

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000131-MR

JAMES L. WILSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVE MERSHON, JUDGE
ACTION NO. 03-CR-003117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: James L. Wilson was charged with and entered a plea of guilty to obscuring the identity of a machine with a value over \$300; failure to renew a motor vehicle registration; operating on a license suspended because of a driving under the influence conviction, second offense; driving under the influence, fourth offense; reckless driving; and for being a persistent felony offender in the first degree. He was

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

sentenced to serve ten years. His *pro se* motion pursuant to CR 60.02 was supplemented and amended by appointed counsel with a motion pursuant to RCr 11.42 asserting instances where trial counsel allegedly provided ineffective assistance. The trial court overruled the RCr 11.42 motion without holding an evidentiary hearing. Notice of appeal was filed by appointed counsel who then filed a motion asking to withdraw because the appeal is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” KRS 31.110(2)(c). That motion was granted by this Court and Wilson has proceeded *pro se* with the appeal.

In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Hodge v. Commonwealth* 116 S.W.2d 463 (Ky. 2003). The petitioner must demonstrate that absent the errors by trial counsel, the result would have been different. *See Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001). Wilson has not done that. The trial judge must examine the issues and the record and may determine that the allegations are insufficient to invalidate the conviction. *See Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998). An evidentiary hearing is not required to consider issues already refuted by the record. *Glass v. Commonwealth*, 769 S.W.2d 764 (Ky. 1989).

First, Wilson alleges that trial counsel failed to conduct any pretrial investigation or establish any meaningful defense. This allegation is merely conclusory and does not suffice to raise issues of fact such that an evidentiary hearing was required.

The record also indicates a suppression hearing was held prior to Wilson's entry of a plea of guilty. Wilson points to three situations revolving around the suppression hearing he claims were ineffective assistance of counsel. On the evening of his arrest, he called an attorney and left a message on a telephone message recorder. He argues that had his attorney played that tape at the suppression hearing, it would have shown his speech was not slurred and that he was not intoxicated. He also asked counsel to bring in several witnesses who would allegedly testify to the time of Wilson's last alcoholic drink on the evening of his arrest and the fact that they believed he was not intoxicated. Finally, he would have had counsel call a witness to discredit the police officer's testimony regarding which hospital Wilson had requested for an independent blood test.

Wilson was charged with a violation of KRS 189A.010. The question surrounding the suppression hearing was a challenge to the results of the machine used to test Wilson. The machine indicated Wilson had an alcohol concentration in excess of the legal limit. While the witnesses sought may have been useful at trial to cast some doubt in the minds of a jury, they were not remotely relevant to whether or not the results of the machine should have been suppressed. What the suppression hearing did show was that counsel in fact mounted a defense, discounting Wilson's argument that the attorney did nothing. The trial judge was well within the bounds of discretion to determine from the record that counsel had in fact prepared a defense and investigated the facts of the case. *See Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986).

Wilson next urges us to find that he was deprived of his rights when he entered a plea to the felony charge of obscuring the identity of a machine with a value over \$300. He now argues the facts better fit the misdemeanor charge of improper registration of a vehicle. We agree with the Commonwealth's position that Wilson is actually arguing insufficiency of the evidence to support the felony conviction. A guilty plea extinguishes his right to challenge the sufficiency of the evidence. *Taylor v. Commonwealth*, 724 S.W.2d 223 (Ky. App. 1986). We also note that Wilson entered a plea to a total of three felony charges. Each of those carried a five year sentence that was ordered to run concurrently. There is no error of a constitutional magnitude as Wilson suggests.

Finally, Wilson signed a motion to enter guilty plea where he stated he had a full understanding of the charges against him and any defenses. The trial court engaged in a colloquy with Wilson and was satisfied there was a factual basis for the plea and that it was entered into in a knowing and intelligent manner. A guilty plea generally constitutes a waiver of defenses. *See Greer v. Commonwealth*, 713 S.W.2d 256 (Ky. App. 1986).

An evidentiary hearing is not required in all RCr 11.42 proceedings. *Skaggs v. Commonwealth*, 803 S.W.2d 573 (1990). The trial court was clearly able to resolve the issues on the basis of the trial record. *See Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). It was not error for the trial court to forgo an evidentiary hearing

when the decision concerning the merits of Wilson's motion could be made based solely on the record.

We find no error. The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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