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OPINION OF JUNE 8, 2007 WITHDRAWN

**SUPREME COURT ORDERED NOT PUBLISHED: AUGUST 13, 2008
(FILE NO. 2008-SC-0094-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000923-MR

JAMES V. BUCHANAN

APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 01-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant James V. Buchanan appeals the Fulton Circuit Court's order denying his Motion to Vacate or Set Aside the Judgment of Conviction, brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f). In 2002, Appellant pleaded guilty to the following

charges: unlawful use of a motor vehicle, a violation of Kentucky Revised Statutes (KRS) 514.100; criminal mischief in the third degree, a violation of KRS 512.040; and theft by unlawful taking, namely anhydrous ammonia, a violation of KRS 514.030(2)(b). Appellant was sentenced to serve a total of twenty years of imprisonment. He subsequently filed his RCr 11.42 and CR 60.02 motion in circuit court, and the court denied his motion. After a careful review of the record, we affirm the Fulton Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant entered a guilty plea to the aforementioned charges on January 10, 2002. His written plea agreement provided that he understood the range of punishment for his offense was up to twenty years of imprisonment. It further provided that, in exchange for his guilty plea, the Commonwealth agreed to recommend a sentence of ten years of imprisonment. The circuit court entered its judgment against Appellant on April 25, 2002, sentencing him to serve the maximum of twenty years of imprisonment. According to the parties, the court gave Appellant the choice of immediately serving ten years of imprisonment, as provided in the plea agreement, or receiving the maximum sentence of twenty years of imprisonment and getting that sentence probated. Appellant wanted probation, so the circuit court initially sentenced him to serve twenty years of imprisonment, then the court probated that sentence and ultimately sentenced Appellant to serve five years of probation. The court also imposed conditions on Appellant's probation.

After the judgment was entered against Appellant, he violated the terms of his probation and his probation was revoked. He was then sentenced to serve out his sentence of twenty years of imprisonment in the state penitentiary.

Thereafter, Appellant filed his RCr 11.42 and CR 60.02(e) and (f) motion to vacate the judgment and sentence against him. He asserted the following claims: (1) trial counsel rendered ineffective assistance when counsel failed to advise Appellant, before he pled guilty, that if he received probation, he would receive the maximum sentence allowed by law; (2) the trial court should have provided Appellant the opportunity to withdraw his guilty plea after the court increased his sentence by ten years above the sentence provided by the plea agreement; (3) the trial court failed to hold, and trial counsel failed to request, an evidentiary hearing to determine whether Appellant's guilty plea was entered intelligently and knowingly after the court learned that Appellant suffered from a chemical imbalance and bipolar disorder and that Appellant was under the care of a psychiatrist; and (4) trial counsel rendered ineffective assistance by failing to advise Appellant that merely possessing anhydrous ammonia is not enough to prove intent to manufacture methamphetamine.

The circuit court entered an order in January 2006, overruling Appellant's motion to vacate the judgment or to set aside or correct his sentence. Approximately two months later, the Commonwealth filed its response to Appellant's RCr 11.42 and CR 60.02 motion. The circuit court then entered another order denying Appellant's motion and finding that the issues could be resolved by reviewing the record.¹

¹ Although we are uncertain as to why the circuit court entered two orders denying Appellant's RCr 11.42 and CR 60.02 motion, we assume that the circuit court entered its second order because it realized that it had entered its first order before the Commonwealth had a chance to respond to Appellant's motion.

Appellant now appeals, claiming that the trial court erred when it denied his request for an evidentiary hearing. He also alleges that he received the ineffective assistance of trial counsel because counsel failed to understand the elements that the Commonwealth would have been required to prove to obtain a conviction against Appellant for theft of anhydrous ammonia with the intent to manufacture methamphetamine. Appellant further asserts that he received the ineffective assistance of trial counsel when his attorney failed to explain to him that he would receive the maximum sentence in exchange for the probation that he requested. Finally, Appellant contends that his trial counsel rendered ineffective assistance when counsel failed to request a competency hearing at sentencing.

II. COMMONWEALTH'S ARGUMENTS CONCERNING THE TIMELINESS OF RCr 11.42 MOTION AND APPEAL

The Commonwealth argues for the first time on appeal that Appellant's RCr 11.42 motion was untimely because it was filed outside the three-year window set forth in RCr 11.42(10). However, because the defense of untimeliness must be affirmatively pled, and the Commonwealth's Attorney did not assert it as a ground for dismissal in the circuit court, the Office of the Attorney General cannot raise the defense for the first time on appeal.

Under RCr 11.42(10), a defendant filing a motion to vacate, set aside or correct his sentence must do so within three years of finality of judgment unless the facts supporting the claim were either unknown and could not with due diligence have been discovered within the three-year window, or a new fundamental constitutional right was established since the three-year window closed and the new right is being applied retroactively. Noncompliance with RCr 11.42 triggers consequences for both defendants

and the government. If a defendant chooses to file a motion to vacate, set aside or correct his sentence, and does so outside the three-year window, he risks swift dismissal of the motion as being time barred. However, dismissal of a motion to vacate filed outside the three-year window is not automatic. The fact that a defendant has filed outside the mandatory window must be brought to the attention of the trial court, and the responsibility falls upon the Commonwealth's Attorney who must affirmatively allege untimeliness as a defense. *See* RCr 11.42(5); CR 8.03. If a prosecutor fails to argue untimeliness in the trial court, it cannot be argued for the first time on appeal to this Court since we review only those issues presented to the trial court for a ruling. *Sherley v. Commonwealth*, 889 S.W.2d 794, 799 (Ky. 1994).

The purpose of the RCr 11.42(10) window is to prevent the clogging of the court dockets with claims conceived and filed years after the defendant's conviction when witnesses may be unavailable and memories have faded. However, the salutary purpose of the rule is lost unless prosecutors argue to the trial court that the claim is filed outside the three-year window. Failure to assert this affirmative defense, when meritorious, unnecessarily increases the workload for all and the Commonwealth risks the motion to vacate being granted on the merits.

In attempting to raise timeliness as a defense for the first time on appeal to the Court, the Attorney General cites *Commonwealth v. Stacey*, 177 S.W.3d 813 (Ky. 2005) in support of the trial court's denial of the RCr 11.42 motion. However, *Stacey* is factually distinguishable from the case we review today. In *Stacey*, the trial court denied the motion to vacate because it was filed more than six months after “the statute of

limitations” had expired.² While the *Stacey* opinion does not reveal whether the Commonwealth's Attorney argued untimeliness to the trial court, the trial court's ruling would suggest he did. In the case before us, the prosecutor did not argue timeliness in its response to the RCr 11.42 motion and the trial court did not dismiss the claim as being time barred.

We fully recognize the caseload under which Commonwealth Attorneys labor. However, we cannot overstate the importance of prosecutors asserting untimeliness of an RCr 11.42 motion as an affirmative defense in the circuit court. Failure to do so may constitute waiver of the defense. While a prosecutor's failure to raise timeliness as an affirmative defense in the trial court necessarily risks its waiver, nothing in this opinion is intended to preclude a trial court from *sua sponte* discovering the motion was filed after the three-year window had expired and dismissing the motion to vacate as being untimely.

The Commonwealth also asserts that the present appeal was untimely filed because the circuit court's first order denying Appellant's RCr 11.42 and CR 60.02 motion was entered in January 2006, and the notice of entry of the order was mailed at that time. Appellant did not file a notice of appeal regarding the first order, so the

² We take this opportunity to comment upon another matter mentioned in *Stacey*, that being a reference to the three-year window in RCr 11.42(10) as a “statute of limitations.” *Stacey* addressed a matter of first impression in Kentucky, equitable tolling of state post-conviction proceedings. Because there were no Kentucky cases to guide its decision, our Supreme Court followed the lead of Ohio which gives defendants 180 days from specified events in which to petition for post-conviction relief. Ohio Revised Code § 2953.21(2). However, Ohio's time limit is part of that state's statutory scheme whereas Kentucky's three-year window is part of our Rules of Criminal Procedure. While it may be appropriate for Ohio to refer to a statute of limitations in determining whether a petition for post-conviction relief is timely filed in Ohio, we are reluctant to refer to the three-year window in RCr 11.42(10) as a statute of limitations, even though our Supreme Court used that term in *Stacey*, because it is, in fact, incorporated into a procedural rule rather than into a statute. We note that this is a technical distinction regarding terminology which in no way impacts the requirement that the Commonwealth raise the untimely filing of an RCr 11.42 motion as an affirmative defense at the trial court level.

Commonwealth argues that the present appeal is untimely. However, after the circuit court entered its first order, the Commonwealth responded to Appellant's RCr 11.42 and CR 60.02 motion, and the circuit court entered another order denying Appellant's motion. Appellant now appeals from the court's second order. We find no error in this. Nonetheless, we hold that the appeal fails on the merits of Appellant's claims.

III. RCr 11.42 ASPECT OF APPELLANT'S MOTION

A. STANDARD OF REVIEW

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id.* "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id.* (citations omitted).

Appellant alleges that the circuit court should have granted his request for an evidentiary hearing concerning his RCr 11.42 claims. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . ." In the present case, because the circuit court had determined that Appellant's claims could be resolved by examining the record, the court denied his request for an evidentiary hearing.

On appeal, after "the trial court denies a 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 v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted).

In the present case, Appellant's claims were resolved by reviewing the record. Thus, the circuit court did not err when it denied Appellant's request for an evidentiary hearing. *See id.*

B. MERITS OF APPELLANT'S RCr 11.42 CLAIMS

1. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO UNDERSTAND THE ELEMENTS OF THE CHARGE

Appellant first alleges that he received the ineffective assistance of trial counsel because counsel failed to understand the elements that the Commonwealth would have been required to prove to obtain a conviction against Appellant for theft of anhydrous ammonia with the intent to manufacture methamphetamine. Thus, Appellant asserts that he would not have pled guilty but for his counsel's ineffectiveness.

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's

performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001).

In his appellate brief, Appellant contends that *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006), implies that in order for him to have been "lawfully convicted of theft of anhydrous ammonia with the intent to manufacture methamphetamine, he had to have possessed the anhydrous [ammonia] and one other chemical or piece of equipment required to manufacture methamphetamine. Thus, possession of *only* anhydrous [ammonia] is a valid defense" to this crime of which he is convicted. However, Appellant's argument is misplaced. *Matheney* interpreted KRS 218A.1432, a statute pertaining to the manufacture of methamphetamine. *See Matheney*, 191 S.W.3d at 604. In *Matheney*, the Kentucky Supreme Court held that, in order to constitute a violation of KRS 218A.1432(1)(b), "one must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine. . . ." *Id.* On the contrary, Appellant pled guilty to violating KRS 514.030(1), a statute pertaining to theft by unlawful taking or disposition, and in Appellant's case, he specifically pled guilty to theft by unlawful taking, namely anhydrous ammonia, with the intent to manufacture methamphetamine. Therefore, Appellant's argument lacks merit because he did not plead guilty to manufacturing methamphetamine, as provided in the statute discussed in *Matheney*; rather, he pled guilty to theft by unlawful taking, thus rendering the *Matheney* reasoning inapplicable to this case.

2. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO EXPLAIN TO APPELLANT THAT HE WOULD RECEIVE THE MAXIMUM SENTENCE IN EXCHANGE FOR PROBATION

Appellant next asserts that he received the ineffective assistance of trial counsel when his attorney failed to explain to him that he would receive the maximum sentence in exchange for the probation that he requested. However, Appellant's claim lacks merit. Even if we were to assume, *arguendo*, that counsel rendered deficient performance by failing to explain this sentencing scheme to him, Appellant cannot prove that he would not have pled guilty but for this deficient performance, as he is required to prove to establish his ineffective assistance of counsel claim. *See Bronk*, 58 S.W.3d at 486-87. Appellant cannot prove that he would have chosen to proceed to trial but for counsel's allegedly deficient performance because Appellant was warned by the judge at sentencing that he would be sentenced to the maximum term if Appellant chose probation in lieu of the minimum sentence, and Appellant nevertheless chose probation. Thus, because Appellant was forewarned by the sentencing judge that he would receive the maximum sentence if Appellant chose probation, he cannot now show that he would have proceeded to trial if his counsel had given him this same information. Therefore, this claim lacks merit.

3. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO REQUEST A COMPETENCY HEARING AT SENTENCING

Finally, Appellant contends that his trial counsel rendered ineffective assistance when counsel failed to request a competency hearing at sentencing. Appellant asserts that he informed the trial court during sentencing that he was taking Xanax, which his doctor had prescribed for him. Additionally, he contends that his mother informed the

trial court that Appellant has a chemical imbalance, i.e., bipolar disorder. Appellant argues that his counsel failed to inform him of the defenses of incompetence and lack of criminal responsibility, and that if counsel had informed him of these defenses, he would not have pled guilty.

However, it should be noted that Appellant does not allege that he was incompetent or that he lacked criminal responsibility. Further, Appellant has proffered no evidence showing that he was incompetent to be tried or to plead guilty. Therefore, Appellant cannot establish that his counsel rendered deficient performance by failing to inform Appellant of these defenses as Appellant does not even allege that he qualified for these defenses. *See Bronk*, 58 S.W.3d at 486-87. Thus, this claim lacks merit.

IV. CR 60.02(e) AND (f) ASPECTS OF APPELLANT'S MOTION

A. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

B. MERITS OF APPELLANT'S CLAIMS UNDER CR 60.02

In his motion brought in the circuit court, Appellant also alleged that he was entitled to relief under CR 60.02(e) and (f), which state as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. . . .

"Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks and citation omitted). Civil Rule 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.* In the present case, because Appellant raised his claims in his RCr 11.42 motion, his CR 60.02 motion fails. *Id.* Moreover, because Appellant's CR 60.02 motion lacks merit, he is not entitled to a hearing on his CR 60.02 motion. *See White*, 32 S.W.3d at 86.

Accordingly, the order of the Fulton Circuit Court is affirmed.

ALL CONCUR.

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