

RENDERED: NOVEMBER 13, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000104-MR

CANDIDO ROJAS LOPEZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-O1634

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Candido Rojas Lopez brings this *pro se* appeal from a July 15, 2008, order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

Appellant was charged with burglary in the first degree and violation of domestic violence order (DVO). The charges stemmed from appellant breaking

into his ex-wife's home, while wearing only underwear and armed with a butter knife. Appellant placed the knife at his ex-wife's throat. She suffered bruises, a black eye and cuts to the throat from appellant's actions.

Pursuant to a plea agreement with the Commonwealth, appellant entered a guilty plea to the amended charges of burglary in the second degree and violation of DVO. By a May 31, 2006, judgment, the circuit court sentenced appellant to a total of ten-years' imprisonment.

Thereafter, appellant filed a *pro se* RCr 11.42 motion to vacate his judgment of imprisonment. Appellant was appointed counsel, and counsel filed a supplemental RCr 11.42 motion. By order entered July 15, 2008, the circuit court denied appellant's RCr 11.42 motion without an evidentiary hearing.

Appellant contends that the circuit court erroneously denied his RCr 11.42 motion without an evidentiary hearing. Specifically, appellant argues that trial counsel was ineffective for advising him to plead guilty and that his guilty plea was not voluntary.

To prevail, appellant must demonstrate that trial counsel was deficient and that such deficiency resulted in prejudice; in other words, except for counsel's deficient performance there exists a reasonable probability that appellant would not have pleaded guilty but would have insisted on a jury trial. *See Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Sparks v. Com.*, 721 S.W.2d 726 (Ky. App. 1986). As to the guilty plea, appellant must show that the plea did not represent a voluntary, knowing, and intelligent choice. *See North Carolina v.*

Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). And, an RCr 11.42 motion is properly denied without an evidentiary hearing if defendant's allegations of error are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001).

Appellant initially claims that trial counsel was ineffective for advising him to plead guilty and that he desired a trial by jury. Specifically, appellant alleges that trial counsel failed to conduct a proper investigation of the facts surrounding the charges against him. Appellant contends there was "no evidence corroborating the very allegations made by [a]ppellant's wife."

Appellant's Brief at 4.

The face of the record clearly refutes appellant's claim. The record reveals that the parties' minor child reported that appellant was holding a knife to his mother's throat and that a neighbor observed appellant leaving his ex-wife's home in his underwear. Moreover, by pleading guilty, appellant admitted the factual basis of the charges. *See Bush v. Com.*, 702 S.W.2d 46 (Ky. 1986). As such, we believe the record clearly refutes appellant's allegation that trial counsel was ineffective for failure to investigate.

Appellant also claims that trial counsel misled him as to the terms of the plea agreement, thus rendering his guilty plea involuntary. Specifically, appellant asserts that trial counsel induced him to plead guilty by promising that he would receive immediate probation. During a hearing on April 28, 2006, the circuit court specifically asked appellant if any promises were made to appellant

enticing him to enter the guilty plea. Appellant responded in the negative. And, the circuit court explained to appellant his possible sentence of ten-years' imprisonment upon pleading guilty. Considering the whole, we believe the face of the record refutes appellant's allegation that his guilty plea was not voluntary.

In sum, we think appellant's allegations were refuted upon the face of the record and the circuit court properly denied appellant's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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