

RENDERED: AUGUST 17, 2007; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001527-MR

CRISTOVAL ALVARADO

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 02-CR-00299-02

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY<sup>1</sup>, SENIOR JUDGE

PAISLEY, SENIOR JUDGE: On November 29, 2004, Cristoval Alvarado entered a plea of guilty to one count of murder and one count of burglary in the first degree. He was sentenced to life without benefit of parole for the murder charge and twenty years on the burglary with those sentences running concurrently. His request for relief pursuant to RCr 11.42 was denied by the trial court. He alleges the trial court erred when it denied his request for an evidentiary hearing. He additionally brings three other issues for our

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

review. First, whether he was denied ineffective assistance of counsel because of his claim that his guilty plea was not made knowingly and voluntarily. Second, that he was denied effective assistance of counsel because counsel failed to inform him of any defenses that could have been raised or lesser included offenses and finally, that the cumulative effect of the alleged errors resulted in a denial of his right to due process of law. We find no errors and affirm the judgment of the McCracken Circuit Court.

Alvarado was initially appointed counsel for purposes of this appeal. The Department of Public Advocacy filed a motion seeking to withdraw on the grounds that the appeal was “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” KRS 31.110(2). We granted that motion and Alvarado has proceeded with the appeal *pro se*.

An evidentiary hearing in RCr 11.42 matters at the trial court level is only required if there is a material issue of fact that cannot be resolved by an examination of the record. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003). An evidentiary hearing for a motion pursuant to RCr 11.42 is not automatic. *Skaggs v. Commonwealth*, 803 S.W.2d 573 (Ky. 1990). Our own review of the record and Alvarado's allegations of error indicate that the record before the trial court was sufficient. *See Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). The trial court did not err when it decided the RCr 11.42 motion without an evidentiary hearing.

Alvarado next argues that his guilty plea was not voluntary or made in a knowing manner. We disagree. Although he now states that he did not receive any real

notice of the charges against him, the record shows otherwise. He was arraigned on the murder charge in November of 2002. He filed a request for a bill of particulars a month later. He was then arraigned on the burglary charge in January 2003. The Commonwealth provided a notice of aggravating circumstances and advised that the death penalty would be sought in February of 2003. Alvarado's attorney conducted extensive pre-trial discovery and an aggressive motion practice prior to the entry of a plea of guilty. There is no merit to his contention now that he did not receive notice of the charges against him.

Alvarado next asserts that his attorney failed to inform him of any defenses or lesser included offenses. The record is clear that counsel engaged in extensive plea negotiation. We have no reason to conclude that potential defenses and lesser included offenses were not a part of those negotiations. Alvarado has not presented a single affirmative fact to lead us to any other conclusion.

Alvarado signed a motion to entry guilty plea form and submitted that to the trial court. Declarations in open court carry a strong presumption of reliability. *Edmonds v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006). He has provided nothing to rebut the reliability of his plea except the bare assertion that it was not made in a knowing and voluntary manner. Additionally, the trial court conducted an extensive colloquy where Alvarado affirmed his understanding of the sentencing recommendation, the plea of guilty and most significantly, any potential defenses to the charges. He stated without hesitation that his guilty plea was given freely, knowingly, intelligently and voluntarily.

The trial court was correct in finding that he was not entitled to relief under this situation. We will not disturb the trial court's ruling regarding an RCr 11.42 motion absent a showing that it was clearly erroneous. *See Johnson v. Commonwealth*, 180 S.W.3d 494 (Ky. App. 2005). We find nothing in the record to indicate there was any error.

Finally, Alvarado suggests that even if any errors were not of a magnitude to individually require a reversal, they collectively constitute cumulative error. Having found no errors, we find the argument for cumulative error to be without merit.

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cristoval Alvarado, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Susan Roncarti Lenz  
Assistant Attorney general  
Frankfort, Kentucky