

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001731-MR

NICHOLAS A. ROLLINGER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 84-CR-00029 & 84-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Nicholas A. Rollinger appeals the Kenton Circuit Court's September 8, 2011, denial of his motion for RCr¹ 11.42 relief, claiming the circuit court erroneously disposed of his motion without first conducting an evidentiary hearing. Because the circuit court properly denied Rollinger's motion

¹ Kentucky Rule of Criminal Procedure.

on procedural grounds which were apparent upon examination of the record, we affirm.

I. Background

In April of 1984, Rollinger pleaded guilty to charges of first-degree robbery, receiving stolen property, and being a persistent felony offender (PFO) in the first degree. He was sentenced to a total of twenty years' imprisonment, enhanced to life due to the PFO conviction.

In May of 1986, Rollinger filed his first RCr 11.42 motion challenging the validity of his guilty plea on the basis of ineffective assistance of counsel. He claimed his trial counsel had misadvised him regarding the length of sentence he could expect to receive. The circuit court's denial of the motion was affirmed on appeal. *Rollinger v. Commonwealth*, 1986-CA-001705 (Ky. App. 1987).

Rollinger requested and was granted parole in 1993. Parole was revoked in 2003, but Rollinger was again paroled in 2004. His parole was again revoked in 2006, and Rollinger was returned to prison to complete the sentence he had received in 1984.

Rollinger filed his second RCr 11.42 motion attacking the 1984 conviction on February 15, 2011. He once again argued he had received ineffective assistance of counsel in entering his guilty plea. More specifically, he claimed his trial attorney's performance was prejudicially deficient in that he was misadvised regarding his parole eligibility.²

² Although Rollinger has described counsel's purportedly deficient advice as "gross," he has not articulated the factual basis of his allegation.

The circuit court did not reach the substance of his arguments, however, because it identified two procedural bars to Rollinger's motion. The circuit judge ruled, first, that the motion was untimely in that it was filed beyond the three-year limitation of RCr 11.42(9), and Rollinger had not demonstrated grounds for extending the three-year period, as permitted by RCr 11.42(10)(a-b). Secondly, the circuit court determined Rollinger's motion was impermissible because it was successive.

Rollinger appealed, claiming the denial was inappropriate in the absence of an evidentiary hearing.

II. Standard of review

When a defendant collaterally challenges his guilty plea on the basis of ineffective assistance of counsel, he is entitled to an evidentiary hearing "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001) (citations omitted); RCr 11.42(5). "Our review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967) (citations omitted).

Despite this rule, where there is a procedural bar to the defendant's motion, there is no need for the trial court to address its merits or conduct an evidentiary hearing. *See Satterly v. Commonwealth*, 441 S.W.2d 144, 145 (Ky. 1969) (citations omitted).

III. Discussion

Rollinger is not correct that he was entitled to an evidentiary hearing, or even consideration of his motion on the merits. There is a procedural bar to his claim: defendants are not permitted to submit successive motions for RCr 11.42 relief where the grounds for the later motion were known or knowable at the time the original motion was filed. RCr 11.42(3); *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). It appears from the record and Rollinger's argument that the effect of his guilty plea upon his parole eligibility was known to him at the time he filed his first RCr 11.42 motion in 1986. He has not argued otherwise or offered any facts in support of a conclusion that he could not have been aware of this alleged basis of ineffective assistance at that time.

Rollinger contends the United States Supreme Court's recent holding in *Padilla v. Kentucky* should excuse his untimely and successive filing. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). *Padilla* announced the rule that "counsel must inform her client whether his plea carries a risk of deportation." 130 S.Ct. at 1486. Rollinger has not asserted that he is subject to deportation as a result of his conviction or even that he is not a U.S. citizen. Any effect on Rollinger's parole eligibility was known to him at the time of his first motion, and *Padilla* did not afford him any new rights.

The circuit court did not err in disposing of Rollinger's successive RCr 11.42 motion without conducting an evidentiary hearing.

IV. Conclusion

The circuit court correctly determined Rollinger's 2011 RCr 11.42 motion was not permissible following his 1986 motion. Denial was proper without resort to an evidentiary hearing. We affirm.

ALL CONCUR.

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