

RENDERED: NOVEMBER 26, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2007-CA-002159-MR

ROBERT ROSE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 01-CR-002493

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

LAMBERT, JUDGE: Robert Rose appeals from the denial of his RCr 11.42 motion, alleging that evidence against him was obtained through an illegal search and seizure and that he was given ineffective assistance of counsel. For the reasons set forth herein, we affirm.

On July 15, 2003, Rose entered a guilty plea on trafficking in a controlled substance in the first degree, illegal possession of drug paraphernalia, and being a persistent felony offender in the first degree. Rose was sentenced to ten years' imprisonment, but the sentence was probated by a judgment entered on December 14, 2005. On September 16, 2006, for issues unrelated to this appeal, Rose's probation was revoked.

On July 30, 2007, Rose filed a RCr 11.42 motion, seeking to vacate the judgment against him. The Jefferson Circuit Court denied the motion. Rose now appeals.

Rose first argues that the judgment against him should be vacated based on an allegedly illegal search of his home and seizure of evidence found therein. He has overlooked, however, the longstanding holding in this Commonwealth that substantive claims of illegal search and seizure are not proper grounds for relief under RCr 11.42. *See, e.g., King v. Commonwealth*, 387 S.W.2d 582 (Ky. 1965); *Dupin v. Commonwealth*, 404 S.W.2d 280 (Ky. 1996); *Collier v. Commonwealth*, 387 S.W.2d 858 (Ky. 1965); *Brown v. Wingo*, 396 S.W.2d 785 (Ky. 1965).

“RCr 11.42 is patterned after 28 U.S.C.A. § 2255, which did not enlarge the scope of review theretofore permitted by habeas corpus and is not a substitute for a timely appeal.” *See Collier*, 387 S.W.2d at 859. As the Kentucky Supreme Court so decidedly stated in *Brown*, 396 S.W.2d at 786,

[t]he reason an illegal search cannot form the basis for a successful RCr 11.42 proceeding is that an error consisting of the admission of improper evidence, even though the evidence may have been obtained in violation of constitutional rights, does not invalidate the proceeding or the judgment of conviction. . . . In this state the exclusionary rule was in force long before *Mapp v. State of Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Hence the error was and still is remediable by appeal. Habeas corpus cannot be used to undo an error that could have been corrected by a timely appeal.

(Internal citations omitted). Therefore, we find the trial court properly dismissed this portion of Rose's RCr 11.42 motion.

Rose additionally argues that the judgment against him should be vacated on the grounds that he was given ineffective assistance of counsel. He specifically contends that his counsel failed to file a motion to suppress the evidence obtained during the allegedly illegal search of his apartment. He additionally asserts that had he been informed of these constitutional challenges to his conviction that he would not have entered into his guilty plea.

The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which we adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Strickland* requires the court to first find that there was an error in counsel's performance. If the court so finds, the court must then find that the error was prejudicial to the defendant, meaning that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The trial court must then determine whether counsel's deficient performance

rendered the result of the trial unreliable or the proceedings fundamentally unfair so as to deprive a defendant of a substantive or procedural due process right.

We need go no further than the first *Strickland* inquiry because contrary to Rose's allegations, the record reflects that prior to the entry of the guilty plea his counsel did file a motion to suppress the evidence gathered in the search of his apartment and also moved for an evidentiary hearing on that motion. These motions were acknowledged by counsel, in front of Rose, on the videotape of Rose's entry of his guilty plea on July 15, 2003. In light of the fact that the record directly refutes Rose's allegation that his attorney failed to raise and thereby inform him of these constitutional challenges, we find no merit to his claim that he would not have entered his guilty plea.

We accordingly affirm the dismissal of Rose's RCr 11.42 motion.

ALL CONCUR.

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