

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002412-MR

TIMOTHY TILLERY

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 99-CR-00162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: After entering a guilty plea, Timothy Tillery was sentenced to eight years in prison by the Bell Circuit Court for two counts of selling crack cocaine. He did not appeal, but he later filed postconviction motions to vacate the judgment. The motions were denied without an evidentiary hearing being held, and Tillery filed this appeal. We affirm.

On October 11, 1999, a Bell County grand jury indicted Tillery on two counts of first-degree trafficking in a

controlled substance, second offense, and for being a second-degree persistent felony offender (PFO II). The trafficking offenses each carried possible prison sentences of ten to twenty years. Had Tillery been convicted of those offenses, his sentences would have been enhanced had he also been found guilty of the PFO charge.

Rather than stand trial for the crimes for which he was indicted, Tillery entered into a plea agreement with the Commonwealth. Under the terms of the agreement, the two trafficking charges were amended from second offense to first offense. Further, the PFO charge was dismissed.

Before being sentenced, Tillery filed a motion to withdraw his guilty pleas. A hearing was held, but the motion was denied. Tillery was then sentenced by the court to eight years in prison on each trafficking charge, with the sentences to run concurrently with each other. The final judgment was entered on January 7, 2003.

With the assistance of counsel, on March 27, 2003, Tillery filed an RCr¹ 11.42 motion to set aside the judgment. He later filed a pro se motion to vacate the judgment pursuant to RCr 11.42 and/or CR² 60.02. In the latter motion he moved the court to appoint counsel, to conduct an evidentiary hearing, and

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

to allow him to proceed in forma pauperis. Furthermore, he filed a motion for the trial judge to recuse. All motions were denied by the court without an evidentiary hearing in an order entered on October 27, 2003. Tillery's appeal herein followed.

Tillery contends that the circuit court erred in not granting an evidentiary hearing. An evidentiary hearing on an RCr 11.42 motion is required if there is a material fact issue that cannot be conclusively resolved by examining the record. See Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

Tillery makes three arguments in his brief alleging the ineffective assistance of counsel in connection with his guilty plea. We will examine each to determine whether the record conclusively disproves his allegations.

Tillery first argues that his guilty plea was not made knowingly and voluntarily because he was denied the effective assistance of counsel. In support of this argument, he contends that his counsel failed to investigate the case, failed to interview prospective witnesses, and failed to "study the law and facts" of his case. He asserts that the record reflects that his plea did not satisfy the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). However, he fails to state the facts that would have been disclosed by further investigation, the names of the prospective witnesses who could have helped his defense, and the law and/or

facts that would have aided his counsel had he known of them. See RCr 11.42(2) which states in part that "[t]he motion . . . shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds."

The short answer to this argument is that the record indicates that Tillery's plea was entered knowingly, intelligently, and voluntarily, and that the requirements of the Boykin case were met. Tillery signed two documents prior to entering his guilty plea. The first was the Commonwealth's Offer on a Plea of Guilty, and the second was a Motion to Enter Guilty Plea. The first document specifically set forth the terms of the plea agreement, including the charges to which Tillery would be pleading guilty and the sentence he would receive. The second document explained his constitutional rights, including his right to a trial by jury, and acknowledged that he would be waiving all rights should he plead guilty to the charges. Additionally, the circuit court engaged in an extensive colloquy with Tillery explaining to him his constitutional rights as well as the consequences of a guilty plea.

"[T]he validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding

it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). See also Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). The circumstances in this case are similar to those in Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992). In that case the appellant's RCr 11.42 motion to vacate the judgment on the grounds that the plea was not made knowingly, voluntarily, and intelligently was denied where the transcript of the guilty plea proceedings and the accompanying forms signed by the appellant indicated that he had entered a valid plea. Id. at 434. Likewise, having reviewed the transcript of the guilty plea proceeding in this case and having reviewed the accompanying documents as well as the statements made by Tillery concerning his guilty plea at the hearing where he sought to have it withdrawn, we conclude that the record conclusively demonstrates the validity of the plea.

Tillery's second argument is that he received the ineffective assistance of counsel due to counsel's failure to discuss with him the possibility of being convicted of a lesser-included offense if he chose to stand trial. However, he does not state in either his brief or his motion what the lesser offense was or why the evidence would have warranted a conviction of a lesser offense. Assuming that Tillery could demonstrate that counsel rendered ineffective assistance in this regard, he has not indicated how he was prejudiced. In short,

we conclude he was not entitled to an evidentiary hearing on this issue.

Tillery's third argument is that he received the ineffective assistance of counsel because counsel grossly misadvised him as to parole eligibility on the sentence he received. In his RCr 11.42 motion, Tillery states that his attorney advised him that he would be eligible for parole after serving nineteen months and two days of the sentence. Having received an eight-year sentence, Tillery would have been eligible for parole consideration after serving twenty percent of it. Twenty percent of eight years (96 months) is 19.2 months. We fail to see any gross misadvice in this regard.

Although he does not make specific reference to it, Tillery's real complaint is that he discovered following sentencing that his parole in Tennessee would likely be revoked because of the judgment of conviction herein. This matter was specifically addressed by the trial court when Tillery entered his guilty plea. The court asked Tillery whether this conviction was going to be a violation of his parole in Tennessee. Tillery stated that it would not because "[t]his was prior."

The failure of an attorney to advise a defendant of parole eligibility prior to entering a guilty plea is not such a failure as to warrant relief under RCr 11.42. See Turner v.

Commonwealth, Ky. App., 647 S.W.2d 500, 502 (1982). Even if it were grounds for such relief, Tillery has not shown how his attorney's statement as to parole eligibility was inaccurate. Parole eligibility and the actual granting of parole are two different matters, especially considering that Tillery was on parole from Tennessee when he was convicted herein. In short, we conclude there was no constitutional violation to warrant relief from the judgment.

Finally, Tillery also apparently appealed from the circuit court's denial of his motion to recuse. Tillery did not address that issue other than brief mention of it at the conclusion of his brief. He failed to demonstrate how his motion had merit, and we conclude that the court properly denied it.

Because the record conclusively refuted the allegations made by Tillery in his motions, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

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