

RENDERED: April 15, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000818-MR

CRAIG MILNER

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT  
v. HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 98-CR-00257

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Craig Milner (Milner) brings this appeal from an "Opinion and Order" entered by the Fayette Circuit Court on April 19, 2004, overruling his "Motion to Enter an Order to Set Aside his Guilty Plea." Before us, Milner argues that the trial court erred in failing to allow him to "withdraw his guilty plea" as it was involuntary, unintelligent, and not

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

factually supported, due in part to ineffective assistance of counsel. We affirm.

On November 17, 1997, the police executed a search warrant at nineteen year-old Milner's two-story single family residence, based on 1) complaints of a lot of "foot traffic in and out of" and that "shots had been fired from" the home; 2) complaints that Milner had shot at an individual in the past and had previously sold marijuana, L.S.D. and cocaine on school grounds; and 3) the discovery from the trash of the residence on two different occasions (including the day of the search) of several baggies with the corners missing and several suspected marijuana stems, seeds and roaches and a silver alligator clip. According to the record on appeal, the search recovered the following: 1) from Milner's bedroom: rolling papers, pipes, scales, marijuana, marijuana seeds, marijuana stems, marijuana roaches, mushrooms, crack cocaine, and 10 Petri dishes with suspected mushrooms; 2) from Milner's coat pocket: one marijuana roach; 3) from the TV room and kitchen: scales, marijuana, crack cocaine, pipe, baggies with drug residue, a tape and a book on how to grow mushrooms, indoor grow equipment, soft body armor, eleven handguns, and nine rifles and shotguns. Because of the discovery of drugs and firearms, the federal authorities were notified.

On March 6, 1998, Milner was indicted for possession of a controlled substance (cocaine), first degree,<sup>2</sup> possession of drug paraphernalia while in possession of a firearm,<sup>3</sup> possession of marijuana,<sup>4</sup> and possession of a controlled substance (psilocybin), second degree.<sup>5</sup> After several pre-trial hearings, Milner pleaded guilty, pursuant to the Commonwealth's recommendation, to possession of a controlled substance (cocaine), first degree. Recommendation on the plea from the Commonwealth included one year on the possession with dismissal of the remainder of the charges and forfeiture of all guns and items seized. The Commonwealth further stated on the record that, according to the federal authorities, no federal charges would be pursued.

In taking the plea, the trial court conducted an extensive colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). During the colloquy, Milner admitted knowing the elements of the offense; admitted that he was not made any promises or threats in order to plead, beyond the Commonwealth's recommendation of a one-year sentence; and acknowledged satisfaction with counsel. His signature on

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<sup>2</sup> Kentucky Revised Statutes 218A.1415, a class D felony.

<sup>3</sup> Kentucky Revised Statutes 218A.500 and 218A.992, a class D felony.

<sup>4</sup> Kentucky Revised Statutes 218A.1422, a class A misdemeanor.

<sup>5</sup> Kentucky Revises Statutes 218A.1416, a class A misdemeanor.

the guilty plea form further substantiated the above admissions. Also during the colloquy, although at first placing blame on his roommate for the drugs in the house, upon further questioning by the trial court Milner answered affirmatively to the court's question, "You did know that there was cocaine in the house?" and that he did, in fact, on November 17, 1997, commit the offense of possession of cocaine.

At sentencing, despite the trial court's notification that, although probation was appropriate, the nature of the case warranted a longer sentence and therefore the court was not accepting the Commonwealth's recommendation of one year, Milner declined the opportunity to withdraw his plea indicating that he was willing to accept the increased sentence with a possibility of probation. The court thereafter sentenced Milner to the maximum term of five years, probated the term for five years, and included strict conditions of probation.

Three years later, Milner stipulated to probation violations. The court revoked his probation but re-probated him for another five years upon similar but tighter conditions. After only one month on this new probation, Milner again stipulated to violations, was revoked and ordered him to serve out his time. After six months in prison he was shock probated,<sup>6</sup> again on strict conditions, and placed on probation for an

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<sup>6</sup> Kentucky Revised Statutes 439.265.

additional five years. Eighteen months into this latest probationary period Milner stipulated to a violation for cocaine use and was again ordered to serve out his time.

After seven months in prison, on March 8, 2004, Milner filed a "Verified Motion for Postconviction Relief." Although filed by counsel, the motion mainly consisted of Milner's pro se affidavit, alleging that his guilty plea was involuntary, unknowing and unintelligent, in that he was unaware of the defense of "constructive possession" and would not have pleaded guilty "if he had known the possession elements of the alleged offense or been aware he had a defense. . .stat(ing) he pled guilty in this case because he thought he was required to take responsibility for the alleged presence of drugs in the home where he and a roommate resided and he was under the threat of Federal prosecution." He also alleged various errors by defense counsel in the entry of his guilty plea (including the abovementioned ignorance of the defense of "no constructive possession"). In argument before the trial court, Milner's counsel clarified that this was a motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, but argued that it was not barred under the rule's time limits as the issue of the defense of "constructive possession" had just come to Milner's attention. Counsel further argued that Milner's plea was involuntary as he was unaware of the defense that he did not

exercise dominion and control over the cocaine. The court overruled Milner's motion, indicating that as an RCr 11.42 motion, it had been filed more than three years from the final judgment and meeting no other exceptions was untimely under RCr 11.42(10). No appeal from taken from this ruling.

In response to Milner's motion asking the court to enter a separate order addressing his motion to set aside the guilty plea as involuntary and unknowing and preserving his appeal rights, the court issued the "Opinion and Order" which is the basis for the appeal herein. In overruling the motion to set aside his guilty plea, the court found that the record indicated that Milner stated in his guilty plea that his attorney had explained all possible defenses to him and that dismissal of the charges rendered no ineffective assistance of counsel. The court sustained an appeal bond of \$16,000.00, full cash/no property. This appeal follows.

Milner advances three arguments on appeal, all based on the underlying contention that the trial court erred in not allowing him to "withdraw his guilty plea" on the separate issues of involuntariness (due to threat of federal prosecution), insufficient factual basis (no factual basis for possession of cocaine), and ignorance, asserting as well in the last argument that his unknowing plea was due to counsel's

ineffectiveness in not explaining the defenses to the charge of possession.

The standard of review on appeal in an RCr 11.42 case where the trial court has denied the request for post-conviction relief without an evidentiary hearing is "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000); *citing* Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). We have reviewed the record and in the case sub judice, Milner argued his entitlement to post-conviction relief on grounds that were either untimely pursuant to RCr 11.42(10), waived by his decision to plead guilty, or able to be refuted by reference to the court records. Therefore, the trial court committed no error in refusing to set aside Milner's guilty plea, pursuant to RCr 11.42, without holding an evidentiary hearing.

For the foregoing reasons, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael T. Meehan  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Kentucky Attorney General

Louis F. Mathias, Jr.  
Assistant Attorney General  
Frankfort, Kentucky