

RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001230-MR

GARY WAYNE WILDER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Gary Wayne Wilder appeals from the Bell Circuit Court's denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm.

On November 27, 2002, Wilder was indicted for cultivating five or more marijuana plants, first offense; and for being a second-degree persistent

felony offender (PFO II). Following a jury trial in which he was found guilty, Wilder and the Commonwealth reached a plea agreement whereby Wilder pled guilty and received a five-year sentence, enhanced to seven years by the PFO II, for marijuana cultivation. He further agreed to plead guilty in another Bell County case, No. 02-CR-00117, and to stipulate to a probation violation in a third Bell County case, No. 97-CR-00020-3.

The agreement provided that he would accept a three-year sentence in Bell County case 02-CR-00117 and would serve the five-year suspended sentence for the Bell County probation revocation. These sentences would be served consecutively with each other and consecutively with his marijuana cultivation conviction for a total fifteen-year sentence. Under the agreement, these sentences would be served consecutively with Wilder's three-year sentence from Boone County. Thus, Wilder agreed to an eighteen-year sentence in exchange for the resolution of several criminal cases.

On September 19, 2003, the day after the trial, Wilder appeared before the trial court to enter his guilty plea. After informing Wilder that it was setting aside the jury's guilty verdict based on the plea agreement, the trial court engaged in a plea colloquy with Wilder in which he was informed of his constitutional rights. The Commonwealth then recited the terms of the plea agreement in which the three Bell County sentences would run consecutively with each other and consecutively to the Boone County sentence.

Wilder then admitted guilt to his criminal charges and acknowledged that his plea was made knowingly, voluntarily, and intelligently with the assistance of competent counsel. At the conclusion of the hearing, the trial court accepted Wilder's plea. On September 29, 2003, Wilder was finally sentenced to fifteen-years' imprisonment to be served consecutively to his Boone County sentence.

Subsequently, in the first half of 2004, Wilder filed two motions for shock probation which were denied. On October 22, 2004, Wilder filed a *pro se* motion with the trial court for the modification of his sentence to a five-year term. This motion was denied. Thereafter, Wilder filed a motion for a belated appeal in this Court in which he alleged that he had not waived his constitutional right of direct appeal and that his trial counsel had failed to directly appeal his conviction as counsel had promised.

On January 13, 2005, in Case No. 2004-CA-002212-MR, this Court issued an order directing the trial court to conduct an evidentiary hearing as to whether Wilder explicitly or implicitly waived his constitutional right of direct appeal. At the evidentiary hearing, the video recording of Wilder's plea colloquy was played wherein Wilder specifically waived his right of direct appeal. Further, his trial counsel testified that he informed Wilder that he was waiving his right of direct appeal due to his plea. Wilder's trial counsel further testified that he had informed Wilder that he would not be preparing a direct appeal in his case.

After hearing this evidence, the trial court found that Wilder explicitly waived his right of direct appeal, and this Court thereafter denied Wilder's request

for a belated appeal. On March 15, 2007, Wilder filed a motion pursuant to RCr 11.42 to set aside his conviction on the basis that his trial counsel had rendered ineffective assistance during his criminal proceedings. On May 14, 2007, the trial court denied Wilder's motion. This appeal follows.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the two-prong test promulgated in *Strickland* is modified when the ineffectiveness is alleged to have resulted in the entering of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *See Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky.App. 1996).

Pursuant to the modified test, as stated in *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990), the defendant must demonstrate the following:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.”

Wilder first contends that his trial counsel rendered ineffective assistance when counsel misled him into believing that he was pleading to a shorter sentence than the actual sentence imposed. Specifically, he contends that he was led to believe that the sentence from his stipulated probation revocation would not be applied to extend the sentence under his plea but rather would be set aside. We disagree.

Allegations contained in an RCr 11.42 motion that are refuted by the record do not merit any post-conviction relief. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998). The trial court and the prosecutor informed Wilder in open court that the terms of his plea agreement required that he serve all of his sentences consecutively. Further, during his plea colloquy, Wilder was specifically informed that his reinstated sentence due to his probation revocation would be served consecutively to his other sentences. Therefore, Wilder's allegation was refuted by the record.

Wilder next contends that his trial counsel rendered ineffective assistance when counsel misled Wilder into believing that his guilty plea was not a waiver of his constitutional right of direct appeal. Additionally, Wilder contends that his trial counsel promised him that counsel would file a direct appeal of Wilder's conviction. Thus, he contends that he was entitled to post-conviction relief. We disagree.

During an evidentiary hearing regarding the waiver of Wilder's constitutional rights, which was ordered by this Court in Case No. 2004-CA-002212-MR, Wilder's trial counsel testified that he specifically informed Wilder that he was waiving his right of direct appeal as a result of his guilty plea. His trial counsel further testified that he never informed Wilder that he would file a direct appeal on Wilder's behalf. Accordingly, Wilder's allegation was refuted by the record.

Wilder next contends that his trial counsel rendered ineffective assistance during his jury trial. Specifically, Wilder contends that his counsel failed to call a necessary witness; failed to engage in meaningful cross-examination of witnesses; failed to adequately investigate his case; improperly “opened the door,” thereby permitting the admission of formerly suppressed evidence; and impermissibly refused to permit him to testify in his own defense. We disagree.

Wilder contends that his counsel failed to interview and secure a witness that would have testified that Wilder did not own the property on which the marijuana was found. However, a defendant’s non-ownership of the property where contraband is found does not preclude his conviction for his criminal conduct associated with the contraband. Moreover, after his apprehension at the conclusion of a foot pursuit, Wilder confessed his ownership of the marijuana plants to the arresting officer. Accordingly, his trial counsel’s failure to interview and secure a witness regarding the ownership of the *situs* of the crime did not constitute ineffective assistance of counsel.

Wilder contends that his trial counsel failed to engage in meaningful cross-examination of the Commonwealth’s witnesses and failed to investigate his case. However, Wilder has not stated what beneficial evidence would have been uncovered by a meaningful cross-examination or further investigation of his case. Accordingly, Wilder’s general and vague allegations regarding counsel’s ineffective performance without specific factual claims of error and prejudice did

not warrant post-conviction relief. *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005).

Wilder contends that his trial counsel's actions "opened the door," thereby permitting the admission of his previously suppressed confession. Specifically, he contends that the trial court ruled his unsigned written confession inadmissible, but his counsel unwisely referred to the written confession several times during his trial. Thus, he contends that this constituted ineffective assistance of counsel.

However, while the record demonstrates that the written confession was not admitted as a trial exhibit, the trial court did not preclude the officer from testifying about his personal observations. The officer testified that he wrote Wilder's confession but Wilder refused to sign it. Therefore, we fail to see how Wilder's trial counsel could have opened a door that was never closed.

Wilder contends that his trial counsel impermissibly prevented him from testifying in his own defense. While Wilder correctly states that a defendant has a fundamental right to testify in his own defense as stated in *Watkins v. Commonwealth*, 105 S.W.3d 449, 453 (Ky. 2003), he never expressed this desire during his criminal proceedings and expressly waived the right to testify during his plea colloquy. Therefore, Wilder's allegation was refuted by the record.

Wilder next contends that his numerous ineffective assistance of counsel contentions constitute cumulative error if not individual error. However, these types of contentions have been consistently rejected. *Epperson v.*

Commonwealth, 197 S.W.3d 46, 65-66 (Ky. 2006). Moreover, after extensively reviewing the record, we conclude that Wilder has simply not stated any claim that would have legitimately caused him not to enter a guilty plea and that would have beneficially changed the outcome of his case.

For the foregoing reasons, the Bell Circuit Court's order denying Wilder post-conviction relief is affirmed.

ALL CONCUR.

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