

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001331-MR
AND
NO. 2005-CA-000704-MR

MICHAEL GUINN HARRIS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 01-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, AND TACKETT,¹ JUDGES; HUDDLESTON, SENIOR JUDGE.²

TACKETT, JUDGE: Michael Harris appeals from two orders of the Christian Circuit Court denying post-conviction relief without holding evidentiary hearings. Both cases involve a judgment convicting him of criminal attempt to manufacture

¹ This opinion was completed and concurred in prior to Judge Julia K. Tackett's retirement effective June 1, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

methamphetamine, first-degree possession of a controlled substance, possession of drug paraphernalia (subsequent offense), and being a first-degree persistent felony offender. Harris entered an unconditional guilty plea to the charges and was sentenced to thirteen years. He subsequently filed motions for relief under Kentucky Civil Rule (CR) 60.02 and Kentucky Rule of Criminal Procedure (RCr) 11.42 which were denied by the trial court. The resulting appeals were consolidated and will be disposed of by this opinion in which we affirm the trial court's orders.

The charges against Harris were filed after narcotics officers executed a search warrant at his residence on January 2, 2001. Harris was extremely cooperative with the officers and helped them locate evidence of his methamphetamine operation. Further, he explained how he used various items found by the officers in his manufacturing process and admitted that he had a drug problem. The original indictment charged him with manufacturing methamphetamine, trafficking in a controlled substance, possession of drug paraphernalia and being a PFO. He filed a suppression motion, which the trial court overruled after a hearing.

Harris' case went to trial January 17, 2002. One of the narcotics officers testified that Harris did not have all of the items necessary to manufacture methamphetamine in his

possession when the search was conducted. At the close of the Commonwealth's case, Harris moved for a directed verdict on the charges. The trial court granted the request as to the trafficking charge; however, citing a case that had proceeded before another judge, the trial court expressed the opinion that sufficient evidence existed to convict Harris of manufacturing. The following morning, Harris accepted the Commonwealth's offer on a guilty plea to the amended charges of criminal attempt to manufacture methamphetamine, first-degree possession of a controlled substance, possession of drug paraphernalia and PFO.

He entered an unconditional guilty plea after a colloquy during which Harris informed the court that he had discussed his plea with counsel, had all of the time he needed to consult with counsel, was satisfied with counsel's performance, had read and signed the affidavit, and was in fact guilty of the charges. Harris was sentenced to thirteen years. A subsequent motion for shock probation was denied. On May 14, 2002, he filed a *pro se* motion for relief under CR 60.02 claiming that, as a result of the Kentucky Supreme Court's decision in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), his judgment and sentence should be vacated. Harris sought to challenge only his conviction for attempted manufacturing of methamphetamine, and specifically stated that he was not challenging his conviction for possession of a controlled

substance, possession of drug paraphernalia, and PFO. The trial court denied the motion without a hearing on May 25, 2004. On January 24, 2005, Harris filed a *pro se* RCr. 11.42 motion alleging ineffective assistance of counsel, prosecutorial misconduct, and a defective indictment. This motion was also denied without a hearing. Harris appealed both denials, and these appeals were consolidated by this Court.

Harris argues that the trial court should have granted his CR 60.02 motion because, under the subsequently-rendered Kotila decision, he is imprisoned for actions which do not constitute a crime. Kotila interpreted the statute on manufacturing methamphetamine to require possession of all of the chemicals or equipment necessary to do so. At trial, a narcotics officer testified that Harris would have been able to begin, but not complete, the manufacturing process, with the materials in possession at the time of the search.

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make

it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983). Harris filed neither a direct appeal, nor a motion for RCr 11.42 relief, before filing his CR 60.02. Consequently, the trial court was correct in denying the motion without a hearing.

With regard to his RCr 11.42 motion, Harris argues that he was entitled to an evidentiary hearing because his allegations of ineffective assistance of counsel were not refuted by the record. Harris claims that his trial counsel failed to prepare sufficiently for trial, deprived him of his right to be present during bench conferences, and improperly advised him to plead guilty. The standard for proving ineffective assistance of counsel requires a showing that counsel made unprofessional errors, and that counsel's errors prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S.668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When a voluntary guilty plea is entered, the standard is even higher. Harris must show that, but for counsel's errors, he would have refused to plead guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366,

88 L.Ed.2d 203 (1985). In the case at hand, Harris did in fact opt for a jury trial. Due to his counsel's efforts, one of the most serious charges against him, trafficking in methamphetamine, was dismissed at the close of the Commonwealth's case. In addition, counsel's efforts to secure dismissal of the manufacturing charges led to a plea offer from the Commonwealth amending the charge to criminal attempt, a Class C felony. Nevertheless, Harris argues that counsel's advice to him was deficient because of the Kentucky Supreme Court's subsequent decision in Kotila. This argument fails for two reasons. Counsel's failure to anticipate a future decision interpreting a criminal statute cannot be considered unreasonable. Further, Harris' counsel did not advise him to plead guilty to manufacturing methamphetamine, only to criminal attempt which requires taking a substantial step towards committing a crime.

Harris' contentions regarding prosecutorial misconduct and bribery of a witness are similarly refuted by the record. Nor was the indictment against him defective since it referred to the statute defining and prohibiting the manufacture of methamphetamine. For the forgoing reasons, the orders of the Christian Circuit Court denying Harris' motions for post-conviction relief under CR 60.02 and RCr 11.42 are affirmed.

ALL CONCUR.

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