

RENDERED: August 27, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002310-MR

MICHAEL HARRIS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NO. 00-CR-00501

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: The sole question in this appeal is whether the trial court erred in denying appellant's motion for RCr<sup>2</sup> 11.42 relief without appointing counsel or conducting an evidentiary hearing. Because we are convinced that allegations advanced in appellant's post-conviction motion are conclusively

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

refuted by the record, we affirm the denial of relief in this case.

On April 13, 2001, appellant entered a guilty plea to one count of trafficking in cocaine, first offense; one count of trafficking in Loritab, first offense; one count of trafficking in Xanax, first offense; and to a charge of being a persistent felon in the first degree. Prior to accepting appellant's guilty plea, the trial court conducted a colloquy in the presence of appellant's appointed counsel and the prosecutor. In the course of that examination, the trial court inquired as to whether appellant had ever suffered from a mental disease or defect. Appellant responded that he had previously been diagnosed with major depression with psychotic features and that he had been without his medication while he was in jail. The trial court thereafter asked appellant's counsel if she had any reason to believe that appellant was in need of a competency evaluation and she responded that she did not. When asked whether he understood the nature of the proceedings and whether he would like to have a competency evaluation before proceeding, appellant responded that he understood what was transpiring and would like to proceed. After hearing appellant's responses to these questions, as well as his statement that he believed that he was in need of treatment for his drug addiction but not for his previous mental problems, the trial court accepted

appellant's plea was the product of a knowing, intelligent and voluntary decision.

On the day of sentencing, appellant requested to withdraw his plea, asserting that it was involuntary due to his mental problems. The trial court conducted a hearing at which appellant's counsel stated that although she had been present during plea agreement discussions, it was appellant who had actually negotiated the agreement with the Commonwealth and that he had appeared to be competent at that time. The prosecutor also stated at the hearing that there had been no indication whatsoever that appellant was not competent at the time the plea was negotiated and accepted. The trial court subsequently denied appellant's request to withdraw the plea and sentenced him in accordance with the plea agreement.

Approximately one year later, appellant filed the RCr 11.42 motion at issue in this appeal. In that motion, appellant alleged that the trial court should not have accepted appellant's plea after he had been put on notice of appellant's previous mental problems and the fact that he had been without his medication during the time he was incarcerated. Appellant requested an evidentiary hearing and appointment of counsel to assist him on his motion. The trial court denied the motion without appointment of counsel or an evidentiary hearing on the basis that appellant's claim of incompetence at the time he

entered the plea was not supported by the record and that there is nothing in the record suggesting that appellant's counsel was in any way ineffective. We find no error in that determination.

In support of his contention that he was deprived of due process when the trial court accepted his guilty plea after being informed of a previous mental condition, appellant cites RCr 8.06, KRS<sup>3</sup> 504.100(1), Pate v. Robinson,<sup>4</sup> and Williams v. Bordenkircher,<sup>5</sup> all of which stand for the proposition that in order to preserve a defendant's constitutional rights, a trial judge must sua sponte order a competency evaluation if he has doubts about the defendant's competency. The Williams court provides the following standard for reviewing a trial court's decision as to whether a competency hearing should be conducted:

Whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.<sup>6</sup>

However, contrary to appellant's position in this appeal, a review of the proceedings which culminated in the acceptance of appellant's guilty plea dispels any contention that the trial

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)

<sup>5</sup> 696 F.2d 464 (6<sup>th</sup> Cir. 1983), cert. denied 461 U.S.916 (1983).

<sup>6</sup> 696 S.W.2d at 467.

court should have "experienced doubt" with respect to appellant's competence to enter the plea.

Noticeably absent from the record of the proceedings surrounding the entry and acceptance of appellant's plea are any of the usual indicia that might have called into question appellant's competence. The video tape of the proceedings shows appellant to be lucid, articulate, respectful, responsive to the questioning, and fully knowledgeable as to the terms of the Commonwealth's offer in exchange for his plea. In fact, appellant expressed displeasure at the fact that the Commonwealth did not offer to drop the persistent felon charge and particularly requested that the trial court grant him 90 days before having to commence service of the sentence to allow him to visit his father who was ill. Furthermore, appellant's counsel was specifically asked whether she thought appellant was in need of a competency evaluation and she responded that she did not. Thus, we are convinced that the record conclusively refutes appellant's contention that the trial court had doubts about his competence at the time his guilty plea was accepted.

Appellant also focuses upon the fact that the trial court ordered a competency evaluation after sentencing. Again, review of the record provides an acceptable explanation for the unusual timing of that order. In the course of the hearing on appellant's request to withdraw his guilty plea, appellant

indicated to the trial court that he was in need of help with his mental condition and the trial judge informed him that, insofar as he was able, he would attempt to see that appellant received mental health assistance as part of his incarceration. Thus, the ordering of a competency evaluation after sentencing does not provide support for appellant's claim that the trial court entertained doubt as to appellant's competence to enter a knowing, intelligent and voluntary guilty plea. Rather, it is an indication that appellant's request for help at the time of sentencing was acted upon by the trial court.

In sum, we are convinced that appellant has failed to demonstrate that the trial court entertained any doubt as to appellant's competence at the time he entered his plea and thus, there was no due process deprivation in the failure to sua sponte order a competence evaluation. Furthermore, appellant had an opportunity to appeal the denial of his motion to withdraw his plea and failed to avail himself of that opportunity. It is well-established that RCr 11.42 is not intended to be a substitute for direct appeal and is to be utilized for obtaining review of issues that were not accessible by direct appeal.<sup>7</sup> Thus, although we question whether this issue is a proper subject of RCr 11.42 relief, we have nevertheless

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<sup>7</sup> Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

elected to address the matter because it relates to an important constitutional right.

Finally, because the matters asserted in appellant's motion are conclusively refuted by the record, he was not entitled to an evidentiary hearing or appointment of counsel to assist in the prosecution of the RCr 11.42 motion.<sup>8</sup>

The judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David J. Harris  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
  
Courtney J. Hightower  
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Frankfort, Kentucky

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<sup>8</sup> Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).