

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000988-MR

JAMIE LEE GROSS

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 03-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.  
SCHRODER, JUDGE: Jamie Lee Gross appeals, *pro se*, from the  
McLean Circuit Court's denial of his RCr 11.42 motion. We  
affirm.

On June 9, 2003, appellant was indicted on two counts  
of third-degree trafficking in a controlled substance  
(Diazepam), second or subsequent offense (KRS 218A.1414), and  
being a first-degree persistent felony offender (PFO I).

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

Pursuant to a plea agreement, the PFO I charge was amended to second-degree persistent felony offender (PFO II). On July 7, 2003, appellant entered a guilty plea to two counts of third-degree trafficking, second or subsequent offense (Class D felony), and second-degree persistent felony offender (PFO II). Appellant was sentenced to five years each on the trafficking counts, enhanced by one year each for the PFO II, for a total of six years on each count, to be served concurrently.

On March 30, 2005, appellant filed an RCr 11.42 motion to vacate, set aside, or correct sentence. On April 14, 2005, the trial court denied the motion without a hearing. This appeal followed. On appeal, appellant argues that his sentence, per the plea agreement, as both a subsequent offender under KRS Chapter 218A, and as a persistent felony offender, was an unlawful double enhancement, and that his counsel was ineffective for negotiating this unlawful plea agreement. We disagree.

Appellant pled guilty to two counts of third-degree trafficking in a controlled substance, second or subsequent offense (KRS 218A.1414),<sup>2</sup> and PFO II. KRS 218A.010(30) provides:

“Second or subsequent offense” means that for the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his conviction of the

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<sup>2</sup> KRS 218A.1414(2)(b) provides that a person convicted of a “second or subsequent offense” shall be guilty of a Class D felony, whereas a first offense, per KRS 218A.1414(2)(a), constitutes a Class A misdemeanor.

offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances . . . .

In Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002), our Supreme Court held that an offender's sentence may be enhanced under both the "second or subsequent" offender provisions of KRS Chapter 218A, and under the persistent felony offender statute, KRS 532.080, where separate prior qualifying convictions are used to support each enhancement. Appellant was convicted in 1994 of three felonies - two counts of trafficking in a controlled substance within 1000 yards of a school, and trafficking in marijuana. In its order denying appellant's RCr 11.42 motion, the trial court found that one of the 1994 convictions for trafficking within 1000 yards of a school was used to make each of the trafficking counts in the present indictment a second offense, leaving either of the two other 1994 felony convictions available to support the PFO II conviction. Per Morrow, we conclude the trial court was correct in its finding that appellant's sentence was not an unlawful double enhancement, as separate qualifying convictions were used to support the enhancements under KRS Chapter 218A and the persistent felony offender statute (KRS 532.080(2)).<sup>3</sup>

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<sup>3</sup> In support of his argument, appellant also refers to KRS 532.080(8) which states that "No conviction, plea of guilty, or Alford plea to a violation of KRS 218A.500, shall bring a defendant within the purview of or be used as a

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that counsel's performance was deficient relative to current professional standards and that, but for the deficient performance, there is a reasonable likelihood that the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986). Having concluded that appellant's sentence was not an unlawful double enhancement, appellant's contention that counsel was deficient for negotiating an unlawful plea agreement is without merit. To the contrary, defense counsel's performance resulted in appellant receiving quite a favorable sentence of six years total.

Appellant also includes an argument to the effect that he was coerced into taking the plea. A review of the record, including the plea colloquy and plea documents, shows no evidence that the plea was other than intelligently and voluntarily made. See Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). Finally, as appellant's allegations are refuted on the face of the record as a whole, the trial court

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conviction eligible for making a person a persistent felony offender under this section." KRS 218A.500, however, is a statute dealing with drug paraphernalia, and not applicable to appellant's case.

was not required to hold an evidentiary hearing. Sparks, 721 S.W.2d at 727.

For the aforementioned reasons, the order of the McLean Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jamie Lee Gross, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky