

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000629-MR

MILES C. RAMIREZ

APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 09-CR-00224

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

VANMETER, JUDGE: Miles C. Ramirez appeals from the February 28, 2013, order of the Henderson Circuit Court which denied Ramirez's request for RCr¹ 11.42 post-conviction relief. For the following reasons, we affirm.

In 2009, Ramirez was indicted for one count of possession of a firearm by a convicted felon. On May 16, 2011, Ramirez entered a guilty plea to this offense and received a two-year sentence, ordered to run consecutive to any

¹ Kentucky Rules of Criminal Procedure.

other sentence he was serving. On February 20, 2013, Ramirez filed an RCr 11.42 motion to vacate his conviction and set aside his guilty plea, alleging that he had entered a plea of guilty involuntarily and that he had received ineffective assistance of counsel. Without holding an evidentiary hearing, the trial court denied Ramirez's motion by order entered on February 28, 2013. Ramirez now appeals.

In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986). When a defendant has pled guilty, the second prong of the *Strickland* test is slightly modified to require the defendant to demonstrate that, but for the alleged errors of counsel, a reasonable probability exists that the defendant would not have pled guilty, 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); adopted by *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

When the trial court denies a defendant's motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, "our review is limited 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.”” *Sparks*, 721 S.W.2d at 727 (citation omitted). If the movant’s allegations are refuted on the face of the record as a whole, no evidentiary hearing is required. *Id.*

On appeal, Ramirez maintains that his guilty plea was not knowingly and voluntarily made. He asserts that his counsel misinformed him as to the elements of the offense, the evidence the Commonwealth had against him, and how that evidence supported the elements of the offense. He further argues that his counsel failed to: challenge the indictment, investigate the facts, and pursue a defense of actual innocence.

A review of the record refutes Ramirez’s claims. During his guilty plea hearing, Ramirez acknowledged that he had received a copy of the indictment and had discussed it with his counsel. The indictment plainly charges Ramirez with possession of a firearm by a convicted felon, by knowingly and unlawfully possessing two .223 caliber assault rifles on or about October 6, 2009, in Henderson County, Kentucky, after being convicted of a prior felony offense. This indictment is a “plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged,” in compliance with RCr 6.10. Ramirez does not provide any authority in support of his assertion that the indictment must specifically describe the felony for which he was previously convicted. Moreover, Ramirez indicated under oath during his guilty plea that he had been provided with the indictment and had ample opportunity to confer with his counsel, with whose assistance he stated he was

satisfied. Accordingly, we fail to appreciate Ramirez's contention that the indictment was defective and that his trial counsel rendered ineffective assistance by failing to challenge it.

With respect to Ramirez's allegation that his trial counsel failed to investigate the facts and to present a defense of actual innocence, Ramirez does not state what "facts" his counsel failed to uncover and how these uncovered facts would have exonerated him. RCr 11.42(2) requires a movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." Ramirez contests the sufficiency of the evidence against him, arguing that the Commonwealth's case hinged on hearsay evidence and the mere fact that police found a spent .223 shell in his yard. Based on this alleged insufficient evidence, Ramirez contends his counsel should have explored a defense of actual innocence.

In support, Ramirez points to a letter his counsel wrote him after entry of the guilty plea in which counsel stated that the Commonwealth "had a lousy case and we might have won." The letter goes on to say that Ramirez was "probably wise to take their offer of two (2) instead of facing the possibility of five (5)" and that since he pled guilty to the federal charges before resolving the state charges, Ramirez would serve less time overall. Ramirez claims his counsel failed to advise him that his state sentence was legally required to run consecutive to his federal sentence.

However, Ramirez's synopsis of the case ignores other evidence against him. The Kentucky State Police records show that on the day in question, officers responded to a dispatch call that shots had been fired on a vehicle from a "chasing car" in the vicinity of Ramirez's house. Upon arriving at Ramirez's residence, officers found a vehicle matching the description of the "chase car" parked in Ramirez's driveway, located a spent .223 ammunition casing in the driveway, and a live round of .223-caliber ammunition on the ground near the stairs leading to Ramirez's side door. The round was new without any rust or dirt on it. During the course of the investigation that followed, officers took a statement from an individual who stated that Ramirez had brought him two .223-caliber rifles to hide. A search of that individual's residence uncovered the rifles, which the individual confirmed were the guns Ramirez had brought to him to store.

Additionally, Ramirez overlooks the fact that the offense to which he pled guilty does not require that he be the actual owner of the firearms. A person may be found guilty of possession of a firearm by a convicted felon if the person "possesses" the firearm. KRS² 527.040(1). For purposes of the Kentucky Penal Code, "possession" is defined as having "actual physical possession or otherwise to exercise actual dominion or control over a tangible object[.]" KRS 500.080(14). Here, the Commonwealth intended to present evidence that an individual was hiding firearms for Ramirez at his residence, at Ramirez's request. In light of the law, and the facts of this case, we do not find any merit in Ramirez's claim that his

² Kentucky Revised Statutes.

counsel rendered deficient performance by failing to investigate the facts and by failing to explore the defense of actual innocence.

Regarding Ramirez's contention that he was misadvised about sentencing and thus his guilty plea was not knowingly and voluntarily made, a review of the record likewise refutes this claim.³ The video record of Ramirez's guilty plea hearing demonstrates the voluntary nature of his guilty plea and disproves his assertion that he was not advised that his state sentence could run consecutive to his federal sentence. The record shows that Ramirez was placed under oath and questioned thoroughly by the trial judge about the plea. The judge confirmed that Ramirez had ample time to confer with his counsel, with whom Ramirez stated he was satisfied, and that Ramirez desired to plead guilty. The judge reiterated the Commonwealth's recommendation on sentencing, and emphasized that there was no guarantee of probation or parole and that Ramirez may have to serve out his entire sentence. The judge further asked Ramirez if he was relying on any information that his counsel had given him concerning how the guilty plea might affect any current sentence he is serving, or any other case, to which Ramirez responded no. This statement alone refutes Ramirez's present assertion that he was misadvised by counsel regarding sentencing.

³ Our review of the record reveals that Ramirez's plea hearing was conducted simultaneously with that of four other defendants who were indicted for separate, unrelated crimes. While neither party raises this as an issue on appeal, we note that the utilization of a multiple defendant plea colloquy has been held acceptable when the trial court addresses each defendant individually and obtains individual responses. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 289 (Ky. App. 2004). In this case, Ramirez's plea hearing was adequate for the trial court to determine whether his guilty plea was made knowingly and voluntarily.

The judge asked Ramirez what happened in this case, to which Ramirez responded that “some guns were found and they were mine.” The judge asked Ramirez if the guns were found in his possession in Henderson County, to which Ramirez answered yes. The judge then confirmed that Ramirez was a convicted felon. This exchange reflects Ramirez’s practical understanding of the elements of the charged offense. At no point during the guilty plea did Ramirez ask for clarification or imply that he did not understand the proceeding or the charge against him. Further, his “Motion to Enter Guilty Plea” verifies that he and his counsel had discussed the charge and any possible defenses. Based on a review of the record, we are unable to say Ramirez’s guilty plea was involuntary and should be set aside. His claim for RCr 11.42 relief is refuted on the face of the record as a whole and therefore he was not entitled to an evidentiary hearing.

The Henderson Circuit Court’s order denying Ramirez’s motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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