RENDERED: June 4, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002188-MR

GENE COLLINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES SHAKE, JUDGE
ACTION NO. 97-CR-000909

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE;[1] BUCKINGHAM AND VANMETER, JUDGES.

VANMETER, JUDGE. Gene Collins appeals from an order of the Jefferson Circuit Court denying his petition for postconviction relief pursuant to RCr 11.42. For the reasons stated below, we affirm.

On April 10, 1997, Collins was indicted for

[1] Chief Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

first-degree trafficking in a controlled substance (KRS 218A.1412); tampering with physical evidence (KRS 524.100); resisting arrest (KRS 520.090); illegal use or possession of drug paraphernalia (KRS 218A.500); and first-degree persistent felony offender (KRS 532.080).

The charges resulted from the allegation that on November 29, 1996, Collins attempted to sell crack cocaine to undercover police officers; that upon realizing that his customers were police officers he tried to crush the cocaine; that Collins attempted to fight the police when they tried to arrest him; and that he had a crack pipe on his person. The persistent felony offender (PFO) indictment resulted from felony convictions which occurred in 1992 and 1994.

On August 28, 1997, the trial court entered an order referring Collins to drug court. The referral to drug court was pursuant to an agreement with the Commonwealth under which the Commonwealth agreed to dismiss the charges if Collins successfully completed the drug court program. On July 30, 1998, a bench warrant was issued because Collins failed to appear in drug court. On August 24, 1998, a second bench warrant was entered because Collins again failed to appear in drug court. On September 24, 1998, Drug Court Judge Henry Weber issued an order terminating Collins from the drug court program. The order stated that "the Defendant, having failed to meet the

requirements of the Jefferson County Drug Court is hereby transferred to Jefferson Circuit Court, Division Two, for further proceedings."

On June 9, 1999, Collins and the Commonwealth entered into a plea agreement. Pursuant to the plea agreement Collins was to receive five years on the trafficking charge, one year on the tampering charge, 12 months on the resisting arrest charge, and 12 months on the paraphernalia charge, with all sentences to run concurrently for a total of five years to serve. However, in exchange for a bond reduction pending sentencing, Collins agreed to serve ten years on the trafficking charge if he failed to appear at the sentencing hearing. Collins subsequently failed to appear at the scheduled sentencing hearing. On October 5, 1999, the trial court, consistent with the plea agreement, entered final judgment sentencing Collins to a total of ten years to serve.

On December 3, 2001, Collins filed a motion for postconviction relief pursuant to RCr 11.42. On January 24, 2002, the trial court entered an order denying Collins' motion for postconviction relief. On January 28, 2002, Collins filed a "Motion to Reconsider Opinion and Order." The trial court denied this motion on February 13, 2002. This appeal followed.

Collins' first two arguments, that he was denied due process when he was prosecuted in violation of his agreement

with the Commonwealth following his successful completion of drug court, and that he was denied due process when the trial court failed to conduct an evidentiary hearing regarding his alleged failure to complete drug court before permitting the prosecution to proceed, are not properly the subject of a RCr 11.42 motion. Matters which were or could have been the subject of an appeal may not be raised in a RCr 11.42 motion. *See Gross v. Commonwealth*, Ky., 648 S.W.2d 853, 857 (1983) (court holding "the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground which it is reasonable to expect that he or his counsel is aware of when the appeal is taken"). Any procedural deficiencies in the termination of appellant's diversion referral clearly should have been the subject of a direct appeal.

Next, Collins contends for various reasons that he received ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A*ccord*, *Gall v. Commonwealth*, Ky., 702 S.W.2d 37, 39-40 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance[.]" *Strickland*, 104 S.Ct. at 2065. In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate 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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985). *See also Phon v. Commonwealth*, Ky. App., 51 S.W.3d 456, 459-460 (2001); *Taylor v. Commonwealth*, Ky. App., 724 S.W.2d 223, 226 (1986).

Collins alleges that he received ineffective assistance of counsel because trial counsel failed to file a motion to dismiss the indictment based upon his successful completion of drug court. The record demonstrates, however, that Collins failed to successfully complete drug court.[2] Consequently, trial counsel did not provide ineffective assistance by failing to file a motion seeking to dismiss the indictment based upon the flawed premise that Collins had successfully completed the program.

Next, Collins contends that he received ineffective assistance of counsel because trial counsel gave him erroneous

[2] Collins' allegation is that he completed the substantive portion of drug court diversion, but failed only to complete the graduation part of the program. Under any scenario, the graduation is a part of the program. In addition, the record contains Collins' admissions at the October 23, 1998, hearing that he had relapsed into using illegal substances.

advice concerning the range of penalties to which he was subject under the April 10, 1997, indictment. Collins' argument is based on the premise that because his 1992 and 1994 felony charges[3] had resulted in "concurrent or uninterrupted consecutive prison terms" under KRS 532.080(4), they should have been deemed to be only one (1) conviction for purposes of PFO sentencing, so that he should have been charged only as a PFO second degree. Further Collins' argument to the trial court in support of his motion for RCr 11.42 relief stated:

> As a Second-Degree Persistent Felony Offender, Collins faced punishment of five to ten years if convicted of a Class D felony. Yet counsel advised Mr. Collins that he faced ten to twenty years even if convicted only of Possession of Cocaine. Based on this advice, Mr. Collins accepted a plea offer of five years - - five years better than he believed he could hope for at trial, and fifteen years better than the maximum. Had Mr. Collins been advised correctly, there is a reasonable probability he would have gone to trial.

The fallacy of Collins' argument is that one of the prior convictions was for possession of a controlled substance. Even under Collins' argument, and assuming he would have risked going to trial and receiving a possession conviction, that charge was still a Class C felony because of the prior

[3] The convictions which resulted in the PFO I charge against Collins were 1992 convictions for operating a motor vehicle under the influence, fourth offense, and operating a motor vehicle while license is revoked for DUI, and 1994 convictions for first-degree possession of a controlled substance and tampering with physical evidence.

possession conviction.[4] Due to his other prior felony conviction of, fourth-offense DUI, Collins still faced a possible second-degree PFO. The end result was still a possible sentence of ten to twenty years as a second-degree PFO, enhancing the change of possession of a controlled substance, second-offense. KRS 532.080(5). Hence, even if Collins was only convicted of being a second-degree PFO, he risked a twenty-year enhanced sentence whether he was convicted of trafficking in cocaine or convicted of possession of cocaine. In sum, Collins was properly informed regarding the potential sentencing range if convicted of possession of cocaine.

Next, Collins contends that his guilty plea was not knowing, intelligent, and voluntary because he entered the plea based upon erroneous information concerning the range of penalties. Again, this argument fails because Collins was properly advised.

Finally, Collins contends that he was entitled to an evidentiary hearing on his motion for postconviction relief. It is well settled that an evidentiary hearing on a defendants' RCr 11.42 motion is required only when the motion raises "an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743-44 (1993); *Hodge v. Commonwealth*, Ky. 68 S.W.3d 338, 342 (2001).

[4] Second-offense possession is a Class C felony. KRS 218A.1415(2)(b).

The court need not conduct an evidentiary hearing regarding issues which were refuted by the trial court's record. *Sanders v. Commonwealth*, Ky., 89 S.W.3d 380, 385 (2002). Here, because all issues raised by Collins are refuted by the record of the trial court, an evidentiary hearing is not required.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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