

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002542-MR

DAVID SHERRARD

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 97-CR-00276

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: David Sherrard appeals, *pro se*, from an order of the Hardin Circuit Court denying his motion to vacate judgment against him pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Sherrard was convicted of complicity to commit marijuana cultivation while in possession of a firearm, complicity to commit marijuana possession while in possession of a firearm, and complicity to commit possession of drug paraphernalia while in possession of a firearm and sentenced to sixteen years' imprisonment. He argues that the trial court

erred by failing to hold an evidentiary hearing to determine whether his trial counsel was ineffective for failing to object to the evidence seized pursuant to an allegedly invalid search warrant. Because trial counsel did in fact file an unsuccessful motion to suppress the evidence seized while executing the search warrant, the trial court's decision to deny relief under RCr 11.42 is affirmed.

Sherrard was tried by a jury and convicted of several offenses related to the cultivation of marijuana. He appealed to this court as a matter of right, and we affirmed the results of his jury trial. The Kentucky Supreme Court denied Sherrard's request for discretionary review. Afterwards, Sherrard filed a motion, pursuant to RCr 11.42, asking the trial court to vacate the judgment and alleging that his trial counsel was ineffective. His complaints included counsel's alleged failure to object to the evidence seized by police while executing a search warrant, counsel's failure to discover the identity of the confidential informant who gave police information about Sherrard's marijuana cultivation, counsel's lack of objection to a statement Sherrard made to a police officer at the hospital without being advised of his constitutional rights, counsel's trial strategy relating to his closing argument, and several other matters which had already been decided by the Court of Appeals on direct appeal. The trial court reviewed the record,

found that all of Sherrard's contentions were amply refuted and issued an order which thoroughly addressed Sherrard's allegations of ineffective assistance of counsel and denied the motion to vacate the judgment. This appeal followed.

First, Sherrard argues that his trial counsel rendered ineffective assistance by failing to object to the introduction of evidence seized during a search of his home. In order to demonstrate ineffective assistance of counsel, Sherrard must meet a two-prong test first showing that his trial counsel's performance was defective and then showing that counsel's defective performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Sherrard claims that the evidence seized from his home was illegally obtained because the search warrant was not supported by an affidavit. In addition, he contends that his attorney rendered ineffective assistance by failing to challenge the admission of this evidence, but the record clearly refutes this allegation. Prior to his trial, Sherrard's counsel filed a motion to suppress the evidence seized from his home accompanied by a memorandum of law. The trial court held an evidentiary hearing and then denied the suppression motion. Still, Sherrard's attorney made motions to suppress the evidence after the jury was seated and again during the course of the trial. Consequently, Sherrard cannot now base his entitlement to RCr

11.42 relief on the notion that his attorney allowed the seized evidence to be presented to the jury unchallenged.

In his appellate brief, Sherrard also makes vague complaints about being denied his right to confront witnesses against him because trial counsel refused to let him cross-examine the Commonwealth's witnesses, the failure of trial counsel to obtain the identity of the confidential informant, trial counsel's failure to demonstrate that there was no nexus between the firearm and the drugs, and trial counsel's lack of specificity in making motions for a directed verdict. The right to confrontation does rest on an accused defendant's right to hear the testimony of witnesses against him and to subject such testimony to cross-examination, but there is nothing in the cases cited by Sherrard which supports his claim that he was denied this right because cross-examination was conducted by his attorney rather than himself. Next, although the confidential informant's statements to police led to them getting a search warrant for Sherrard's home, the evidence used to convict him at trial came solely from the drugs and the gun seized pursuant to the search warrant. Further, the identity of the confidential informant is only subject to disclosure under certain limited circumstances, none of which were present in Sherrard's case. Kentucky Rule of Evidence 508. Additionally, Sherrard contends that the police created the nexus between the firearm and the

drugs seized from his home by removing an unloaded gun from on top of the refrigerator and placing it in proximity to the marijuana they found. What Sherrard fails to demonstrate is any legal basis for his argument that he was not simultaneously in possession of drugs and a firearm when both were found in his home at the same time. Finally, Sherrard asks this court to find that his trial counsel was ineffective for failing to state more specifically the grounds for motions for a directed verdict. Regardless, Sherrard neither informs us what those specific grounds should have been, nor does he demonstrate, in light of the overwhelming evidence seized from his home, how this alleged defect in counsel's performance resulted in an outcome different than what would have otherwise occurred.

Sherrard also argues that the district court abused its discretion in allowing the charges against him to proceed to a Grand Jury and that the circuit court abused its discretion by trying the matter in front of a jury. These contentions appear to be based on Sherrard's belief that the search warrant, which resulted in the seizure of the evidence used to convict him, was invalid. Sherrard seems to contend that the district and circuit courts had an obligation to recognize that the warrant was defective and decline to allow the Commonwealth to proceed with the charges against him. The circuit court did, in fact, conduct an evidentiary hearing and determined that the search

warrant issued was valid. Moreover, Sherrard failed to raise this allegation in his request for RCr 11.42 relief. We will not review complaints of error which the lower court has had no opportunity to consider.

For the foregoing reasons, the order of the Hardin Circuit Court denying Sherrard's motion to vacate the judgment against him pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Sherrard, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky