

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001568-MR

BRIAN LEE HADDIX

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, KELLER AND STUMBO, JUDGES.

KELLER, JUDGE: Brian Haddix (Haddix) appeals from the Breathitt Circuit Court's order denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. For the following reasons, we reverse and remand.

FACTS

On April 3, 2009, the Breathitt County Grand Jury indicted Haddix for one count of first-degree trafficking in a controlled substance and for being a persistent felony offender in the first degree. In exchange for the Commonwealth's recommending a sentence of ten-years' imprisonment, Haddix entered a guilty plea on June 8, 2009, to first-degree trafficking in a controlled substance and to being a persistent felony offender in the first degree. In accordance with the plea agreement, the trial court sentenced Haddix to ten-years' imprisonment.

Haddix subsequently filed a *pro se* motion in the Breathitt Circuit Court to set aside his conviction and sentence pursuant to RCr 11.42, as well as a motion for an evidentiary hearing. The trial court denied Haddix's RCr 11.42 motion and his motion for an evidentiary hearing. This appeal followed.

STANDARD OF REVIEW

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

When a movant has pled guilty, the *Strickland* test is slightly modified. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that, but for the alleged errors of counsel, there is a reasonable probability he would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

There is no automatic entitlement to an evidentiary hearing with regard to an RCr 11.42 motion. Rather, a hearing is required only if there is an “issue of fact that cannot be determined on the face of the record.” RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Furthermore, “[w]here the movant’s allegations are refuted on the face of the record as a whole, no evidentiary hearing is required.” *Sparks*, 721 S.W.2d at 727 (Ky. App. 1986) (*citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)).

ANALYSIS

On appeal, Haddix argues that he received ineffective assistance of counsel because his counsel advised him to plead guilty to being a persistent felony offender in the first degree when his previous convictions supported only a conviction for being a persistent felony offender in the second degree. Haddix further argues that because his allegations are not refuted on the face of the record, the trial court erred by not conducting an evidentiary hearing. We agree that the trial court erred by failing to conduct an evidentiary hearing.

In support of his argument, Haddix contends that, pursuant to Kentucky Revised Statutes (KRS) 532.080(3)-(4), his two previous criminal convictions resulted in concurrent sentences and would have been deemed to be only one conviction for persistent felony offender purposes. KRS 532.080(3) provides, in pertinent part, that:

A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies, or one (1) or more felony sex crimes against a minor as defined in KRS 17.500, and now stands convicted of any one (1) or more felonies.

Further, KRS 532.080(4) states that:

For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

Thus, Haddix argues that his counsel failed to investigate or advise him that his previous felony convictions were insufficient to support a conviction of being a persistent felony offender in the first degree.

Haddix acknowledges that, even if he was charged with being a persistent felony offender in the second degree, he would still face a potential sentence of ten- to twenty- years' imprisonment. However, Haddix notes that, if convicted of being a persistent felony offender in the first degree, he would be required to serve

a *minimum* of ten-years' imprisonment prior to being eligible for parole. *See* KRS 532.080(5); KRS 532.080(7).

We note that the Commonwealth concedes that an evidentiary hearing is necessary in this case to determine the veracity of Haddix's claims regarding his previous felony sentences. Specifically, the Commonwealth concedes that there is no indication in the record regarding the nature, timing, or duration of Haddix's previous convictions. Thus, Haddix's allegations are not refuted by the record. RCr 11.42(5). Therefore, we conclude that the trial court erred by failing to conduct an evidentiary hearing.

CONCLUSION

For the foregoing reasons, we reverse and remand so that the Breathitt Circuit Court can hold an evidentiary hearing on Haddix's motion for RCr 11.42 relief. We express no opinion with regard to the merits of Haddix's claim that he received ineffective assistance of counsel.

ALL CONCUR.

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