

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000350-MR

DAMON DEMETRIOUS CROFT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CR-000269

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Damon Demetrious Croft ("Croft") appeals from an order of the Jefferson Circuit Court denying his motion for CR 60.02 relief. We affirm.

On September 29, 1995, Croft was arrested in Jefferson County, Kentucky, and charged with trafficking in a controlled substance. Detectives of the Louisville Police Department observed Croft engaging in an apparent drug sale with another individual. After a brief foot pursuit, both persons were

arrested. Croft was found to have a quantity of cash in his possession, and the other party had a small quantity of cocaine. Pursuant to a plea agreement, Croft plead guilty to one count of first degree possession of cocaine, and received a probated sentence of three years in prison. Croft later violated the terms of his probation and was ordered to serve the three year sentence.

While incarcerated, Croft filed a CR 60.02(f) motion to vacate his sentence, and he sought an evidentiary hearing on the motion. As a basis for the motion, he maintained that he received ineffective assistance of counsel and that the ineffective assistance resulted in the guilty plea. Specifically, he claimed that counsel should have sought to suppress the introduction of evidence relating to his co-defendant's possession of cocaine. The motion was denied without a hearing, and this appeal followed.

Croft now argues that the trial court erred in denying the motion for relief and in failing to conduct an evidentiary hearing on the matter. He argues that the court abused its discretion in not concluding that counsel was ineffective for failing to suppress the evidence relating to the cocaine found in the possession of his co-defendant. Croft again maintains that counsel's failure resulted in his plea of guilty, and that said failure constitutes ineffective assistance of counsel.

We have closely examined Croft's argument, and find no error. As the Commonwealth properly notes, Croft's claim of ineffective assistance has not been properly brought pursuant to CR 60.02. A claim of ineffective assistance must be brought on direct appeal if appellate counsel is aware of the claim at the time direct appeal is taken. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). If the basis for the claim of ineffective assistance is discovered after a direct appeal, or after the period during which the party may avail himself of direct appeal, he may prosecute the claim under RCr 11.42. Id. CR 60.02 relief is limited to claims not available on direct appeal or under RCr 11.42. Id.

In the matter at bar, Croft should have brought his claim of ineffective assistance, if at all, pursuant to RCr 11.42. He did not, and this fact taken alone forms a sufficient basis for affirming the trial court's denial of his motion for relief. Since Croft failed to allege any special circumstances which, if true, would entitle him to CR 60.02 relief, he was not entitled to an evidentiary hearing and the trial court properly so ruled. Id.

Arguendo, even if the claim of ineffective assistance had been brought in a timely manner pursuant to RCr 11.42, we would have found no error in the circuit court's denial of the motion. Croft has alleged nothing upon which a trial court

could have reasonably concluded that cocaine found in the possession of his co-defendant should have been suppressed, nor that counsel was ineffective in failing to so argue. Counsel's performance must be shown to be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Croft's arguments set forth before the circuit court and on appeal are insufficient to prevail on an RCr 11.42 motion for relief.

For the foregoing reasons, we affirm the Jefferson Circuit Court's denial of Croft's motion for CR 60.02 relief and for an evidentiary hearing on the motion.

ALL CONCUR.

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