

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001822-MR

JAMES MAXIE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 00-CR-00096

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: James Maxie brings this *pro se* appeal from a June 17, 2005, order of the McCracken Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. We affirm.

Pursuant to a jury verdict rendered in May 2001, appellant was found guilty of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and of

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

being a second-degree persistent felony offender. Appellant was subsequently sentenced to twenty years' imprisonment. Appellant's sentence was affirmed by direct appeal to the Kentucky Supreme Court in the published opinion of Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002). Thereafter, appellant filed a *pro se* RCr 11.42 motion seeking to set aside his sentence. On June 17, 2005, the circuit court denied appellant's RCr 11.42 motion without an evidentiary hearing and without appointment of counsel. This appeal follows.

Appellant contends that his trial counsel was ineffective for failing to object to the introduction of certain evidence. Specifically, appellant alleges that trial counsel was ineffective for failing to object to the introduction of various audiotape recordings of controlled drug buys between appellant and an informant. During the trial, the Commonwealth introduced an audiotape recording of an informant purchasing cocaine from appellant. Appellant claims that trial counsel's failure to object to the introduction of this audiotape and other audiotape recordings of controlled buys constituted ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, defendant must demonstrate that counsel's performance was deficient and that such deficiency prejudiced the defense.

Strickland v. Washington, 466 U.S. 668 (1984). A defendant is entitled to an evidentiary hearing where his allegations are not refuted upon the face of the record. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

In the case at hand, the record clearly indicates that trial counsel filed a motion in limine specifically seeking to suppress “the audio tapes of [the] ‘controlled buy’” and “any reference to any alleged prior bad acts” As the record clearly reveals that trial counsel sought to suppress the audiotapes and the evidence of prior bad acts, we believe appellant’s allegation of ineffective assistance of trial counsel was clearly refuted upon the face of the record. Thus, we are of the opinion that trial counsel was not ineffective for failing to object to the introduction of certain evidence.

Appellant next claims that trial counsel was ineffective for failing to request a jury instruction upon the lesser included offenses of first-degree and second-degree possession of a controlled substance. A review of the record indicates that the jury was instructed upon first-degree possession of a controlled substance. As to second-degree possession of a controlled substance, the Commonwealth points out that appellant “would not be eligible for a second-degree instruction because cocaine, in whatever form, is a schedule II

narcotic." We agree with the Commonwealth and believe that the jury was properly instructed. As appellant's allegations were flatly refuted upon the face of the record, we believe that he was not entitled to an evidentiary hearing and his RCr 11.42 motion was properly denied.

Appellant also contends that the cumulative effect of the alleged errors by trial counsel was prejudicial and thus warrants reversal of his conviction. Having concluded that trial counsel was not ineffective, we consider this allegation to be moot.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Maxie, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
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