

RENDERED: JULY 3, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NOS. 2002-CA-000236-MR
2002-CA-000237-MR
2002-CA-000238-MR

BILLY RAY SADLER, JR.

APPELLANT

APPEAL FROM HARRISON CIRCUIT COURT
v. HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NOS. 00-CR-00003, 00-CR-00007 AND 00-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: JOHNSON AND KNOPF, JUDGES; AND JOHN D. MILLER, SPECIAL JUDGE.¹

JOHNSON, JUDGE: Billy Ray Sadler Jr., pro se, has appealed from the Harrison Circuit Court's denial of his RCr² 11.42 motion. We

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

² Kentucky Rules of Criminal Procedure.

affirm in part, reverse in part and remand for appointment of counsel and an evidentiary hearing.

Sadler was indicted on January 4, 2000, by a Harrison County grand jury under two separate indictments. Indictment No. 00-CR-00003 charged Sadler with theft by unlawful taking (firearm),³ and as being a persistent felony offender in the second degree (PFO II).⁴ Indictment No. 00-CR-00007 charged Sadler with possession of a handgun by a convicted felon,⁵ tampering with physical evidence,⁶ and as being a PFO II. In exchange for the Commonwealth's offer to dismiss the PFO II charges and the tampering charge and to make a sentencing recommendation of five years' imprisonment on each of two convictions with the sentences to run concurrently, Sadler entered two separate guilty pleas on March 7, 2000, to theft by unlawful taking (firearm) on the first indictment and to possession of a handgun by a convicted felon on the second indictment.

A third indictment (Indictment No. 00-CR-00025) was returned by a Harrison County grand jury on April 7, 2000,

³ Kentucky Revised Statutes (KRS) 514.010.

⁴ KRS 532.080(2).

⁵ KRS 527.040.

⁶ KRS 524.100.

charging Sadler with escape in the second degree,⁷ and as being a persistent felony offender in the first degree (PFO I).⁸ After the Commonwealth offered to dismiss the PFO I charge and to make a sentencing recommendation of one year on the escape charge, Sadler pled guilty on November 8, 2000.

In each case, Sadler and his counsel signed the standard AOC⁹ form 491; and in each case, the trial court entered judgments of conviction on the plea of guilty, which followed the Commonwealth's sentencing recommendation. In each judgment the trial court specifically found that Sadler understood the nature of the charges against him and that he knowingly and voluntarily waived his rights. Sadler was sentenced to five years' imprisonment each on the theft and possession convictions to be served concurrently and one year on the escape conviction to be served consecutively, for a total sentence of six years.

Sadler filed an RCr 11.42 motion to vacate his convictions and sentences on October 25, 2001, challenging all three convictions, requesting appointment of counsel and an evidentiary hearing. In an order entered on November 29, 2001, the circuit court summarily denied the motion for appointment of counsel and the motion to vacate. Sadler then filed three

⁷ KRS 532.030.

⁸ KRS 532.080(3).

⁹ Administrative Office of the Courts.

separate appeals. We granted the Commonwealth's motion to consolidate the three appeals in an order entered on June 28, 2002.

Sadler claims his motion for RCr 11.42 relief should be granted because (1) defense counsel rendered ineffective assistance; (2) his guilty pleas were not voluntary, knowing and intelligent; and (3) the trial court erred by denying his motion without appointment of counsel or without holding an evidentiary hearing.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in Strickland v. Washington.¹⁰ He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance such that counsel was not performing as counsel guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty and that the outcome would have been different. In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate that there is a reasonable probability that but for counsel's

¹⁰ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39-40 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

unprofessional errors, he would not have pled guilty and would have insisted on going to trial.¹¹

Sadler claims that his attorney failed to investigate his case and failed to raise the defense that the gun, which resulted in the possession and tampering charges, was found pursuant to an illegal search. The record refutes this argument, in that Sadler's attorney on March 3, 2000, filed a motion to suppress the gun, and a suppression hearing was scheduled for March 7, 2000. However, Sadler entered his guilty pleas on the same day the suppression hearing was to be held. While this refutes Sadler's claim that his attorney failed to investigate this defense, it raises the question of whether Sadler's attorney advised him that he had filed the motion to suppress and whether counsel properly advised Sadler of the implications of that motion before advising him to plead guilty.

For a guilty plea to be constitutionally valid, the plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant.¹² It does appear from the record that there was some basis in fact to support Sadler's motion to suppress. Depending on the outcome

¹¹ Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985). See also Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 226 (1986).

¹² North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986).

of a suppression hearing, there is at least a reasonable probability that Sadler would have chosen to go to trial, or in the alternative, that he would have entered a conditional guilty plea. The suppression of the gun would have affected the ability of the Commonwealth to prove the theft charge, and it appears that its suppression would have resulted in the dismissal of the possession and tampering charges. While there is likelihood that the Commonwealth's offer was contingent upon avoiding the suppression hearing, and that counsel in consultation with Sadler determined that accepting the Commonwealth's offer was the best course of action, it would have been error for the trial court based solely on the record to have merely assumed that this occurred. Because this question could not be determined on the face of the record, Sadler was entitled to appointment of counsel and an evidentiary hearing.¹³

An evidentiary hearing is required if there is an issue of fact that cannot be determined on the face of the record.¹⁴ If an evidentiary hearing is required, counsel must be

¹³ We note that Sadler made a proper designation of record. Since no videotape or transcript of the proceedings was certified, we can only assume that they do not exist. As a result, we cannot say that the record shows that the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), were met. While this is not reason alone to vacate the judgments, it is a reason why the knowing and voluntary nature of the plea cannot be affirmatively established. Conklin v. Commonwealth, Ky., 799 S.W.2d 582, 583 (1990).

¹⁴ Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

appointed to an indigent movant upon a specific request in writing.¹⁵

Sadler also claims that his guilty plea to the escape charge under Indictment 00-CR-00025, entered on November 8, 2000, was not knowing, voluntary and intelligent, in that counsel failed to investigate the charge and to raise a valid defense. Sadler claims that he had a valid defense in that he was not in custody at the time he escaped. The record clearly refutes this claim. The record shows that police officers went to Sadler's residence to arrest him for failure to make required disposition of property. After arresting Sadler, the officers allowed him to go to the bedroom to get dressed, at which time he escaped out of a window. A special request for transfer was executed with the state of New York to return Sadler to Kentucky for trial. The record also reflects that defense counsel was able to get a PFO I charge dismissed and to get a prison sentence of one year in exchange for Sadler's guilty plea to the escape charge. Sadler is unable to demonstrate any deficient performance on the part of counsel or that his guilty plea to the escape charge was not knowing, voluntary and intelligent. We affirm the judgment as it pertains to the escape conviction.

Based on the foregoing reasons, we affirm the orders of the Harrison Circuit Court denying Sadler any relief on his

¹⁵ Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

RCr 11.42 motion pertaining to Indictment No. 00-CR-00025 (the escape conviction). As to the circuit court's order denying Sadler any relief on his RCr 11.42 motion pertaining to Indictment Nos. 00-CR-00003 (the theft conviction) and 00-CR-00007 (the possession conviction), we reverse and remand for appointment of counsel and the holding of an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Billy Ray Sadler, Pro Se
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BRIEF FOR APPELLEE:

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