

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002502-MR

DENNY CO

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CR-00149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; KNOPF,¹ JUDGE; BUCKINGHAM, SENIOR
JUDGE.²

BUCKINGHAM, SENIOR JUDGE: Denny Co appeals from an order of the
Franklin Circuit Court denying his motion to vacate his

¹ Judge William L. Knopf concurred in this opinion prior to his retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

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

conviction and sentence pursuant to RCr³ 11.42. The sole issue is whether any failure by his trial counsel to advise him that he might be subject to deportation upon his conviction constitutes the ineffective assistance of counsel. In light of the Kentucky Supreme Court's recent ruling in Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005), we affirm.

On March 23, 2001, Co entered an Alford plea to charges of third-degree burglary and first-degree criminal mischief. The charges arose out of an incident that occurred on July 11, 2000, where Co allegedly broke into Western Hills High School and destroyed or damaged office equipment and parts of the building.

Pursuant to a plea agreement with the Commonwealth, Co was sentenced to five years in prison on each count, to run consecutively for a total of ten years. As part of the agreement, the Commonwealth agreed not to oppose pretrial diversion. Once Co pled guilty, he was placed on pretrial diversion for a period of five years.

On June 4, 2001, the Commonwealth filed a motion to void the pretrial diversion agreement due to numerous alleged violations. Following a hearing, the court found that Co had violated the terms of his pretrial diversion, and it voided the agreement. The court then sentenced Co to ten years in prison,

³ Kentucky Rules of Criminal Procedure.

but the sentence was later amended to reflect concurrent sentences rather than consecutive sentences. Thus, his sentence was fixed at five years.

After learning that he was subject to deportation, Co filed a motion to vacate his sentence pursuant to RCr 11.42. Therein, he alleged ineffective assistance of counsel. An evidentiary hearing was held in July 2004. Co testified that he was born in the Philippines and moved to the United States in 1996. He was 18 years old at the time of his guilty plea, and he was not a citizen of the United States. Co testified that he was not informed prior to his guilty plea that he would be deported and barred from returning to the United States if he pled guilty. He further testified that had he been so advised, he would have insisted on going to trial. The trial court denied Co's motion, and this appeal followed.

While this appeal was pending, the Kentucky Supreme Court addressed this specific issue in the Fuortado case. Therein, the court held that "[b]ecause the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel." Id. at 386. Based on that holding by the court, it is apparent

that Co's RCr 11.42 motion and arguments in this appeal are without merit.

The order of Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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