guilty I will go easy on you, maybe give you a lighter sentence, or probate you?" Beckley responded, "No sir."

The record contains a Pretrial Disposition Sheet outlining the prosecution's recommendation of one year on each count and stating that the prosecutor did not object to concurrent sentencing. This document also states that Beckley was waiving his

constitutional rights and contains the signatures of Beckley, his attorney and the prosecutor. Finally, Beckley signed the document entitled Waiver of Further Proceedings with Petition to Enter Guilty Plea explicitly setting out his various constitutional rights and the absence of any promise of probation by any person. These documents refute Beckley's allegations that he was not fully informed of the nature and consequences of his plea, that the circuit court did not establish a factual basis for the guilty pleas, that he was not informed of the nature and elements of the burglary offenses, that the pleas were obtained by an unkept plea bargain, and that he was not informed of his constitutional rights. The record shows that his pleas were entered knowingly, voluntarily, and intelligently. See Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990)(written documents signed by a defendant explaining indictment and waiver of rights were sufficient to show valid guilty plea). Beckley also was not improperly denied his right to direct appeal because by entering a guilty plea, rather than going to trial, he waived his right to a direct appeal.

Beckley argues that his guilty pleas were invalid because he was not informed that his convictions could be used later for enhancement purposes. Generally, whether a conviction can be used for enhancement purposes on a subsequent conviction is considered a "collateral," as opposed to a "direct," consequence of a guilty plea. While a defendant must be informed of all direct consequences of the plea before a valid guilty plea may be entered, a trial court need not inform him of any potential collateral consequences, including the enhancing effect of a conviction on

subsequent sentences. King v. Dutton, 17 F.3d 151 (6th Cir.), cert. denied, 512 U.S. 1222, 114 S. Ct. 2712, 129 L. Ed. 2d 838 (1994); United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990). More specifically, failure of the trial court to inform the defendant that his state conviction could be used to enhance his sentence in a future federal prosecution does not render the state guilty plea involuntary or invalid. United States v. Gentry, 782 F. Supp. 1276, 1283 (N.D. Ill. 1992)(involving enhancement of a federal handgun sentence based on prior state convictions for burglary pursuant to guilty plea), aff'd, 978 F.2d 1262 (7th Cir. 1992), cert. denied, 507 U.S. 978, 113 S. Ct. 1429, 122 L. Ed. 2d 797 (1993). Consequently, the circuit court's failure to advise Beckley that his convictions could be used for enhancement purposes did not render the guilty pleas invalid.

Beckley also argues that the convictions are invalid because he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test by showing: (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). When a defendant challenges a guilty plea based on ineffective assistance of counsel he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970), and that the deficient performance so

seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that he would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994). A court must indulge a strong presumption that counsel is competent, and the burden rests on the defendant to overcome the presumption by demonstrating a constitutional violation. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 873 (1998); Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 879 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993).

Beckley asserts that his attorney failed to do any pretrial research or investigate the case, that he failed to advise him of the later enhancement possibilities of the convictions, and that counsel told him he would receive probation. Beckley fails to provide any factual support for his contention that counsel did not perform an adequate investigation. He has not presented any specific examples of how counsel's investigation was deficient or what information an adequate investigation might have uncovered. Beckley's allegation on this point is simply too vague to rebut the presumption that counsel acted reasonably. See Strickland, 466 U.S. at 690, 1045 S. Ct. at 2066 (defendant must identify acts or omissions of counsel); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 56 (1990); Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970)(allegation of ineffective assistance of counsel must allege sufficient facts to support claim).

Beckley's complaint that counsel told him that he would receive probation does not establish ineffective counsel because he was specifically informed by the circuit court at the guilty plea hearing that the court alone would decide whether to grant probation. Beckley also indicated at the hearing in response to the court's inquiry that no one had promised him that the court would probate him. Thus, even assuming counsel told him he would receive probation, Beckley cannot establish that counsel's statements prejudiced him. See Ramos v. Rogers, 170 F.3d 560 (6th Cir. 1999); Baker v. United States, 781 F.2d 85 (6th Cir.), cert. denied, 479 U.S. 1017, 107 S. Ct. 667, 93 L. Ed. 2d 719 (1986).

Finally, Beckley has not demonstrated that counsel's failure to advise him of the potential use of the convictions for enhancement purposes constituted ineffective assistance of counsel. Even assuming that Beckley's attorney failed to advise him of the enhancement possibilities and that this constituted deficient performance, he has not shown that he suffered prejudice because of this deficiency. Beckley does not claim that he did not commit the three burglaries in 1977 or that the Commonwealth did not have sufficient evidence to obtain a conviction. The deficient performance at issue does not involve any information that would have affected the outcome of a trial. Beckley was facing a potential maximum sentence of fifteen years on the three counts of burglary upon conviction, whereas under the plea agreement the Commonwealth recommended the minimum sentence of one year on each count with no objection to the sentences running concurrently. The fact that the circuit court later decided to run the sentences

consecutively is irrelevant to Beckley's decision to plead guilty or go to trial because the plea agreement left that option open and the circuit court would have been free to run the sentences consecutively even after a jury trial. In any event, the three-year sentence was lenient under the circumstances. Consequently, Beckley has not shown that even if his attorney had informed him that the burglary convictions could be used for enhancement purposes upon a subsequent criminal conviction, he would have decided to go to trial rather than plead guilty. See United States v. Gentry, supra; Sims v. Superintendent of Clinton Correctional Facility, Dannemora, New York, 887 F. Supp. 571 (S.D.N.Y. 1995). In conclusion, Beckley has failed to satisfy his burden of establishing ineffective assistance of counsel sufficient to render his guilty plea unconstitutional.[1]

For the foregoing reasons, we affirm the order denying Beckley's "Petition for Post-Conviction Relief."

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby Beckley, pro se
Manchester, Kentucky

BRIEF FOR APPELLEE:

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Attorney General

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[1] Beckley's delay in raising this issue until nineteen years after pleading guilty and only when the state convictions were used for enhancement of his federal sentence suggests that the possible enhancement information was not critical to his decision to plead guilty.