

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001876-MR

DONALD T. MILLER

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 08-CR-00104

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: Donald T. Miller brings this appeal from the Nelson Circuit Court's denial of his motion under Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues that, because his indictment did not state the age of his victim, the trial court should not have accepted his plea of guilty to first-degree sexual abuse as a Class C felony. We affirm. Miller's RCr 11.42 motion was untimely

and procedurally improper. Additionally, Miller was made aware of his victim's age through the bill of particulars and he agreed to the amended charges in his guilty plea.

Miller was indicted on one count of each of the following: first-degree sodomy, first-degree unlawful transaction with a minor, incest, first-degree sexual abuse, and being a first-degree persistent felony offender. Subsequently, Miller and the Commonwealth entered into a plea agreement. In exchange for Miller's guilty plea to two counts of first-degree sexual abuse, the Commonwealth agreed to recommend amending the sodomy charge to first-degree sexual abuse and dismissing the remaining charges. The Commonwealth also agreed to recommend a sentence of seven years' imprisonment for each charge, to be served concurrently, for a total of seven years' imprisonment. Though Miller entered a guilty plea, he later moved to withdraw it.¹ The court denied the motion and sentenced Miller consistently with the Commonwealth's recommendation, including five years of postincarceration supervision.² Miller served his seven-year sentence, but the parole board revoked his period of postincarceration

¹ Though Miller did not file a formal motion to withdraw, a docket sheet included in the record contains a notation stating Miller moved to withdraw his plea in court. There is no video record included on appeal. When the record is incomplete, we assume that the omitted record supports the decision of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

² The parties state that Miller was placed on "conditional discharge." However, our General Assembly amended Kentucky Revised Statute (KRS) 532.043, replacing the term "conditional discharge" with "postincarceration supervision[.]" See *Melcher v. Commonwealth*, 471 S.W.3d 699, 701 (Ky. App. 2015). Miller was placed on postincarceration supervision.

supervision because he failed to complete the Sex Offender Treatment Program (SOTP).

Miller filed a *pro se* motion under Kentucky Rules of Civil Procedure (CR) 60.02. He attacked, *inter alia*, the validity of the parole board's decision, the evidence against him, his indictment, his sentence, and his presentence investigation report. The circuit court denied Miller's motion, determining the court cannot interfere with administrative proceedings conducted in the executive branch. The court did, however, amend Miller's period of postincarceration supervision to three years.

Miller then filed a second *pro se* motion under CR 60.02. He alleged he should not have been convicted of two counts of first-degree sexual abuse when his indictment only charged one count. He also argued he had been indicted for first-degree sexual abuse with forcible compulsion, a Class D felony, but had erroneously pleaded guilty to first-degree sexual abuse of a victim under twelve years of age, a Class C felony. The circuit court denied his motion, concluding Miller should have raised these arguments in an RCr 11.42 motion. The court also found his claims to be substantively meritless because he had been given notice of the amended charges through the Commonwealth's offer on a plea of guilty.

Miller also filed a petition for a writ of mandamus.³ He argued that he was subject to double jeopardy when he was sentenced to both counts of first-degree sexual abuse, that the dismissal of the remaining counts of his indictment served to dismiss the indictment as a whole, and that the Department of Corrections lacked the power to revoke his three-year sentence because he was originally sentenced to five years of postincarceration supervision. This Court denied Miller's petition.

Miller then filed the instant *pro se* RCr 11.42 motion. He again argued, *inter alia*, that he had been indicted for a Class D felony, but had erroneously pleaded guilty to a Class C felony. Miller also argued his counsel was ineffective for allowing his plea of guilty in those circumstances. The circuit court denied Miller's motion, concluding Miller had raised these issues in his previous CR 60.02 motions and his writ of mandamus. This appeal follows.

In an RCr 11.42 proceeding, the movant has the burden to “establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding[.]” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only “if there is an issue of fact which cannot be determined on the face

³ *Miller v. Seay*, No. 2016-CA-000965-OA (Ky. App. 2016).

of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993); RCr 11.42(5).

As a preliminary matter, the Commonwealth has argued that Miller’s RCr 11.42 appeal was untimely and procedurally improper. We agree. Miller’s final judgment was entered on November 20, 2009. He filed the instant motion on November 14, 2016. RCr 11.42(10) provides

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Miller’s motion was clearly filed outside the limitation period.

Although the circuit court did not make a finding as to the motion’s timeliness, we may affirm for any reason supported by the record. *See King v. Commonwealth*, 384 S.W.3d 193, 194 (Ky. App. 2012) (affirming the denial of two motions under RCr 11.42 as untimely even though the record did not contain the circuit court’s findings for either motion). Additionally, Miller’s argument on appeal is procedurally improper because he previously raised it in his second CR 60.02

motion, the denial of which he did not appeal.⁴ The Kentucky Supreme Court “has attempted to make abundantly clear . . . that CR 60.02 and RCr 11.42 motions are not to be used to relitigate previously determined issues.” *Baze v. Commonwealth*, 276 S.W.3d 761, 766 (Ky. 2008). Miller’s motion was untimely and procedurally improper, and the circuit court did not err in denying it.

Even if we did not conclude Miller’s motion was untimely or procedurally improper, however, we would affirm. Miller’s sole argument on appeal is that he was indicted for first-degree sexual abuse with forcible compulsion, a Class D felony, but that he pleaded guilty to two counts of first-degree sexual abuse of a victim under twelve years of age, a Class C felony.⁵ First-degree sexual abuse is a Class D felony unless the victim is under 12, in which case it is a Class C felony. KRS 510.110(2). Miller’s indictment did not contain the age of his victim.

“[T]he general rule in this state is that an unconditional guilty plea waives all defenses except that the indictment does not charge a public offense.” *Jackson v. Commonwealth*, 363 S.W.3d 11, 15 (Ky. 2012).

⁴ Though Miller raised ineffective assistance of counsel regarding this matter in his RCr 11.42 motion, he has not raised it on appeal.

⁵ Miller makes a collateral argument that the “code” ascribed to first-degree sexual abuse in his indictment did not correspond with the “code” for a Class C felony. This argument is subsumed within Miller’s other argument, and we need not address it separately.

[A]n indictment properly states an offense merely by naming the offense charged. In other words, a[n] . . . indictment is not infirm and subject to dismissal solely because it lacks a detailed recitation of the underlying facts. The protocol for a defendant who desires more information is to serve a motion for a bill of particulars.

Parker v. Commonwealth, 291 S.W.3d 647, 656 (Ky. 2009) (footnote omitted). A criminal defendant's guilty plea is intelligent if he is "advised by competent counsel regarding the consequences of entering a guilty plea, including the constitutional rights that are waived thereby, is informed of the nature of the charge against him, and is competent at the time the plea is entered." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006). "A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court." *Id.*

The age of Miller's victim should not have been a surprise to him. Miller's counsel moved for a bill of particulars, requesting factual clarification for each of the charges. In response, the Commonwealth stated the acts forming the basis of Miller's first-degree sexual abuse charge occurred "on an almost nightly basis from the time the victim was 5 years old until she was 12 years old." Therefore, Miller had notice he was being charged with a crime involving a victim under the age of 12. Furthermore, we note that Miller signed the Commonwealth's offer on a plea of guilty, which listed the charges against him, and that Miller's motion to enter a guilty plea states that he had reviewed the charges and the

Commonwealth's offer. These documents are evidence that Miller's plea was knowingly and voluntarily entered. *See Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990). Miller's motion was untimely, procedurally improper, and substantively meritless.

For the foregoing reasons, the order of the Nelson Circuit Court denying Miller's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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