

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000477-MR

MICHAEL L. JESSIE

APPELLANT

V. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NOS. 97-CR-00071 and 98-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

* * * * *

BEFORE: BARBER, GUDGEL, and GUIDUGLI, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Breckinridge Circuit Court denying appellant's RCr 11.42 motion. For the reasons stated hereafter, we vacate the court's order and remand this matter with directions to conduct an evidentiary hearing.

Appellant was indicted in October 1997 on a felony charge of receiving stolen property over \$300. In January 1998 he was indicted on a misdemeanor charge of second offense DUI, on a felony charge of fourth offense operating a motor vehicle while his license was suspended for DUI, and as a second-degree persistent felony offender (PFO) based on the receiving stolen property and the felony suspended license charges. In August

1998, pursuant to a plea bargain agreement whereby the PFO charge and the misdemeanor DUI charge were dismissed and the Commonwealth agreed not to pursue unspecified "charges on handgun or tractor," appellant pled guilty to the felony offenses of receiving stolen property and operating a motor vehicle on a license suspended for DUI. He was sentenced to serve consecutive terms of five years' imprisonment on the receiving stolen property charge and one year's imprisonment on the suspended license charge. Appellant subsequently filed an RCr 11.42 motion to vacate, alleging that he was afforded ineffective assistance of counsel. The court denied the motion without conducting an evidentiary hearing, and this appeal followed.

It is well established that one may not use an RCr 11.42 proceeding to attack the sufficiency of evidence to support a conviction. See Newberry v. Commonwealth, Ky., 451 S.W.2d 670 (1970). However, contrary to the Commonwealth's contention and the court's finding, appellant's claim is based not upon the sufficiency of the evidence, but instead upon a claim that he was afforded ineffective assistance of counsel during the guilty plea proceedings.

Appellant asserts and our review of the record indicates that although appellant pled guilty in September 1997 to driving on a license suspended for DUI, documents included in the circuit court record show that his license in fact was no longer suspended for DUI when the September 1997 events occurred. If that is indeed the case, the court might have been compelled to dismiss the September 1997 suspended license charge if counsel

had timely raised this point. As a result, the court also might have been compelled to dismiss the PFO charge, as it was based on that suspended license conviction.

Clearly, "it is ineffective assistance of counsel to fail, without a reasonable basis, to present a defense that would compel dismissal of the charge." Ivey v. Commonwealth, Ky. App., 655 S.W.2d 506, 512 (1983). See also Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001). Moreover, since appellant was sentenced to serve a one-year term of imprisonment for the suspended license conviction relating to the 1997 events, and since that sentence was ordered to run consecutive to the five-year maximum sentence imposed for the receiving stolen property conviction, we certainly cannot say that it is clear from the record that appellant was not prejudiced by counsel's failure to attack the 1997 suspended license charge. Although there may have been some reasonable basis for appellant's plea and counsel's apparent failure to present an available defense, no such justification exists on the face of the record provided to us on appeal. Thus, we must conclude that there are material issues of fact which are not answered by the record, and that an evidentiary hearing is required to address those issues and the issue of whether appellant was afforded effective assistance of counsel.

Appellant also raises issues on appeal regarding the voluntariness of his guilty plea. However, as that issue was not specifically raised below, it will not be addressed by this court on appeal.

The court's order is vacated and remanded to the trial court with directions to conduct an evidentiary hearing consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Neel, Jr.
Appellate Public Advocate
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Janine Coy Bowden
Assistant Attorney General
Frankfort, KY