RENDERED: MAY 31, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001383-MR

GARY WAYNE CHAPMAN — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 96-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, HUDDLESTON, AND McANULTY, JUDGES.

McANULTY, JUDGE: The appellant, Gary Wayne Chapman, appeals from an order of the Perry Circuit Court that denied without a hearing his RCr[1] 11.42 motion to vacate, set aside, or correct his sentence for the offense of trafficking in marijuana within 1,000 yards of a school. We affirm.

On August 21, 1996, appellant Gary Wayne Chapman pled guilty to the offense of trafficking in marijuana within 1,000 yards of a school. Having entered his plea, Chapman accepted the Commonwealth's pre-trial diversion offer. Accordingly, Chapman's

[1]Kentucky Rules of Criminal Procedure

sentencing was diverted for a period of five years upon the following conditions: (1) the defendant shall have no further arrests; (2) the defendant shall regularly attend any AA or NA meetings as prescribed by the court; (3) the defendant shall undergo periodic drug screens; and (4) in the event of a violation as set forth above, the case may proceed to sentencing upon Motion of the Commonwealth or by the Court, *sua sponte*. The matter was dismissed without prejudice on September 9, 1997.

In February 1999, Chapman filed a motion to vacate the pre-trial diversion order and judgment pursuant to RCr 11.42. Following a response by the Commonwealth, the circuit court denied Chapman's motion without a hearing. The circuit court found, inter alia, that Chapman was not "in custody" for purposes of RCr 11.42 and thus he was barred from bringing a claim under RCr 11.42. Moreover, the circuit court found that even if Chapman were able to bring a claim under RCr 11.42, by pleading guilty Chapman had knowingly and voluntarily waived each basis for review of his RCr 11.42 Motion. This appeal followed.

Chapman's complaints on appeal are threefold. First, Chapman claims that the circuit court erred in finding that he is not "in custody" for purposes of RCr 11.42. Chapman also claims that the circuit court erred in finding that even if Chapman is properly able to seek relief under RCr 11.42, then by pleading guilty to trafficking in marijuana within 1,000 yards of a school that he has knowingly and voluntarily waived each basis for review of his 11.42 Motion. Finally, Chapman claims that the

circuit court erred in denying his motion for relief under RCr 11.42 without first conducting an evidentiary hearing.

Chapman contends that the circuit court abused its discretion by finding that Chapman was not "in custody" for purposes of RCr 11.42 and thus that RCr 11.42 is inapplicable to the case at bar. The plain language of RCr 11.42 provides that "a prisoner in custody under *sentence*" or "a defendant . . . who claims a right to be released on the ground that *sentence* is subject to a collateral attack" may bring a claim for ineffective assistance of counsel under RCr 11.42. (Emphasis Added). Although Chapman was charged with the offense of trafficking marijuana within 1,000 yards of a school, he was never sentenced for committing such a crime. Rather, by accepting the plea agreement offered by the Commonwealth, any sentence resulting from his committing the crime was suspended for a period of five years. Because the pre-trial diversion order and agreement do not constitute a sentence, Chapman has no redress under RCr 11.42.

Even if Chapman is afforded a remedy under RCr 11.42, the record is insufficient to support a finding of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused 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); 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). Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that the counsel made serious errors outside the wide range of professionally competent assistance 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 the appellant would not have pled guilty, but rather 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); Phon v. Commonwealth, Ky., 51 S.W.3d 456, 459-60 (2001); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18, 22 (1999).

It is well established that counsel is presumed to be constitutionally sufficient and that the movant of an Rcr 11.42 Motion has the burden of overcoming this presumption. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999). In his brief, Chapman makes several references to the plea transcript in order to overcome the presumption that his counsel was efficient. However, this transcript is not part of the record on appeal. Under CR 75.07(5), it is the duty of the appellant to see that the record is properly certified. Moreover, a silent record is presumed to support the circuit court. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 144-145 (1985).

Chapman has also failed to plead the prejudice prong of the Strickland test with sufficient specificity to invalidate his guilty plea. In order to prove actual prejudice in the context

of a guilty plea, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial." Phon v. Commonwealth, Ky. App., 51 S.W.3d 456, 459-460 (2001) citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d. 203 (1985). Nowhere in Chapman's pleadings does he allege that but for his counsel's professional errors, he would not have pleaded guilty and would have insisted on going to trial. Therefore, on this ground, Chapman fails to establish entitlement to relief.

Finally, Chapman claims that the circuit court abused its discretion by refusing to hold a hearing on his RCr 11.42 motion. It is well established that where a trial court has denied a defendant's motion for an evidentiary hearing on his RCr 11.42 Motion, appellate review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record, and, which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). Moreover, "[w]here the movant's allegations are refuted on the record as a whole, no evidentiary is required." Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986) citing Hopwell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985). Generally, pleading guilty waives all defenses except that the indictment did not charge an offense. Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994) citing Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). Thus, Chapman's guilty plea alone constitutes sufficient record to rule on his RCr 11.42 Motion.

In conclusion, Chapman has no redress under RCr 11.42 because he has not been sentenced. Moreover, even if RCr 11.42 is applicable to his claim, Chapman has failed to show with specificity that his counsel was deficient and that as a result, he was actually prejudiced by such ineffective assistance of counsel. Finally, the circuit court properly denied an evidentiary hearing on Chapman's RCr 11.42 motion.

For the foregoing reasons, the order of the Perry Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT.

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