

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002322-MR

LARRY LEE HUGHES

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00215

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** **

BEFORE: BUCKINGHAM, COMBS, and TACKETT, Judges.

COMBS, JUDGE. Larry Lee Hughes appeals the order of the McCracken Circuit Court which denied his motions for relief under RCr¹ 11.42, for an evidentiary hearing, and for the appointment of counsel. We vacate the order entered on October 24, 2002, and remand for additional proceedings.

On June 30, 2001, Larry Lee Hughes purchased simulated crack cocaine from an undercover police officer as part of a reverse sting operation conducted by the Paducah Police

¹ Kentucky Rules of Criminal Procedure.

Department. During his arrest, defendant swallowed the simulated cocaine that he had purchased. He had a crack pipe with residue in his possession; he was also operating a motor vehicle on a suspended license.

On September 7, 2001, a McCracken County grand jury returned a five-count indictment against Larry Lee Hughes. Counts 1 and 2 of the indictment charged him with two counts of first-degree possession of a controlled substance (cocaine); count 3 charged him with one count of possessing drug paraphernalia. Count 4 charged him with operating a motor vehicle while his license was revoked or suspended. Finally, count 5 charged him with being a persistent felony offender in the second degree (PFO II) by virtue of a prior felony conviction.

On November 30, 2001, Hughes pleaded guilty to two (2) counts of first-degree possession of a controlled substance (cocaine), possession of drug paraphernalia, and operating a vehicle on a suspended license. In his plea agreement, the Commonwealth agreed to dismiss the PFO II charge. Subsequently, Hughes was sentenced to six years in prison.

On September 4, 2002, appellant *pro se* filed a motion under RCr 11.42 to set aside his convictions and sentences. He also filed a supporting memorandum of law and a motion for an evidentiary hearing. As grounds for his motion, Hughes alleged

that his trial counsel had rendered ineffective assistance by failing: (1) to conduct a pre-trial investigation of his case, (2) to consult with him prior to trial, and (3) to prepare a proper defense and viable trial strategy. Hughes alleges that the cumulative effect of these errors deprived him of his constitutional right to due process and equal protection of the law. On October 24, 2002, the Circuit Court entered an order denying the RCr 11.42 motion. This appeal followed.

On appeal, Hughes argues that the trial court erred by failing to hold an evidentiary hearing. After our review of the record, we agree.

In Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001), the Kentucky Supreme Court addressed the proper procedure that a trial court must follow when ruling on motions for appointment of counsel and for an evidentiary hearing under RCr 11.42. Fraser holds that it is incumbent upon the trial court to determine whether the allegations in the motion can be resolved on the face of the record. If so, an evidentiary hearing is not required. However, a hearing is required if there is a material issue of fact that cannot be conclusively resolved (*i.e.*, conclusively proven or refuted) by an examination of the record alone. The trial judge may not simply disbelieve or dismiss the movant's factual allegations unless the record fails to substantiate the contentions. Id. at 452. The record before us

suggests that Hughes's 11.42 motion was denied solely because of the fact that he had pled guilty -- and the requisite evidentiary grounds were either lacking or erroneously assumed to exist.

It is readily apparent that not all reasonable avenues of the appellant's defense were explored. Most striking is that Hughes was indicted for possession of controlled substance when in fact he possessed a simulated substance. There is no evidence that appellant's counsel investigated the law surrounding possession of a simulated substance or that she was even aware that the substance was indeed simulated. There is also an absence of evidence that a lab report was made, which would have been a prerequisite to substantiate a second count of possession of cocaine. This apparent lack of investigation, coupled with counsel's reluctance to meet with the appellant prior to the entry of the guilty plea, suggests that an incompetent defense might have been provided and accordingly compels that an evidentiary hearing be held. Failure to do so was error.

Additionally, our review of the video transcripts of the hearing during which Hughes entered his plea of guilty reveals serious digressions from proper procedure as dictated by Boykin v. Alabama 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. The instructions given by the court at the time of entry of a

plea of guilty are of paramount importance with respect to guaranteeing a defendant's right to due process of the law. They must be meticulously discussed with the defendant in order for the court to ascertain that there is a complete meeting of the minds and that the plea is entered intelligently, knowingly, and voluntarily. In this case, the court asked the defendant if he were aware of his constitutional rights. No additional colloquy followed. Nor was any explanation of rights forthcoming from the bench. The abbreviated and perfunctory exchange was wholly insufficient to determine if Hughes properly understood the nature of the rights that he was waiving in entering a plea of guilty.

The October 30, 2002, judgment of the McCracken Circuit Court is vacated, and this matter is remanded for an order granting an evidentiary hearing and the appointment of counsel.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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