

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002509-MR

ROY ELMER WHITE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 94-CR-00834

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GARDNER, HUDDLESTON AND KNOX, JUDGES.

GARDNER, JUDGE: Roy Elmer White appeals from an order of the Fayette Circuit Court denying his motion to vacate, alter, amend or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record, we affirm.

On August 24, 1994, Fayette County Police Detective Ronald Compton obtained a warrant to search the residence at 221 B Creekside Court in Lexington, Kentucky. On August 24, 1994, the police executed the search warrant and seized small amounts

of cocaine and marijuana, drug paraphernalia, a loaded .380 caliber semi-automatic handgun, approximately \$30,000 cash, and various miscellaneous papers. When the police entered the apartment, White was the only person inside and was in the bed in the bedroom. White was arrested and charged with various drug offenses.

In October 1994, the Fayette County Grand Jury indicted White on one felony count of trafficking in a controlled substance (cocaine) in the first degree (KRS 218A.1412), one felony count of trafficking in marijuana within 1,000 yards of a school (KRS 218A.1411), one felony count of possession of a handgun by a convicted felon (KRS 527.040), one misdemeanor count of possession of drug paraphernalia (KRS 218A.500), and one count of being a persistent felony offender in the first degree (PFO I) (KRS 532.080).

On October 28, 1994, White's attorney filed a motion to suppress the evidence seized during execution of the search warrant. On November 23, 1994, the trial court conducted a hearing on the motion to suppress. The only witnesses who testified at the hearing were Detective Compton and Detective Mark Simmons, who had participated in surveillance of an undercover drug buy from the residence on Creekside Court. During the hearing, defense counsel asked Detective Compton if he knew the identity of the person who had leased the Creekside Court apartment, and why he did not include in the affidavit the fact that the apartment was not leased in White's name. Detective Compton responded that he had not investigated who

had officially leased the Creekside Court apartment because that fact was not particularly relevant. He stated that based on his experience, persons involved in illegal drug activity often register items through innocent persons in order to avoid detection and to conceal the identify of the responsible party from the police. Following counsel's argument that the affidavit was insufficient to support a valid search warrant, the trial court denied the motion to suppress.

On May 11, 1995, White was tried before a jury. The Commonwealth's witnesses included several of the police officers who participated in the search of the Creekside location. Detective Compton testified that White was in the bedroom and was the only person in the apartment when the police executed the search warrant. He said that the police found marijuana, cocaine, drug paraphernalia, all of the cash, and the handgun in the bedroom. Compton also stated that upon questioning White at the time of the search, he had identified 221 B Creekside Court as his place of residence. Defense counsel cross-examined Detective Compton about whether he had attempted to procure White's driver's license and car registration to ascertain his place of residence. Detective Compton responded that White did not have his driver's license at the time of his arrest, and that he did not attempt to independently obtain information about White's driver's license registration, but that he did obtain the car

registration for White's 1988 Peugeot, which listed 432 Smith Street as White's address.

The defense witnesses included White and his uncle, Calvin Archie. White testified that he had lived at 432 Smith Street with his father for over four years prior to his arrest. During White's testimony, the defense introduced a copy of the automobile title registration for White's 1988 Peugeot and his Kentucky State driver's license, both of which listed his place of residence as 432 Smith Street. He stated that his girlfriend, Linda Leach, leased the Creekside apartment and lived there with the couple's young daughter. White testified that he visited the Creekside apartment frequently and occasionally stayed there overnight, but that because his father had serious medical problems, he had to spend most of his time at the Smith Street location. He stated that he had spent the night before the search at the Creekside apartment, that he was asleep when the police entered the apartment, but that none of the drug related items in the apartment belonged to him. On cross-examination, White admitted that he received mail addressed to him at the Creekside location and that the utilities bill for that apartment was in his name. Archie also testified that White lived at 432 Smith Street with his father.

White's attorney called Linda Leach as a witness but before she could take the stand, the prosecutor raised the issue of whether she had been advised of her Fifth Amendment right against

self-incrimination. Defense counsel told the judge that he expected Leach to testify that the marijuana and handgun belonged to her and that he had advised her of the consequences of that testimony. The trial judge then advised Leach of her right against self-incrimination and appointed a public defender to represent her for purposes of discussing with her whether she still wanted to testify. The prosecutor stated that he intended to bring criminal charges against her if she admitted possession of illegal drugs in her testimony. The court recessed the trial for a short period while Leach consulted with an attorney. Upon resumption of the trial, Leach invoked her Fifth Amendment right and decided not to testify. White's attorney then moved for a mistrial alleging the prosecutor had coerced Leach and caused her to not testify. The trial court held that the prosecution did not improperly coerce Leach and denied the motion for a mistrial.

In his closing argument, defense counsel argued that the Commonwealth failed to show that White possessed any of the illegal drugs or the firearm recovered in the search. He stated that if the police had interviewed the landlord, they would have discovered that White was not the legal lessee. He contended that there was insufficient evidence that White lived at the apartment, rather than merely visited there frequently. Counsel argued that White actually lived with his father at a different residence.

The jury found White guilty of trafficking in a controlled substance (cocaine), possession of marijuana, and possession of drug paraphernalia. White waived sentencing by the jury and pleaded guilty to being a PFO I. The Commonwealth recommended that White be sentenced to ten years on trafficking enhanced to twenty years on the status offense of being a PFO I. In July 1995, the trial court sentenced White to ten years on trafficking in cocaine, enhanced to twenty years for being a PFO I, twelve months and a \$500 fine on possession of marijuana, and a \$500 fine for possession of drug paraphernalia.¹

In May 1995, defense counsel filed a motion for a new trial and a motion for judgment notwithstanding the verdict (JNOV). In the motions, counsel argued that the trial court erred in failing to grant the pretrial suppression motion. He also asserted that the court erred by failing to declare a mistrial because the Commonwealth intimidated White's girlfriend by threatening to prosecute her if her testimony at trial included evidence that she had committed a crime. The court denied these motions following a hearing on July 21, 1995.

White filed a direct appeal of his conviction. In his appeal, White challenged the validity of the search warrant on several grounds including the truthfulness of the information in the affidavit supporting the search warrant. The Kentucky Supreme Court

¹ The charge of possession of a handgun by a convicted felon subsequently was dismissed by agreed order.

rejected White's challenges, held the trial court properly denied the motion to suppress the evidence seized in the search, and affirmed the conviction. White v. Commonwealth, 95-SC-689-MR (unpublished opinion rendered August 29, 1996).

On August 4, 1998, White filed an RCr 11.42 motion raising several issues including, inter alia, the validity of the search warrant, obstruction of his ability to call witnesses by the prosecution, error by the court in giving any instructions on trafficking, and ineffective assistance of counsel. White also requested a hearing on his motion. The Commonwealth filed a response to the motion. On September 22, 1998, the trial court summarily denied the motion without a hearing. This appeal followed.

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to the judgments entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on a motion. Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, ___U.S. ____, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999). An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ___U.S. ____, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Sanborn v. Commonwealth, Ky.,

975 S.W.2d 905, 909 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

White raises several arguments on appeal. First, he contends that the evidence seized during the search was inadmissible at trial because the search warrant was issued for the wrong address. Second, he maintains that the police infringed his constitutional rights by obtaining a search warrant based on fraudulent and false information contained in the affidavit. Third, White argues that he was denied his constitutional right of compulsory process for obtaining witnesses because the prosecutor prevented his girlfriend, Linda Leach, from testifying through intimidation. Fourth, he asserts that defense counsel was constitutionally ineffective for failing to challenge the search warrant.

White's first three arguments are not subject to review by way of RCr 11.42, and therefore, are procedurally barred. In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court delineated the procedure for challenging a criminal conviction. The Court stated as follows:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42 and in CR 60.02.

* * * *

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal

case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available.

Id. at 856. See also Commonwealth v. Ivey, 599 S.W.2d 456 (1980). RCr 11.42 is not a substitute for a direct appeal. Clay v. Commonwealth, Ky., 454 S.W.2d 109, 110 (1970), cert. denied, 400 U.S. 943, 91 S. Ct. 245, 27 L. Ed. 2d 247 (1970); Cinnamon v. Commonwealth, 455 S.W.2d 583, 584 (1970), cert. denied, 401 U.S. 941, 91 S. Ct. 942, 28 L. Ed. 2d 221 (1971). RCr 11.42 is limited to issues that were not and could not be raised on direct appeal. Sanborn, 975 S.W.2d at 908-09; Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990).

White raised several issues concerning the validity of the search warrant and the sufficiency of the supporting affidavit in his direct appeal. In the current appeal, White raises several of the same grounds challenging the search warrant that he presented in his direct appeal. The Kentucky Supreme Court rejected his arguments and affirmed the trial court's decision to deny the motion to suppress. We believe White's complaints concerning the search warrant either have been or could have been raised on direct appeal, and thus, are not cognizable pursuant to RCr 11.42.

Similarly, White's third argument dealing with Linda Leach's failure to testify was raised at trial by defense counsel's motion for a mistrial. Counsel presented the same argument in his oral motion that White asserts on appeal in alleging the prosecution intimidated Leach. Clearly, this issue could and should have been included in the direct appeal.

White's final issue involves a claim of ineffective assistance of counsel in violation of the Sixth Amendment. White argues that his attorney was ineffective for failing to challenge the search warrant based on the fact that he lived at 432 Smith Street. White contends that if counsel had investigated his residence and challenged the search warrant on the grounds that he resided at the Smith Street location, rather than the Creekside Court location, the warrant would have been found invalid.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair. 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); Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 112 L. Ed. 2d 180 (1993). Attorney performance is based on an objective standard of reasonableness under the prevailing professional norms.

Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Harper v. Commonwealth, Ky., 978 S.W.2d at 315. In order to establish prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, ___U.S. ___, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

White has not demonstrated either that counsel was deficient or that he suffered actual prejudice. The record unambiguously reveals that White's attorney knew that White maintained a residence at 432 Smith Street. He raised this fact during the suppression hearing and at trial. Both White and his uncle testified that White lived with his father at the Smith Street location. Counsel introduced White's driver's license and car registration which listed 432 Smith Street as his residence. Counsel challenged the validity of the search warrant at the suppression hearing based in part on the fact that the police did not know that Leach had leased the Creekside apartment and White allegedly lived elsewhere. Therefore, White has not demonstrated that counsel was deficient by acting outside the wide range of professionally competent assistance.

Even assuming counsel was deficient, White has not shown actual prejudice. The Kentucky Supreme Court held on direct appeal that the affidavit established sufficient probable cause to support

the search warrant. The fact that White may have resided at the Smith Street location would not render the search warrant invalid. It did not conflict with or negate the other information in the affidavit indicating that White was selling narcotics from the Creekside location and that evidence of illegal drug activity reasonably could be found there. See Commonwealth v. Smith, Ky. App., 898 S.W.2d 496 (1995) (affidavit invalid only if defendant can show that the police omitted facts with the intent to make or in reckless disregard of whether the omission made, the affidavit misleading and the affidavit supplemented by the omitted information would not have been sufficient to support a finding of probable cause). The existence of probable cause to search a building is not contingent on the identity of the persons occupying the place to be searched. Id. at 502, 504. Constructive possession of an object need not be exclusive to a single person. Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1971). White's admission at the trial that he visited the Creekside location frequently, stayed overnight there occasionally, and paid the utilities bills in his name belies his claim that he did not exercise dominion and control over items within the apartment. See Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998) (applying constructive possession principle for person staying in an apartment with others); Dawson v. Commonwealth, Ky., 756 S.W.2d 935 (1988) (finding constructive possession of drugs in apartment even though defendant claimed to have moved several months

prior to search). Consequently, White has not established that he suffered prejudice in that the search warrant would have been declared invalid and the evidence seized would have been held inadmissible at trial based on the fact that he maintained a residence at the Smith Street location.

White's reliance on Coker v. Commonwealth, Ky. App., 811 S.W.2d 8 (1991) is misplaced. In Coker, the police obtained a search warrant for the defendant's old residence but did not prepare a second petition and affidavit before searching his new residence. The court held that the second search conducted without any warrant petition and accompanying affidavit describing the premises to be searched was invalid. In the case at bar, the police submitted a petition for a search warrant for the location at 221 B Creekside Court. The affidavit presented information to support a search of that location. White's argument that the police could not search the Creekside location and could only search his residence on Smith Street merely because he was the object of the investigation is erroneous. Coker is clearly distinguishable from the current case.

For the foregoing reasons, we affirm the Fayette Circuit Court's denial of White's RCr 114.2 motion without a hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy E. White, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Michael L. Harned

Assistant Attorney General
Frankfort, Kentucky