

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001648-MR

DAMAR A. HORTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 97-CR-01052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.
GUIDUGLI, JUDGE. Damar A. Horton appeals from an opinion and
order of the Jefferson Circuit Court denying his motions to
vacate, set aside or correct a sentence pursuant to RCr 11.42
and to modify the judgment pursuant to CR 60.02(f). We affirm.

Horton was indicted by the Jefferson County grand jury
in April, 1997, on two counts of first degree trafficking in a
controlled substance (schedule II cocaine). According to the

record, the charges arose when Horton was found to be in possession of cocaine and several weapons. He entered into a plea agreement with the Commonwealth, and on April 23, 1997, pleaded guilty. He was sentenced to serve ten years on count one and five years on count two, to be served concurrently for a total sentence of 10 years. The sentence was withheld and Horton was placed on probation for five years beginning on July 17, 1997. The record indicates that Horton violated the terms of his probation, and on July 5, 2002 he was ordered to serve the ten year sentence.

On May 30, 2003, Horton filed motions in Jefferson Circuit Court to vacate, set aside or correct the judgment pursuant to RCr 11.42 and to modify his sentence pursuant to CR 60.02(f). As a basis for the motions, he maintained that he received ineffective assistance of counsel when counsel did not adequately investigate the consequences of Horton's crimes. He argued that because of the ineffective assistance, his guilty plea was not made knowingly, voluntarily, and intelligently. He requested an evidentiary hearing on the motions, and sought an order vacating, setting aside or correcting the judgment, or in the alternative modifying his sentence.

The trial court considered Horton's motions without a hearing, and on July 2, 2003, rendered its opinion and order denying the motions for relief. As a basis for the order, the

court determined from the record that Horton had full knowledge of the consequences of his crimes and that he understood the judgment. The court concluded that Horton's counsel properly advised him that he could receive up to thirty years in prison if the sentence was enhanced pursuant to KRS 218A.992 (because firearms were present), and that this advice did not overstate the potential penalty. The court also determined that Horton was not entitled to CR 60.02 relief, and that a hearing was not necessary as the issues could be resolved from the record. This appeal followed.

Horton now argues pro se that the trial court committed reversible error in denying his motions for relief. He claims that his rights under the 6th and 14th Amendments to the United States Constitution and Section 11 of the Kentucky Constitution were violated when his trial counsel improperly advised him that if the criminal charges proceeded to trial, he could receive an enhanced sentence of up to thirty years in prison. Horton argues that but for this assertion by his counsel, he would not have entered a plea of guilty and accepted a ten year sentence. He maintains that the trial court was mistaken in its belief that a trial could have resulted in a sentence of up to 30 years in prison, and argues that such a sentence would have been violative of the prohibition against

double jeopardy. He also argues that the court erred in ruling on the motions without the benefit of a hearing.

We have examined the written arguments, the record, and the law, and find no error. The corpus of Horton's claim of error is that the trial court improperly concluded that his trial counsel acted properly in advising Horton that he could receive up to a thirty year sentence if the matter went to trial. We do not find this argument persuasive. KRS 218A.992 states:

(1) Other provisions of law notwithstanding, any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:

(a) Be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony; or

(b) Be penalized as a Class D felon if the offense would otherwise be a misdemeanor.

Horton was charged with two counts of trafficking in a controlled substance in the first degree in violation of KRS 218A.1412, a Class C Felony. A Class C felony is punishable by a sentence of no less than five years and no more than ten years. By operation of KRS 218A.992, the commission of the offense with a firearm changes the classification, for purposes of sentencing, from Class C to Class B. Class B felonies are

punishable by sentences of not less than ten years nor more than twenty years.

Thus, if Horton went to trial and was found guilty, and if his sentence was enhanced by operation of KRS 218A.992, he could have been sentenced to two consecutive terms of twenty years each. His counsel properly advised him of this possibility. Counsel stated to the trial judge that the avoidance of the possibility of the sentencing enhancement was the basis for accepting the plea. Not only does this advice not run afoul of the two-prong test set forth in Strickland v. Washington, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1985), counsel was duty-bound to fully advise Horton of all possible outcomes if the matter proceeded to trial. Id.

As the trial court and the Commonwealth properly note, the trial court conducted a colloquy with Horton informing him of his rights and the consequences of a guilty plea. He stated that he understood the effects of such a plea, and signed the "motion to enter guilty plea" form stating that he understood the proceedings, was satisfied that counsel was fully informed about the case, and was satisfied with the advice he received. These affirmations carry a strong presumption of verity. Blackledge v. Allison, 432 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Lastly, we cannot conclude that Horton was entitled to a hearing on his motions. Where the motions may be resolved by reference to the record, no hearing is required. Glass v. Commonwealth, Ky., 474 S.W.2d 400 (1971). The record reveals that Horton was charged with two Class C felonies, and that he could have received a sentence based on an enhancement to Class B felonies. This goes to the heart of his motions for relief, and the trial court properly so ruled.

For the foregoing reasons, we affirm the opinion and order of the Jefferson Circuit Court denying Horton's motions for relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Damar A. Horton
Beattyville, KY

BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

Anitria M. Alo
Assistant Attorney General
Frankfort, KY