

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002691-MR

BOBBY JOE FAUGHN

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 00-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: GUDGEL, Chief Judge; COMBS and JOHNSON, Judges.

COMBS, JUDGE: Bobby Joe Faughn, *pro se*, appeals from the Muhlenberg Circuit Court's November 7, 2000, denial of his motion to alter, amend, or vacate the order of the circuit court of October 24, 2000, denying his Kentucky Rules of Civil Procedure (RCr) 11.42 motion to vacate, set aside, or correct his sentence. Having concluded the circuit court did not err, we affirm.

The relevant facts of this case are not in dispute. Bobby Joe Faughn was charged with theft of property over \$300.00 Kentucky Revised Statutes ((KRS)) 514.030); assault, second degree (KRS 508.020); fleeing or evading police, first degree (KRS 520.090); and PFO I (KRS 532.080). These charges resulted

from events at a Wal-Mart in Central City, Kentucky, on March 10, 2000. Faughn and an accomplice took two lawnmowers from a sidewalk display and fled from the police. In the course of their flight, the vehicle operated by Faughn crashed and injured an innocent bystander. On July 13, 2000, Bobby Joe Faughn entered a guilty plea to a reduced charge of theft of property having a value of less than \$300.00 (KRS 514.030); second-degree assault (KRS 508.020); first-degree fleeing or evading police (KRS 520.090); and a reduced charge of PFO II (KRS 532.080).

Faughn was sentenced on July 13, 2000, as follows: twelve months on the theft charge; ten years on the assault charge; and five years on the fleeing and evading charge – enhanced to ten years based on the PFO II charge. These sentences were ordered to run concurrently for a total of ten years.

On September 30, 2000, Faughn filed a motion pursuant to RCr 11.42 to vacate or set aside his sentence. He argued that his guilty plea was not voluntary, that his counsel had been ineffective, and that his guilty plea violated KRS 505.020. The Muhlenberg Circuit Court denied the motion without a hearing on October 24, 2000. Faughn then filed a motion to alter, amend, or vacate that order; his motion was denied November 7, 2000, leading to this appeal.

On appeal Faughn contends the circuit court erred in not appointing counsel for him and in not holding an evidentiary hearing prior to ruling on the RCr 11.42 motion. We believe that Faughn's claims are without merit. An evidentiary hearing is not

required for an RCr 11.42 motion where the issues presented can be clearly determined from the face of the record. Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970). Our review satisfies us that the record sufficed to refute the grounds alleged in Faughn's motion.

In order to prove ineffective assistance of counsel, Faughn had to show: (1) that counsel made errors so serious that his performance fell outside the wide range of professionally competent assistance and (2) that the deficient performance was so prejudicial that the outcome of the defense would very likely have produced a different result but for that deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Taylor v. Commonwealth, Ky.App. 724 S.W.3d 223 (1986).

Faughn argues that his counsel failed to properly investigate the value of the property stolen and the intent necessary for the assault charge. The record plainly refutes that argument. The plea agreement alone reveals that Faughn's counsel negotiated a reduction in both the theft and PFO charges. In negotiating the plea, Faughn's counsel succeeded in reducing what could have been a twenty-year sentence to ten years. Furthermore, prior to entering his plea, Faughn admitted that he had been adequately represented by counsel. His statements in the record acknowledging the competency of his legal representation preclude an ineffectiveness argument pursuant to Harris v. Commonwealth, Ky.App., 688 S.W.2d 338, 341 (1984).

Faughn's claim that his guilty plea was not voluntary is also clearly refuted by the record. As required by Boykin v. Alabama, 395 U.S. 238; 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), the trial court properly determined that Faughn's plea was voluntary and recorded that determination in the record. In reviewing Faughn's guilty plea based on the totality-of-the-circumstances test of Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990), we believe that Faughn entered a voluntary guilty plea. The record reflects that before accepting the plea, the trial court carefully and in great detail reviewed each aspect of his plea with Faughn, meticulously reviewing his rights and the charges against him.

In his initial RCr 11.42 motion, Faughn argued that his guilty plea to both the assault and the fleeing charges violated KRS 505.020, which provides:

- (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
  - (a) One offense is included in the other, as defined in subsection (2); or
  - (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
  - (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

We have discovered no violation of KRS 505.020 in our view of the record.

Finally, Faughn argues that the trial court erred in not appointing counsel to represent him in his RCr 11.42 proceeding. Appointment of counsel is not necessary, however, where the record reveals that application for RCr 11.42 relief "is an exercise in futility." Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 339 (1984). We believe that such was the case as to this application for RCr 11.42 relief.

For these reasons, the order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Bobby Joe Faughn  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky