

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002081-MR

LARRY LEE HUGHES

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

VANMETER, JUDGE: Larry Lee Hughes appeals *pro se* from the McCracken Circuit Court's order denying his motion for relief pursuant to RCr¹ 11.42, following an evidentiary hearing. For the following reasons, we affirm.

Upon receiving an anonymous tip concerning drug activity taking place inside a home, Paducah police officers went to the residence of Hughes, and his

¹ Kentucky Rules of Criminal Procedure.

wife, Ida, and engaged in what the officers described as a “knock and talk.” The officers maintain that Ida consented to a search of the residence. During the search, the officers discovered crack cocaine and drug paraphernalia, secured the residence, obtained a search warrant, and during a second search, discovered additional crack cocaine and drug paraphernalia.

Based upon the foregoing, Hughes was indicted for possession of a controlled substance in the first degree, second offense (class C felony); use/possession of drug paraphernalia, second offense (class D felony); and of being a persistent felony offender (“PFO”) in the first degree. If convicted of the PFO charge, Hughes faced between 10 and 20 years’ imprisonment. Hughes entered into a plea agreement with the Commonwealth under which the PFO charge would be dropped, and he would receive five years’ imprisonment on the remaining charges, to run concurrently. A final judgment was entered in accordance with the plea agreement.

Hughes filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42, alleging that his counsel was ineffective by failing to file a motion to suppress the evidence from the search of his residence; failing to investigate his case and interact with him; and misadvising him regarding his entry of a guilty plea. The trial court denied his motion without conducting an evidentiary hearing, from which Hughes appealed. On appeal, this court remanded the matter to the trial court with directions to hold an evidentiary hearing regarding Hughes’ claim

that his trial counsel was ineffective for failing to file a motion to suppress the evidence, since the claim could not be clearly refuted on the face of the record.²

At the evidentiary hearing, the Commonwealth played an audiotape recording of the officer's "knock and talk" and search of the Hughes' residence. The tape supported the officers' claim that Ida consented to the search, and Hughes did not expressly deny the officers consent to search. Additionally, Hughes' counsel testified that Ida informed him that she did in fact consent to the search of the residence. Counsel testified that he did not file a motion to suppress evidence seized from the search because based on the audiotape, Ida's statement, and other evidence, counsel believed the motion would not succeed. Instead, counsel negotiated a plea offer with the Commonwealth for a five-year sentence if Hughes agreed to not file a motion to suppress the evidence. According to Hughes' testimony, his counsel discussed the offer with him, and advised him to accept it.

On appeal, Hughes argues the trial court erred by denying his motion for relief pursuant to RCr 11.42 since his counsel was ineffective by not filing a motion to suppress. We disagree.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standards by which to consider whether counsel was ineffective. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that the counsel's performance was deficient, and that the defendant was prejudiced, so that in the absence of

² *Hughes v. Commonwealth*, No. 2006-CA-002302-MR, 2007 WL 2745376 (Ky.App., Sept. 21, 2007).

counsel's deficient performance a different result was reasonably probable. *Id.* at 693, 104 S.Ct. at 2067. Further, when a defendant enters a guilty plea, we must determine whether a reasonable probability exists that without counsel's alleged deficient performance, the defendant would not have entered the guilty plea, and instead, insisted on going to trial. *Casey v. Commonwealth*, 994 S.W.2d 18, 22 (Ky.App. 1999) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), and *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)).

In the case at bar, a review of the record supports a finding that a motion to suppress the evidence from the search of Hughes' residence would have been unsuccessful due to his wife's granting consent to the search and no evidence, besides Hughes' testimony, to support his assertion that he expressly denied the search. Counsel's testimony indicates that in order to avoid a potential 20-year sentence, he negotiated a plea agreement for Hughes to serve two concurrent five-year sentences, and advised Hughes to accept the offer. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983) (holding that counsel's advice to plead guilty is not indicative of any degree of ineffective assistance). Hughes presents no argument to suggest this was not a reasonable trial strategy, or was deficient representation in any way. *See Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003) (holding that a defendant must overcome the presumption that his counsel's actions were reasonable trial strategy).

Accordingly, the trial court's order denying Hughes' motion for relief pursuant to RCr 11.42 was not in error.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Larry Lee Hughes, *Pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky