

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001421-MR

JAMIE L. BRAXTON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NOS. 03-CR-00089 AND 04-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jamie L. Braxton brings this appeal from a June 24, 2004, order of the McCracken Circuit Court denying his *pro se* motion to vacate the judgment. We affirm.

Braxton was charged in Indictment No. 03-CR-00089 with five counts, including possession of a firearm by a convicted felon and with being a second-degree persistent felony offender. After appearing for arraignment, Braxton was released on bond. Braxton subsequently committed additional crimes while awaiting trial. Consequently, Braxton was charged in Indictment No. 04-

CR-00066 with possession of a firearm by a convicted felon and with being a second-degree persistent felony offender. Prior to the charges in Indictment Nos. 03-CR-00089 and 04-CR-00066, Braxton had three prior felony convictions.

Pursuant to a plea agreement in both cases, Braxton pled guilty to two counts of possession of a firearm by a convicted felon and two counts of being a second-degree persistent felony offender. Braxton received two sentences of seventeen and one-half years' imprisonment. The two sentences were ordered to run concurrently. Braxton filed a motion to set aside the judgment pursuant to Ky. R. Crim. P. (RCr) 11.42. That motion was denied by the circuit court. This appeal follows.

Braxton first argues that his decision to plead guilty was not made knowingly and voluntarily because he received ineffective assistance of counsel. Specifically, he argues his trial counsel incorrectly advised him that he could receive a potential forty-year sentence of imprisonment if convicted.

In Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986), this Court stated the standard for measuring ineffective assistance of counsel when a defendant has entered a plea of guilty as follows:

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.

Id. at 727-728 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 80 L. Ed. 2d 203 (1985)).

Possession of a firearm by a convicted felon is a Class C felony with a potential maximum sentence of ten years' imprisonment. Second-degree persistent felony offender enhancement increases the potential maximum sentence for each charge of possession of a firearm by a convicted felon to twenty years' imprisonment. In this case, while awaiting trial in Indictment No. 03-CR-00089, Braxton was charged pursuant to Indictment No. 04-CR-00066.

KRS 533.060(3) states:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

Braxton faced two potential sentences of twenty years' imprisonment that would have run consecutively and, thus, could

have resulted in a forty-year sentence. As such, the advice of Braxton's trial counsel was correct and he did not receive ineffective assistance of counsel.

Braxton also argues the plea agreement he entered into was "illegal" because prior felony convictions cannot form the basis for both possession of a firearm by a convicted felon charge and a persistent felony offender enhancement. Prior to the charges in Indictment Nos. 03-CR-00089 and 04-CR-00066, Braxton had three other felony convictions. One of the prior convictions served as the basis for the charge of possession of a firearm by a convicted felon. The remaining prior felony convictions served as the basis for the second-degree persistent felony offender enhancements. In a factually identical case, a defendant was convicted of possession of a handgun by a convicted felon and the sentence was enhanced as a second-degree persistent felony offender through the use of separate additional prior felony convictions. See Eary v. Commonwealth, 659 S.W.2d 198 (Ky. 1983). In the case *sub judice*, separate prior felony convictions formed the basis of the possession of firearm by a convicted felon charge and the second-degree persistent felony offender enhancement. Thus, Braxton's argument is without merit.

Finally, Braxton argues that the circuit court erred by its failure to conduct an evidentiary hearing on his RCr

11.42 motion. An evidentiary hearing is required if there is an issue of material fact that could not be conclusively determined on the face of the record. RCr 11.42(5); Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). As there were no issues of material fact that could not be conclusively determined on the face of the record, we are of the opinion an evidentiary hearing was not required.

For the forgoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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