

RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001554-MR

SHALAKO KWABENE HOOPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 02-CR-000171

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; AND MILLER, SENIOR JUDGE.¹

McANULTY, JUDGE: Appellant Shalako Kwabene Hooper appeals the order of the Jefferson Circuit Court which denied his motion to alter, amend or vacate his sentence pursuant to RCr 11.42.

Hooper pled guilty in May 2002 in the Jefferson Circuit Court to

¹ 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 KRS 21.580.

trafficking in a controlled substance (cocaine) in the first degree while in possession of a firearm, possession of a firearm by a convicted felon, illegal possession of drug paraphernalia while in possession of a firearm, illegal possession of a controlled substance (marijuana) while in possession of a firearm, and being a persistent felony offender in the second degree.

In his RCr 11.42 motion, Hooper alleges that he received ineffective assistance of counsel because his counsel advised him to plead guilty without fully investigating Hooper's case. In order to establish that counsel's assistance was ineffective in enabling him to intelligently weigh his legal alternatives in deciding to plead guilty, a defendant must show: (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. Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986), citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 80 L.Ed.2d 203 (1985).

Since "a plea of guilty constitutes a waiver of all defenses other than that the indictment charged no offense,"

consideration of the motion to vacate is properly limited to the allegation that counsel was ineffective. Sparks, 721 S.W.2d at 727. Where the trial court denies a motion for an evidentiary hearing on the merits, 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." Id.

Hooper argues that counsel failed to investigate whether Hooper was in possession of a firearm at the time of commission of the offense - the fact that led to his sentence being enhanced under KRS 218A.992. He asserts that he did not have actual possession of a firearm at the time of the arrest, and the Commonwealth would have been required to establish a "nexus" between the firearm and the offense. He further asserts that his counsel never explained this nexus requirement or the defenses available to him if he went to trial. He alleges counsel failed to investigate the strength of the Commonwealth's case.

KRS 218A.992(1) "requires a nexus between the crime committed and the possession of a firearm." Commonwealth v. Montaque, 23 S.W.3d 629 (Ky. 2000). If the defendant had constructive possession of a firearm and the firearm was within his "immediate control" when he was arrested, no further proof

of a nexus need be shown. Johnson v. Commonwealth, 105 S.W.3d 430, 436-37 (Ky. 2003).

We find no indication of ineffective assistance. Hooper does not deny that he had constructive possession of the firearm. A Metro Narcotics Investigative Report, which was provided in discovery prior to Hooper's guilty plea, stated that "As detectives made entry into the residence Shalako Hooper retreated to the master bedroom where he was detained without further incident. A large caliber semi-automatic handgun was later discovered in the master bedroom."

Hooper has not shown that anything remained to be investigated by his counsel. The fact that a firearm is located in the room where the defendant is arrested indicates that it was within the defendant's immediate control. Johnson v. Commonwealth, 105 S.W.3d 430 (Ky. 2003). In this case, the firearm was located in the room where Hooper was arrested. The police reports indicate that an officer found it on the bed. Hooper has not presented any basis for believing that counsel would have been able to disprove this clear evidence of a nexus with further investigation. Thus, counsel has not been shown to have been in any way ineffective in investigation or advice to Hooper. The trial court correctly denied the evidentiary hearing on the basis that it was refuted by the record. We affirm the denial of the motion to vacate.

ALL CONCUR.

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