

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001794-MR

PAUL ALTON WISE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 01-CR-002919

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Paul Alton Wise appeals from an order denying his motion for relief pursuant to RCr¹ 11.42. After reviewing the record, we affirm the determination of the trial court that he did not receive ineffective assistance of counsel.

On December 13, 2001, Wise was indicted on charges of possession of a controlled substance and of tampering with physical evidence. He was also charged as a first-degree persistent felony offender (PFO I). In a separate indictment,

¹ Kentucky Rules of Criminal Procedure.

he was charged with trafficking in a controlled substance, tampering with physical evidence, possession of marijuana, and illegal possession of drug paraphernalia.

On October 17, 2002, Wise entered into separate plea agreements with the Commonwealth with respect to both indictments. He filed motions indicating that he wished to withdraw his former pleas and to plead guilty to all of the charges against him. In exchange for the guilty plea with respect to the first indictment, the Commonwealth agreed to recommend that he be sentenced to a term of ten years on the possession charge and five years on the charge of tampering with evidence. The sentence was to be enhanced by ten years because of his PFO I status. However, the Commonwealth agreed to recommend that all these terms be served concurrently for a total of ten-years' imprisonment.

With respect to the second indictment, Wise was to be sentenced to serve five years on the trafficking charge; five years on the tampering-with-evidence charge; and twelve months each for the charges of possession of marijuana and possession of drug paraphernalia. These terms were to be served concurrently (for a total of five-years' imprisonment) as to one another but consecutively as to the sentences in the first indictment.

Wise later appeared before the Jefferson Circuit Court. While the videotape record of the hearing before the court has not been included as part of the record on appeal, the court's order indicates that Wise was carefully examined in order to insure that his decision to enter a guilty plea was knowing, intelligent, and voluntary. He was sentenced in accordance with the Commonwealth's recommendations following a hearing held on January 15, 2003. The judgment provided that the sentences relative to the separate indictments were to be served as follows: concurrent sentences of ten years for the first indictment and concurrent sentences of five years for the second indictment, the two aggregate sentences of each indictment to be served consecutively as to one another for a total of fifteen years to serve.

Six months after his sentencing, Wise sought to vacate the judgment of conviction or to modify his sentences. In his motion filed pursuant to RCr 11.42, Wise urged that his sentence be modified since he had not been made aware that he would be ineligible for parole during the early part of his sentence. He contended that his plea agreement with the Commonwealth had included a dismissal of the PFO charge and had contemplated that all of the terms of imprisonment on the separate indictments were intended to be served concurrently. In the alternative, Wise argued that he had not received effective assistance of

counsel since his attorney had misadvised him with respect to the separate plea agreements. Wise also raised issues related to the Commonwealth's burden of proof and the reasonable doubt standard. Finally, he requested the appointment of counsel and a full evidentiary hearing.

On August 18, 2003, the trial court entered its order denying Wise's motion for relief. The court correctly determined that the PFO I charge had been specifically included in the plea agreement and had not been dismissed. Following its review of the plea agreement forms and the colloquy that occurred prior to sentencing, the court concluded that Wise had known and had understood the sentence that he would receive in exchange for his guilty pleas. Since his claims were refuted by the record, the trial court refused to appoint counsel or to conduct an evidentiary hearing. The motion for relief was denied, and this appeal followed.

On appeal, Wise argues that the trial court erred by failing to grant relief from the sentences. He contends that his counsel was ineffective by failing: (1) to alert the court that he had a mental disability and a limited education; (2) to apprise the court that he was under the influence of drugs during the proceedings; (3) to request a competency hearing; (4) to investigate and to prepare a defense against the PFO I charge; and (5) to secure an expert witness. He argues that he

had a complete lack of understanding of the circumstances relevant to his case. Finally, Wise contends that he was entitled to the appointment of counsel and to an evidentiary hearing.

The numerous arguments now presented for our review were not included among the contentions set forth in Wise's RCr 11.42 motion filed in circuit court. Since the contentions were not properly presented to the circuit court, they are not subject to our review. However, even if these contentions had been submitted to the circuit court, they would have been subject to that court's summary dismissal.

The provisions of RCr 11.42(2) require a movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The failure to provide the factual support required by RCr 11.42 justifies summary dismissal of the motion. Sanders v. Commonwealth, Ky., 89 S.W.3d 380 (2002).

Wise has presented no facts to support his numerous allegations. He has offered only vague and indeterminate assertions concerning possible defenses and mental health issues. Even if Wise had presented his allegations to the circuit court, it would have been justified in denying relief without conducting an evidentiary hearing or appointing counsel

because of his complete failure to satisfy the specificity requirements of RCr 11.42(2).

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul A. Wise, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky