

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000907-MR
AND
NO. 2005-CA-000908-MR

MARK ALLEN HARPER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CR-00387

COMMONWEALTH OF KENTUCKY

APPELLEE

AND: NO. 2005-CA-000909-MR
AND
NO. 2005-CA-000910-MR

MARK ALLEN HARPER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 04-CR-00182

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Mark Allen Harper appeals the denial of several post-conviction motions following guilty pleas arising from two indictments in McCracken Circuit Court. The indictments were consolidated for sentencing. Harper argues that he is entitled to relief from the order of conviction and final sentence based on ineffective assistance of counsel, and a claim of illegal search and seizure. For the reasons stated below, we affirm the order on appeal.

On June 8, 2004, Harper entered a guilty plea in McCracken Circuit Court to possession of marijuana and drug paraphernalia. The charges were set forth in indictment 03-CR-387.

A separate indictment, 04-CR-182, charged Harper with manufacturing methamphetamine, possession of a controlled substance (methamphetamine), and with being a persistent felony offender. Harper later entered a guilty plea to the manufacturing and possession charges.

On October 28, 2004, Harper was sentenced on both guilty pleas. He received a sentence of one year in prison on indictment 03-CR-387, and eleven years on indictment 04-CR-182.

¹ Senior Judge Joseph R. Huddleston, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The sentences were to run consecutively for a total sentence of twelve years in prison.

In late February and early March of 2005, Harper filed a flurry of repetitive pro se motions challenging his convictions. He sought to proceed *in forma pauperis*, and moved for disqualification of the trial judge along with motions for bail, a bail hearing, appointment of counsel, RCr 11.42 relief, a full evidentiary hearing and production of court records under the Commonwealth's open records act. The motions were denied by orders entered on March 4 and March 7, 2005.

Additional motions were filed that set forth the same claims for relief raised in the February and March 2005 motions. These latter motions were denied by way of an order entered on April 11, 2005. On the same day, another order was entered denying Harper's additional, repetitive motions as moot. In May, 2005, Harper was allowed to proceed *in forma pauperis*.

On June 15, 2005, the circuit court entered an order denying more repetitive motions for RCr 11.42 relief, an evidentiary hearing, and the appointment of counsel. In denying the motions it noted that it would no longer acknowledge or rule upon additional motions unless tendered by appointed counsel.

The following month, Department of Public Advocacy counsel was appointed and then withdrew citing KRS Chapter 31. As a basis for the withdrawal, the DPA cited its belief that the

proceeding was not one which Harper would be willing to bring at his own expense. Harper now brings this pro se appeal from the denial of the two orders entered on April 11, 2005.² He does not appeal from the June 15, 2005 order.

Harper first argues that the trial court erred in failing to provide RCr 11.42 relief on the claim of ineffective assistance, and for failing to conduct an evidentiary hearing on same. He maintains that trial counsel was engaged in a conflict of interest and that counsel failed to conduct a meaningful investigation, failed to follow through with a motion to suppress, and failed to cause the sentences to run concurrently. He seeks an order reversing his convictions and remanding the matter for the appointment of counsel and a full evidentiary hearing.

Having examined the record and the law, we find no basis for finding that the trial court erred in its April 11, 2005, orders denying Harper's motions for RCr 11.42 relief. Harper's RCr 11.42 motions asserted no facts upon which relief would be proper. To prevail on a motion for RCr 11.42 relief alleging ineffective assistance of counsel, the movant must show that counsel made errors so serious that his or her performance

² An order of the Court of Appeals dated September 2, 2005, consolidated the cases for purposes of appeal. Four Court of Appeals file numbers are assigned to the appeal because Harper filed two identical appeals from the first April 11, 2005 order and two additional identical appeals from the second April 11, 2005 order.

fell 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 the movant would not have pleaded guilty.³

Rather than proving deficient performance seriously affecting the plea process, Harper's motions for RCr 11.42 relief merely made unsupported and generalized accusations. He even admits in his appellate brief that the "motion was severely lacking in references to the trial record" The trial court is presumptively correct in its rulings,⁴ and Harper has failed to overcome that presumption. To prevail, more is required than merely raising an unsupported claim of error.⁵ Because the motion was justiciable by reference to the record, no evidentiary hearing was required.⁶

Harper also maintains that his arrest and detainment were the result of an illegal search and seizure because the police proceeded without probable cause. This claim of error was properly denied. A claim that evidence was obtained by an unlawful search and seizure must be brought, if at all, at trial

³ Strickland v. Commonwealth, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984).

⁴ City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

⁵ Strickland, 466 U.S. 668.

⁶ Harper v. Commonwealth, 978 S.W.2d 311 (Ky. 1992).

or on direct appeal, and cannot be raised via RCr 11.42.⁷ An RCr 11.42 motion raising this claim of error should be summarily denied.⁸ Accordingly, the circuit court did not err in rejecting this argument.

For the foregoing reasons, we affirm the April 11, 2005, orders of the McCracken Circuit Court denying Harper's motions for relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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⁷ Collier v. Commonwealth, 387 S.W.2d 858 (Ky. 1964).

⁸ Id.