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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002197-MR

DARRYL C. BEASLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CR-002644

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON[1] AND WINE, JUDGES; MILLER,[2] SPECIAL JUDGE.

JOHNSON, JUDGE: Darryl C. Beasley, pro se, has appealed from an order of the Jefferson Circuit Court entered on September 28, 2005, which denied his motion to amend his sentence pursuant to RCr[3] 11.42, without the appointment of counsel and without holding an evidentiary hearing. Having concluded that the trial

[1] Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[3] Kentucky Rules of Criminal Procedure.

court did not err by denying Beasley's motions based upon the face of the record, we affirm.

The sentence at issue in this appeal followed the indictment of Beasley by a Jefferson County grand jury on November 20, 2002, for trafficking in a controlled substance in the first degree,[4] and for being a persistent felony offender in the second degree (PFO II).[5] The trafficking charge arose from Beasley's arrest on March 13, 2002. The indictment stated that Beasley had "previously been convicted of Trafficking in Marijuana by a final judgment of the Jefferson Circuit Court of Kentucky (94CR0240), on or about the 17th day of August, 1994, and is now being charged as a second or subsequent offender under Chapter 218A, Controlled Substances, of the Kentucky Revised Statutes."[6] The PFO II charge was based upon two convictions from 1992 for possession of a controlled substance and trafficking in a controlled substance in the first degree.

[4] Kentucky Revised Statutes (KRS) 218A.1412.

[5] KRS 532.080(2). This statute states: "A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted."

[6] Since Beasley was charged as a subsequent offender under KRS 218A.1412(2)(b), the charge for trafficking in a controlled substance in the first degree was enhanced from a Class C felony to a Class B felony. A Class C felony carries a penalty of not less than five years, or more than ten years, in the penitentiary. A Class B felony carries a penalty of not less than ten years, or more than 20 years, in the penitentiary.

On February 17, 2004, Beasley appeared before the trial court with counsel and pled guilty to the charges. His guilty pleas were entered pursuant to a plea agreement signed by Beasley, his attorney, and the Commonwealth's Attorney. The agreement provided for a prison sentence of ten years on the trafficking conviction, enhanced to 20 years by the PFO II conviction.[7]

On September 26, 2005, Beasley filed a pro se motion pursuant to RCr 11.42 requesting that the trial court amend his sentence. Specifically, Beasley asserted:

> 4. The defendant did not have a subsequent offense[8] of trafficking in a controlled substance, schedule[ ] II cocaine at the time of his Indictment in this case.
>
> 5. The defendant did not have a prior offense for PFO purposes at the time he was Indicted by the Commonwealth of Kentucky and therefore was not subject to PFO enhancement.

Beasley also requested in the motion that the trial court hold an evidentiary hearing and appoint him counsel. In support of his motion, Beasley filed a memorandum stating that counsel had been ineffective by failing to properly investigate his prior record to determine whether he could be convicted as a

[7] Because of the PFO II enhancement and a trafficking conviction as a Class B felony, Beasley could have received a sentence ranging from not less than 20 years, nor more than 50 years, or life imprisonment.

[8] Apparently, Beasley means "prior offense" or that he "did not qualify as a subsequent offender."

subsequent offender and as a PFO II; and that since he had received incomplete and incorrect information from his counsel, his guilty plea had not been entered knowingly, voluntarily, or intelligently. The trial court summarily denied the motion in a handwritten order entered on September 28, 2005.

On October 6, 2005, Beasley filed a motion "for a new trial to vacate court's adverse decision" pursuant to CR 59.05 and CR 52.02. He requested that the trial court make written findings of fact and conclusions of law as to its basis for denying his RCr 11.42 motion. The trial court denied the motion in an order entered on October 11, 2005. The only substantive findings in the order were as follows:

> The plea was knowingly, intelligently, and voluntarily made. The Defendant pled to Trafficking in Controlled Substance in the First Degree (Subsequent Offender), a Class B felony carrying [a] 10-20 year sentence. His previous felony conviction in 92-CR-2253 (December 1, 1992) clearly supported his Persistent Felony Offender in the Second Degree plea and enhancement of his sentence. He received the minimum sentence on Trafficking in Controlled Substance in the First Degree (ten years) even though it was enhanced by the Persistent Felony Offender in the Second Degree conviction.[9]

This appeal followed.

Beasley argues on appeal that if his trial counsel had properly investigated his prior record, counsel would have

[9] The trial court did not address whether Beasley's trafficking conviction was properly enhanced as a subsequent offender based on a 1994 marijuana trafficking conviction.

determined that Beasley did not qualify as a subsequent offender or as a PFO II. Beasley claims that since his guilty plea was based upon incorrect information, the plea was not knowingly, voluntarily, or intelligently entered. In addressing Beasley's arguments, the Commonwealth's brief provided little assistance, including the following:

> The appellant maintains that his prior marijuana conviction was a misdemeanor thus not grounds for a PFO II charge, he also claims that his prior felony conviction under Indictment 92-CR-2253 is also insufficient for a PFO II charge. The appellant's argument that his sentence[ ] was erroneously enhanced is totally without merit as the record shows the enhancement results from a prior felony under Indictment 92-CR-2253, and not the marijuana charge of Indictment 94-CR-240 as argued by appellant. Although the appellant argues incessantly that the basis for the PFO II charge was a misdemeanor marijuana conviction, he is incorrect. The basis of the PFO II charge is a felony conviction for Possession and Conspiracy to Traffick in Controlled Substance.
>
> . . . .
>
> To qualify as a PFO II, the statute merely requires, in pertinent part, that a person has been "convicted of one (1) previous felony." KRS 532.080(2). The record shows, and the appellant does not dispute, that Indictment 92-CR-2253 was a felony for which he received a sentence of five (5) years. Moreover, the appellant does not present any facts that he was outside the time frame for the PFO II conviction. Instead, the appellant merely makes conclusory and confusing statements.

> Such statements are not sufficient to support the appellant's contentions.
>
> The appellant's sentence, then, is appropriate and valid. The appellant either confused or mischaracterized the basis of his enhanced sentence, and he cannot bring any legitimate grounds to have it amended. The trial court recognized such and denied the appellant's motion. The trial court addressed those issues with findings of fact and determined that the appellant's arguments were not supported by the record. The PFO II charge that enhanced his sentence to twenty (20) years is based on a felony conviction, not the marijuana charge as asserted by the appellant. Therefore, the denial by the Jefferson Circuit Court must be affirmed.

In order to show ineffective assistance of counsel in the context of a guilty plea, a defendant must show that his attorney's performance was deficient, and except for that deficiency he would not have pled guilty, but would have insisted on a jury trial.[10] In order to be constitutionally valid, a guilty plea must be entered knowingly, voluntarily, and intelligently.[11] In addition, RCr 8.08 requires a trial court to determine at the time of the guilty plea "that the plea is made voluntarily with understanding of the nature of the charge."[12]

[10] Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky.App. 1986) (citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

[11] Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001).

[12] See also Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001); and Haight v. Commonwealth, 760 S.W.2d 84, 88 (Ky. 1988).

The validity of a guilty plea is determined from the totality of the circumstances surrounding it.[13] A guilty plea is invalid if the defendant does not understand the nature of the constitutional protections that he is waiving, or if he has such an incomplete understanding of the charges against him that the plea cannot stand as an admission of guilt.[14]

In this case, Beasley was indicted for trafficking in a controlled substance as a subsequent offender based upon the Commonwealth's allegation that Beasley had been convicted in 1994 of trafficking in marijuana. Our review of the record below confirms that Beasley was convicted of trafficking in a controlled substance in 1994. While Beasley was initially indicted in 1994 for promoting contraband in the first degree, which is a class D felony,[15] he subsequently entered an Alford[16] plea to the amended charge of trafficking in marijuana, less than eight ounces, a misdemeanor.[17]

It has been clearly established that a conviction for any offense under KRS 218A constitutes an offense for the

[13] See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); and Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

[14] James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995).

[15] Jefferson County Indictment No. 94-CR-000240.

[16] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977).

[17] He was sentenced to 12 months in jail, conditionally discharged for two years following 60 days of home incarceration.

purposes of the subsequent offender statutes. In Byrd v. Commonwealth,[18] this Court held "that one may become a subsequent offender based upon any prior conviction under KRS 218A" [emphasis original]. Thus, Beasley's misdemeanor conviction in 1994 for trafficking in marijuana under eight ounces qualified him as a subsequent offender for enhancement purposes under KRS 218A.1412(2)(b).

Beasley's contention that he did not meet the requirements for a PFO II conviction is also without merit. Beasley was convicted on December 1, 1992, of conspiracy to traffick in a controlled substance in the third degree, second offense, and sentenced to five years' imprisonment, suspended for five years. Since the offense at issue in this appeal was committed on March 13, 2002, the felony which was enhanced clearly occurred within five years of the completion of the 1992 felony sentence.

Beasley also claims that the trial court erred in failing to appoint counsel and to hold an evidentiary hearing as requested in his RCr 11.42 motion. RCr 11.42(5) provides in part as follows:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the

[18] 709 S.W.2d 844, 845 (Ky.App. 1986).

> face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

In Fraser v. Commonwealth,[19] our Supreme Court summarized the procedure to be followed in determining entitlement to appointment of counsel and an evidentiary hearing as follows:

> [T]he trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. . . . The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. . . .
>
> If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. . . .

Since the trial court did not err by determining that Beasley's allegations could be resolved on the face of the record, he was not entitled to a hearing or to appointment of counsel.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

[19] 59 S.W.3d 448, 452-453 (Ky. 2001).

ALL CONCUR.

BRIEF FOR APPELLANT:

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