

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000237-MR

RODGER LEE COX

APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE DOUGLAS M. GEORGE, JUDGE  
ACTION NO. 04-CR-00245

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Rodger Lee Cox (Cox) filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion arguing that his trial counsel had been ineffective.

Just prior to the hearing on that motion, Cox agreed to dismiss it. Approximately two years later, Cox filed a motion to reinstate his RCr 11.42 motion. The trial

---

<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

court denied that motion and Cox appeals from that denial. On appeal, Cox argues that his agreement to waive his RCr 11.42 motion was not knowingly and voluntarily made and that the trial court erred when it failed to reinstate his motion. The Commonwealth argues that Cox did knowingly and voluntarily waive his RCr 11.42 motion and his right to pursue it. For the reasons set forth below, we agree with the Commonwealth and affirm.

## FACTS

On November 1, 2004, Brenda Miller (Miller) and her boyfriend were involved in a domestic dispute. Miller apparently called Cox and his wife (Regina) and asked them for help. Cox, Regina, and Regina's eight-year-old son, Isaac Reardon (Reardon), then drove to Miller's residence. Police officers, who apparently had been called by one of Miller's neighbors, arrived on the scene shortly after Cox, Regina, and Reardon. Miller's boyfriend told the officers that Regina had supplied Miller with drugs. After a consensual search, officers arrested Regina and charged her with possession of a controlled substance.

Following Regina's arrest, Cox, Miller, and Reardon left Miller's residence and spent the night in a motel. The next morning, the trio went to the Cox residence where, according to Cox, he, Reardon, and Miller went back to sleep. Cox and Reardon awoke several hours later, left the house, went to the bank, and posted bail for Regina. Cox stated that he believed that Miller was still sleeping when he and Reardon left. However, after he posted Regina's bail, Cox received a telephone call from a friend who advised him that Miller was dead.

Because of Miller's young age (31) and the circumstances of her death, the coroner ordered a blood test, which revealed the presence of a number of drugs in Miller's system. Based on the blood test, and without the benefit of an autopsy, the coroner ruled that Miller died from an accidental drug overdose.

When questioned by police officers about Miller's death, Cox admitted he had provided her with illegal drugs. He also admitted he had used illegal drugs while with Reardon. Based on these admissions and statements from other witnesses, the police arrested Cox and charged him with murder, first-degree trafficking in a controlled substance, second offense; wanton endangerment in the first degree; and with being a persistent felony offender in the first degree. The grand jury subsequently indicted Cox accordingly.

On August 29, 2005, Cox accepted the Commonwealth's offer to recommend a sentence of fifteen years' imprisonment in exchange for a guilty plea to wanton endangerment and possession of a controlled substance and an *Alford* plea to reckless homicide. Two weeks later, Cox filed a *pro se* motion seeking to withdraw his guilty plea. The court, finding that the plea had been knowing and voluntary, denied that motion and imposed a sentence consistent with the Commonwealth's recommendation.

On January 20, 2006, Cox filed a *pro se* RCr 11.42 motion arguing that his trial counsel was ineffective because he gave incorrect advice regarding the possible sentences Cox faced and because he failed to adequately investigate the cause of Miller's death. As he does here, Cox argued that Miller's death may have

been the result of the altercation with her boyfriend or drugs she consumed before she left her residence with Cox. Cox also moved for an evidentiary hearing and asked the court to appoint counsel. The court granted Cox's motion for a hearing and appointed counsel.

On the day of the hearing, Cox asked to withdraw his RCr 11.42 motion. It appears that Cox made this request, in part, because he was scheduled for a parole hearing within six months of the RCr 11.42 hearing. It also appears that Cox's appointed counsel recommended withdrawal because, if Cox succeeded in obtaining a new trial, he faced the possibility of a significant increase in his sentence.

Before granting his request to withdraw his RCr 11.42 motion, the court asked Cox, several times, if he understood what he was doing and that he would not be able to re-file his RCr 11.42 motion. Cox stated that he understood what he was doing and its implications, that he was acting knowingly and voluntarily, that he had not been offered anything in exchange for dismissing his motion, and that he had not been unduly influenced to do so. In addition to questioning Cox, the court reviewed the underlying plea agreement and the appropriate statutory provisions to determine if Cox and the parties correctly understood his parole eligibility. After that review, the court confirmed that, because Cox pled guilty to class D felonies only, he would be eligible for parole after serving twenty percent of his sentence. The court then entered an order dismissing Cox's motion.

On December 29, 2008, Cox filed a motion to reinstate his RCr 11.42 motion. In the reinstatement motion, Cox argued that his RCr 11.42 court appointed counsel inappropriately advised him to withdraw his RCr 11.42 motion because, in part, his trial counsel was not present for the evidentiary hearing. Cox also argued that his RCr 11.42 court appointed counsel was ineffective because she misrepresented what the potential downside to “winning” the motion could be, and she had not adequately investigated the facts.

The court denied Cox’s reinstatement motion finding that Cox confirmed that he understood that if he withdrew his motion, then he could not refile it, that he understood that the Court could not guarantee that he would receive parole in October when he is eligible for parole, and that his request to withdraw was made voluntarily. He said he did not want to go forward with the hearing. The Court reviewed the Petitioner’s Judgment, and it is correct and reflects the Court’s understanding of the Petitioner’s plea and the Commonwealth’s recommendation regarding his sentence.

Cox then filed this appeal.

#### ANALYSIS

Initially, we note that final disposition of an RCr 11.42 motion, either by direct court action or by “waiver of the opportunity to make [a motion], shall conclude all issues that reasonably could have been presented” in an RCr 11.42 proceeding. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983); RCr 11.42(3). When Cox withdrew his RCr 11.42 motion, he waived the opportunity to present any issues related to ineffective assistance of trial counsel and the trial

court correctly foreclosed him from resurrecting those issues by attempting to re-file his motion.

However, the preceding does not end our analysis. We must also determine if Cox knowingly and voluntarily agreed to withdraw his motion. We have found no case law that directly addresses how a court is to judge the validity of the withdrawal of an RCr 11.42 motion. While we do not believe that the same standard used to judge the validity of a guilty plea must be used in this case, we find it instructive. The test for determining the validity of a guilty plea is whether the plea is a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 164, 27 L.Ed. 2d 162 (1970)). Inquiry into the voluntariness of a plea is fact sensitive and the trial court will only be reversed if its decision was clearly erroneous. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006).

Having reviewed the record we note that the trial court went to great lengths to ensure that Cox understood what he was doing and the implications of his actions. In fact, the trial court went beyond the call of duty when it took the time to determine whether Cox and the attorneys correctly understood the parameters of the plea agreement as well as understanding when Cox would become eligible for parole. Therefore, we discern no error in the court's finding that Cox acted voluntarily and knowingly.

## CONCLUSION

Because Cox waived his right to proceed under RCr 11.42 and because the trial court did not err in determining that Cox's waiver was knowing and voluntary, we affirm.

THOMPSON, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Rodger Lee Cox, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Christian K.R. Miller  
Assistant Attorney General  
Frankfort, Kentucky