

RENDERED: JANUARY 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001443-MR

JEREMY LAWRENCE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 06-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This comes before us as an appeal from the denial of the appellant, Jeremy Eugene Lawrence's, Kentucky Rules of Criminal Procedures (RCr) 11.42 motion. The Commonwealth has filed a response. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Lawrence was indicted for robbery in the first degree (Robbery I), receiving stolen property (RSP) over \$300, and persistent felony offender (PFO) in the first degree on April 6, 2006. On July 12, 2006, Lawrence received a sentence of twenty-two years' imprisonment based upon his plea of guilty to Robbery I, RSP over \$300, and PFO II. On June 10, 2009, Lawrence filed an RCr 11.42 motion with the trial court asserting that he was denied effective assistance of counsel because he was advised to plead guilty to Robbery I even though he was unarmed at the time of the occurrence.

The trial court denied Lawrence's motion without holding an evidentiary hearing and without appointing counsel. Lawrence contends that the trial court erred in so doing since the allegations he made needed additional findings outside the record.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 "motion is limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Com.*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds*.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). With respect to a

guilty plea, there is also a requirement that the movant show that counsel's performance so seriously affected the case that, but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we will examine the trial court's decision.

DISCUSSION

There is no requirement in RCr 11.42 that an evidentiary hearing be held each time a motion is made pursuant to the rule. The RCr 11.42 provides that:

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing

In *Centers v. Com.*, 799 S.W.2d 51, 54 (Ky. App. 1990), the court held that “[i]n determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant.” (Citations omitted). Lawrence asserts that he should not have agreed to plead guilty to the Robbery I charge because there was not sufficient evidence to find that he was in possession of a weapon. He also asserts that there was no evidence that he threatened the immediate use of physical force when he committed the offense.

The trial court found that Lawrence’s guilty plea was voluntary and that “[t]he record establishes that the Movant reviewed the charges and any possible defenses to them. It also establishes that the Movant acknowledged that he threatened to use immediate force against the victim of the robbery.” Order Denying Motion to Vacate Sentence at 2. The trial court then found that “[a]s the plea was voluntarily given, the Movant’s current claims are refuted by the record. As the record conclusively resolves this claim, no evidentiary hearing is necessary. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).” *Id.* The trial court then opined that since no evidentiary hearing was mandated, there was no need to appoint counsel. We agree.

In the present action, Lawrence stated in his guilty plea that he had threatened the victim with bodily harm during the incident. This is clear from the record and we agree with the trial court that an evidentiary hearing was not required under RCr 11.42. We also find that there was no need to appoint counsel on Lawrence’s behalf since no evidentiary hearing was required. Thus, we affirm the decision of the trial court denying Lawrence’s RCr 11.42 motion to vacate his sentence.

ALL CONCUR.

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