

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001307-MR

TIMOTHY MULLINS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 95-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion on grounds that it was untimely filed and all of the claims were refuted by the record. While we agree with appellant that the motion was filed in a timely manner, we nevertheless affirm because the allegations contained therein were refuted by the record.

On May 2, 1996, appellant, Timothy Mullins, filed a motion to enter an unconditional guilty plea to murder, first-degree burglary, and theft by unlawful taking. Pursuant to a plea agreement, the Commonwealth agreed to recommend that Mullins

be sentenced to life imprisonment without the possibility of parole for twenty-five (25) years. In the judgment of May 2, 1996 accepting Mullins's guilty plea, the court stated that final sentencing would be held on May 10, 1996. On May 10, 1996, after a hearing thereon, the court entered a judgment sentencing Mullins to: life imprisonment without the possibility of parole for twenty-five (25) years on the murder conviction; twenty (20) years' imprisonment on the burglary conviction; and five (5) years' imprisonment on the theft conviction. On May 10, 1999, Mullins filed an RCr 11.42 motion claiming, among other things, that his plea was not entered voluntarily and that he received ineffective assistance of counsel. On May 13, 1999, the court denied the motion without a hearing. In the order, the court stated that the motion was not filed within three years after the final judgment as required by RCr 11.42(10). The court also went on to state:

Further, every ground stated in support of the motion is defeated by unequivocal matters in the record. Accordingly, the movant is not entitled to a hearing. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

From this order, Mullins now appeals.

Mullins first argues that his RCr 11.42 motion was filed in a timely manner. We agree. RCr 11.42(10) provides that all motions under that rule must be filed "within three years after the judgment becomes final. . . ." In the present case, we can only surmise that the court found that the motion was untimely filed because it was not filed within three years of the date of the guilty plea, May 2, 1996. However, that was not the

date the judgment was final. The judgment was not final until the order sentencing Mullins, which was entered on May 10, 1996. Accordingly, the court erred in finding that the motion was untimely filed.

Mullins next argues that the case must be remanded to the trial court for a full evidentiary hearing and review of the claims in his RCr 11.42 motion. We do not agree. Although the court did erroneously determine that the RCr 11.42 motion was untimely filed, the court also determined that there was no merit to the claims, as they were refuted by the record. Thus, we need not remand the matter to the trial court if we agree with that portion of the trial court's ruling.

Mullins's first argument in his RCr 11.42 motion is that there was no showing in the record that his guilty plea was entered voluntarily pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Upon reviewing the record, we see that there was ample proof that Mullins's plea was voluntary. First, the motion to enter a guilty plea signed by Mullins lists all of the rights Mullins would be giving up and states that the defendant understands that he is giving up said rights by pleading guilty. The motion further states that the plea was "freely, knowingly, intelligently and voluntarily made." The certificate of counsel attached to the motion confirms that the plea was made voluntarily and that all of the defendant's rights had been explained to him and that he understood those rights. In the transcript of the guilty plea, Mullins responded in the affirmative when asked if he was entering the plea of his

own free will and if he understood what he was doing in pleading guilty. Mullins also indicated he understood, that by pleading guilty, he was giving up his right to a trial by jury, an appeal, and his right to not incriminate himself. During the guilty plea, Mullins's attorney again confirmed that he had explained Mullins's rights to him. Finally, the judgment of May 2, 1996 states that Mullins understood the charges against him, that his plea was entered knowingly and voluntarily, and that he understood the rights he was waiving.

Mullins next argues that he was deprived of effective assistance of counsel when his attorney failed to investigate his case and advised him he had no defense to the charges. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for the deficient performance, the defendant would not have pled guilty but would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The defendant must state the facts underlying his claim of ineffective assistance of counsel with specificity since he has the burden of proving said claim. Strickland, 466 U.S. 668. In his motion, Mullins does not state what facts his counsel would have discovered had he adequately investigated his case, nor does he state any defense(s) that would have been available to him. In our view, Mullins's allegations are simply too general and are refuted by the record.

Mullins's third argument is that his sentence of life imprisonment without the possibility of parole for twenty-five (25) years was arbitrary and in violation of his due process and liberty interests because the court did not make a finding on the record of any of the aggravating circumstances in KRS 532.025. Sentencing pursuant to KRS 532.025 is not required if all parties are in agreement as to the sentence. Commonwealth v. Johnson, Ky., 910 S.W.2d 229, 231 (1995). Here, Mullins agreed to his sentence of life without the possibility of parole for twenty-five (25) years by entering into the plea agreement with the Commonwealth. Since the court accepted the Commonwealth's recommended sentence and sentenced Mullins according to the agreement, Mullins cannot be heard now to complain about the sentence.

Mullins's final argument is that the Commonwealth improperly failed to advise him of the penalty it would seek prior to trial. This allegation is unequivocally refuted by the record. The record contains the Commonwealth's offer on the plea of guilty which clearly states that the recommendations for sentencing would be life without the possibility of parole for twenty-five years on the murder charge, twenty (20) years on the burglary charge and five (5) years on the theft charge, all to run concurrently.

Since all of Mullins's allegations were refuted by the record, he was not entitled to an evidentiary hearing on his motion. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990), cert. denied, 502 U.S. 844, 112 S. Ct. 140, 116 L. Ed. 2d 106

(1991). For the reasons stated above, the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy Mullins, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky