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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001607-MR

JAMIE F. GIBSON — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CR-00321-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,[1] SPECIAL JUDGE.

WINE, JUDGE: Jamie F. Gibson, pro se, appeals from an order of the Pulaski Circuit Court that denied his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appellant claims ineffective assistance of counsel. Specifically, Appellant claims that in light of Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), Appellant would have not have pled guilty under KRS 218A.1432(1)(b) for the manufacture of

[1] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

methamphetamine. For the reasons stated below, the judgment of the trial court is affirmed.

On September 7, 2002, Jamie F. Gibson, Appellant, and a co-defendant were stopped by a Kentucky State trooper for failing to stop at a four-way intersection. After Appellant voluntarily consented to a search of the vehicle, the officers found various items used in the manufacture of methamphetamine. Following his arrest, Appellant entered an unconditional plea of guilty on February 28, 2003, pursuant to RCr 8.08, to manufacturing methamphetamine, first offense, and operating a motor vehicle on a suspended license. Count II of the indictment, the charge of running a marked stop sign, was dismissed. Appellant was then sentenced on March 20, 2003, to a 10-year sentence, suspended for five years on supervised probation at the recommendation of the Commonwealth.

Appellant's probation was subsequently revoked after his own stipulation and the trial court's finding that he had violated conditions of his probation by using amphetamine, methamphetamine, hydrocodone, and hydromorphone. He also tested positive for drug use. Subject to the findings and order of the court, the Appellant was to surrender himself to the custody of the Pulaski County Sheriff. On December 29, 2003, Appellant failed to report to the Pulaski County Detention Center, and

another order was entered April 21, 2004, revoking his probation.

Appellant made three subsequent motions for shock probation that were each denied. On March 14, 2005, Appellant brought an RCr 11.42 motion to vacate the judgment claiming ineffective assistance of counsel. The Pulaski Circuit Court denied, without an evidentiary hearing or appointment of counsel, the motion to vacate. We now affirm that decision.

The Commonwealth has established that pro se pleadings are not required to meet the standard of those applied to legal counsel; however, to be sufficient, such pleadings must at least give fair notice of the claim for relief. Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983) (citing Miller v. Commonwealth, 416 S.W.2d 358 (Ky. 1967)). Appellant's pleadings are adequate and properly brought here, and thus we will address the appeal based on the claim of ineffective assistance of counsel.

The standard to prove ineffective assistance places the burden on the Appellant to prove his legal representation fell below an objective standard of reasonableness. Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky. App. 1986); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellant must show counsel's performance was deficient, and that the deficient performance prejudiced the

defense. Further, despite this two-part test, the court deciding an ineffective assistance of counsel claim need not address both if the defendant makes an insufficient showing on one component. Strickland, 466 U.S. at 697. In the context of a guilty plea, Appellant must prove that he was prejudiced by the deficiency such that there was a reasonable probability that but for those errors he would not have pled guilty and would have insisted on going to trial. Taylor, 724 S.W.2d at 226 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

Appellant's main argument in this appeal relates to the holding of Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), and its impact on his guilty plea. Appellant contends that this case, although pending at the time of his guilty plea, should have been introduced by defense counsel to preclude the charges against him. Appellant contends he would not have met the requirements of KRS 218A.1432(1)(b) if this case had been introduced by counsel. This argument fails on both procedural and substantive grounds.

In Kotila, 114 S.W.3d at 237, the Court held that the statutory language of KRS 218A.1432 stating "the chemicals or equipment" meant "all of the chemicals or all of the equipment necessary to manufacture methamphetamine." Id. at 237 (emphasis added). Subsequent case law has clearly established that this

is no longer the law in the Commonwealth. Further, Kotila has never been applicable to Appellant's case.

As stated by the trial court,

> To the extent that Defendant claims that based on Kotila his counsel provided ineffective assistance, the record does not support that claim. The Defendant had long since pled guilty and been probated before Kotila was final and fit for grounds of a motion of any type. His counsel was specifically prohibited [from] citing this decision [in] any way prior to it being final. . . . Defendant/movant now claims ineffective that which he was not legally entitled [to] at the time. Therefore, the Defendant's motion, on its' face, is defective.

Order Overruling, Record on Appeal, p. 98 (March 18, 2005).

The Kotila decision became final September 18, 2003, nearly eight months after Appellant had already pled guilty and been sentenced. Appellant's claim that defense counsel's failure to mention this case amounted to ineffective assistance is simply without merit. The law in the Commonwealth is now clearly established that Kotila was wrongfully decided and the statutory construction of KRS 218A.1432(1)(b) was incorrect. Matheney v. Commonwealth, 191 S.W.3d 599, 601-03 (Ky. 2006).

Finally, the trial court properly denied Appellant's requests for an evidentiary hearing and appointment of counsel. An evidentiary hearing is only mandated if the motion raises grounds that could not be conclusively refuted upon the face of

the record. Lewis v. Commonwealth, 411 S.W.2d 321 (Ky. 1967). It has been previously held that a motion for ineffective assistance of counsel must set out all the facts necessary to establish the existence of a constitutional violation and the court will not presume facts omitted from the motion to establish the existence of any violation. Sanders v. Commonwealth, 89 S.W.3d 380,393 (Ky. 2002), citing Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992).

As in Sanders, the Appellant has not presented any circumstances to require an evidentiary hearing, and his arguments are not supported by the law. The trial court properly found the record conclusive to refute Appellant's claims, and thus no evidentiary hearing or appointment of counsel was required. See Fraser v. Commonwealth, 59 S.W.3d 448, 453 (Ky. 2001).

For the foregoing reasons, we affirm the denial of the motion to vacate.

MILLER, SPECIAL JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT.

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