

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002393-MR

RANDY AKERS

APPELLANT

APPEAL FROM BELL CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 01-CR-00265

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI, TACKETT AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Randy Akers (hereinafter "Akers") has appealed from the Bell Circuit Court's September 25, 2003, order denying his RCr 11.42 motion to vacate judgment without an evidentiary hearing and from the October 15, 2003, order denying his CR 59.05 motion to vacate the previous ruling. Having closely examined the record and the applicable case law, we must reverse the circuit court's ruling and remand this matter for an evidentiary hearing.

On December 13, 2001, the Bell County Grand Jury indicted Akers on one count of theft by unlawful taking over \$300<sup>1</sup> and for being a persistent felony offender in the second degree (hereinafter "PFO II").<sup>2</sup> According to the indictment, the theft charge stemmed from a November 2, 2001, incident in which Akers took a 1968 Mack DM 600 dump truck from Marvin Brock without his permission. At his arraignment on January 18, 2002, the circuit court appointed public defender Richard O'Leary to defend Akers, and scheduled a pretrial conference for March 4, 2002. By order entered January 23, 2002, the circuit court ordered both sides to furnish discovery.<sup>3</sup> At the March 4, 2002, pretrial conference, Akers, now represented by public defender Cotha V. Hudson, indicated that he had rejected an offer by the Commonwealth and wanted a jury trial. Although the circuit court assigned a trial date of June 4, 2002, that date was later reassigned and a pretrial conference was scheduled for June 17, 2002. At the beginning of the June 17, 2002, court appearance, attorney Hudson indicated that Akers wanted to enter an open plea. However, Akers failed to appear at that court date. Accordingly, the circuit court issued a bench warrant, which was served on August 28, 2002. The circuit court scheduled another pretrial conference for September 16, 2002.

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<sup>1</sup> KRS 514.030.

<sup>2</sup> KRS 532.030(2).

<sup>3</sup> The record does not contain any discovery material.

Akers appeared at the September 16, 2002, pretrial conference, at which time he indicated his desire, after conferring with his attorney, to enter an open guilty plea. The circuit court then conducted a hearing pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), to determine whether Akers's judgment was impaired by medication, alcohol, or drugs; whether he had reviewed the facts of the case with his attorney and was fully informed about the case; whether he understood all of his constitutional rights and that he was waiving those rights by pleading guilty; and whether he had been coerced or threatened into entering a guilty plea. His attorney indicated that Akers was pleading guilty to both the theft by unlawful taking and the PFO II charges, for which he could receive a maximum sentence of ten years. The circuit court then asked Akers questions related to the offense to which he was pleading guilty, and Akers admitted that at the time he committed the offense, he was twenty-one years old and had previously been convicted of a felony. At the conclusion of the hearing, the circuit court accepted Akers's plea as voluntary. The matter proceeded to a final sentencing hearing on November 6, 2002, and the final judgment was entered on November 20, 2002. The circuit court sentenced Akers to a five-year sentence on the theft conviction, enhanced to eight years due to the PFO

II conviction, and provided for a seventy-one day credit for time already served.

From March to September 2003, Akers filed four motions for shock probation, each of which the circuit court denied. On September 22, 2003, Akers filed a pro se motion to correct sentence pursuant to RCr 11.42. In his motion and memorandum in support, Akers indicated that he did not want his sentence vacated or set aside, but rather wanted the sentence to be corrected to show that he should not have been charged with theft by unlawful taking, but with unauthorized use of an automobile or other propelled vehicle pursuant to KRS 514.100. Akers argued that he received ineffective assistance from his attorney because she failed to fully inform herself of the facts and law of the case, and was inadequately prepared. Akers also moved for an evidentiary hearing because his allegations were not refuted by the record, as well as for the appointment of counsel. On September 25, 2003, the circuit court denied Akers's RCr 11.42 motion, indicating that there was no need for an evidentiary hearing and that because his plea was voluntarily entered, he was not entitled to any relief.<sup>4</sup> Akers filed a CR 59.05 motion to vacate that ruling, which was also denied without a hearing on October 15, 2003. This appeal followed.

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<sup>4</sup> The circuit court did not rule on the motion for appointment of counsel.

On appeal, Akers continues to argue that he was improperly charged and that he received ineffective assistance from his appointed counsel, and thus is entitled to relief pursuant to RCr 11.42. On the other hand, the Commonwealth argues that the circuit court properly denied Akers's motion without an evidentiary hearing because he did not cite grounds sufficient to support his motion, his plea was voluntary, and his attorney was not ineffective.

In order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test. A movant must establish: 1) that counsel's performance was deficient and 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to Strickland, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective standard of reasonableness, or under the prevailing professional norms. The movant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). If an evidentiary

hearing is held, our review entails a determination as to whether the circuit court acted erroneously in finding that the defendant below received effective assistance of counsel. Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506 (1983). If an evidentiary hearing is not held, our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). See also Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727 (1986)

In Sparks, this Court addressed the validity of guilty pleas:

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978), (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

Sparks, 721 S.W.2d at 727. The Sparks Court also addressed the two-part test used to challenge a guilty plea based upon ineffective assistance of counsel:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). Cf., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, 721 S.W.2d at 727-728.

In the present matter, the circuit court did not hold an evidentiary hearing, so that our review is limited to determining whether the motion states grounds not conclusively refuted by the record that would invalidate the conviction, if true. Based upon our review, we must hold that the record does not conclusively refute the grounds Akers presented in his RCr 11.42 motion. Rather, the record, limited as it is and with Akers's statements taken as true, appears to support findings that Akers's plea was involuntary and that his appointed counsel

was ineffective. The transcript of the September 16, 2002, guilty plea hearing reveals that Akers did not understand the elements of the offense to which he was pleading guilty. Akers was indicted for, and pled guilty to, theft by unlawful taking over \$300 pursuant to KRS 514.030(1), a Class D felony, which provides that a person is guilty of that offense "when he unlawfully: (a) Takes or exercises control over moveable property of another with intent to deprive him thereof[.]" On the other hand, Akers asserts that he should have been charged with and convicted of the unauthorized use of an automobile or other propelled vehicle pursuant to KRS 514.100, a Class A misdemeanor, which provides: "(1) A person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof." At the guilty plea hearing, the following colloquy took place between the circuit court and Akers regarding the theft charge:

THE COURT: Are you entering a plea of guilty to the charge of Theft Over \$300.00, because on November 2, 2001, you took a 1968 Mack Dump Truck valued at more than \$300.00, from Marvin Brock without his permission and with the intent to steal the truck from Marvin Brock?

MR. RANDY AKERS: I did take it.

THE COURT: Was it your intent to deprive him of that vehicle?

MR. RANDY AKERS: What is that now?

THE COURT: Was it your intent to deprive him of that vehicle, and that he was never going to get it back?

MR. RANDY AKERS: Yes, I was going to bring it back.

THE COURT: When?

MR. RANDY AKERS: That same night.

THE COURT: What were you using it for?

MR. RANDY AKERS: I just took it for a drive.

MRS. COTHA V. HUDSON: And wrecked it, Judge.

It certainly appears that Akers did not understand the elements of the crime for which he was charged and to which he was entering a guilty plea. In light of Akers's contradictory responses, the circuit court should have further questioned Akers to ensure that his plea was both intelligent and knowing. Furthermore, his appointed counsel should have ensured that Akers understood the elements of the offense before recommending that he enter a guilty plea. Although we recognize and agree with the Commonwealth's argument that he may not attack the sufficiency of the evidence to support his conviction due to the entry of a guilty plea, Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223 (1986), Akers is permitted to collaterally attack his

conviction based upon the validity of the plea itself and upon the conduct of his appointed counsel.

Because the circuit court did not hold an evidentiary hearing, we must reverse the denial of the RCr 11.42 motion as well as the denial of the motion for an evidentiary hearing. We remand this matter for a ruling on Akers's motion for appointment of counsel and for an evidentiary hearing regarding the validity of the guilty plea and as to whether his appointed counsel rendered ineffective assistance of counsel in the plea proceedings.

For the foregoing reasons, the circuit court's order denying the RCr 11.42 motion without an evidentiary hearing is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

**BRIEF FOR APPELLANT:**

Randy Akers, pro se  
Central City, KY

**BRIEF FOR APPELLEE:**

Gregory D. Stumbo  
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