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**(FILE NO. 2007-SC-000872-D)**

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000343-MR

CARLOS PATTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 04-CR-000252

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, HOWARD, AND THOMPSON, JUDGES.

HOWARD, JUDGE: Carlos Patton (hereinafter Patton) appeals from the denial by the Jefferson Circuit Court of his 11.42 motion to vacate his conviction, pursuant to his guilty

plea, on two counts of possession of a handgun by a convicted felon. For the reasons stated below, we affirm.

The factual background of this case is as follows. On October 20, 2003, Patton and his wife had a heated argument over money that Patton alleges his stepdaughter had stolen from him. The fight escalated and police were called to the home but did not make any arrest. The next day, Patton, his wife and his wife's mother again were arguing over various domestic issues. A probation officer arrived with police and entered the home. Two handguns were found in the bedroom and Patton was arrested and charged with two counts of possession of a handgun by a convicted felon, under KRS 527.040. He was subsequently indicted on those charges and later, in a separate indictment, for being a Persistent Felony Offender in the First Degree, under KRS 532.080. Patton pled guilty to the two firearm charges on March 9, 2004, and was sentenced to six years on each count, to run concurrently. As part of the plea agreement, the PFO charge was dismissed.

On November 15, 2005, Patton filed a motion to alter, amend, or vacate his conviction and for a new trial, pursuant to RCr 11.42, alleging ineffective assistance of counsel. That motion was denied by an order entered on December 16, 2005, which also denied his request for an evidentiary hearing and for appointment of counsel to represent him on the motion. Patton now brings this appeal from that order.

Patton argues on appeal that his counsel failed to properly investigate the facts of the case or present an available, viable defense; that his counsel coerced him into pleading guilty; and that the circuit court erred by failing to grant him an evidentiary hearing on his RCr 11.42 motion or appoint an attorney to represent him on that motion.

The legal standard which must be met to show ineffective assistance of counsel under RCr 11.42 was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001):

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)[citations omitted]. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result [citation omitted]. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.

A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if the issues raised in that motion reasonably require such a hearing for a determination. On the other hand, a defendant is not entitled to such a hearing if the motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965).

If an evidentiary hearing is required, the court should appoint counsel to represent the defendant at that hearing, if he is indigent and requests such appointment in writing. RCr 11.42(5). If no evidentiary hearing is required, it is not necessary to appoint counsel. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

When a claim is made, as here, that a guilty plea was not voluntary, the voluntariness of the plea is to be determined from the "totality of the circumstances[.]" *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). The court is required to consider the totality of the circumstances surrounding the plea "and juxtapose the

presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel[.]" *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Furthermore, the Kentucky Supreme Court in *Rodriguez* stated, "Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, i.e., an evidentiary hearing." *Rodriguez*, 87 S.W.3d at 10.

Patton asserts that his trial counsel failed to sufficiently investigate the case, failed to present a viable defense[1] and coerced him into pleading guilty. The first two of these claims are easily answered. As to the claim that counsel failed to investigate, Patton offered no affidavits or any specific indication of what testimony such witnesses would have given. He suggested that counsel should have interviewed his wife and mother-in-law, but offered nothing to indicate that, if they conspired to set him up, as he claims, they would have confessed to that or testified on his behalf. A vague allegation that counsel failed to investigate or call witnesses, without offering specifics as to the testimony such witnesses would have offered, is insufficient to support an 11.42 motion. *Sanders v. Commonwealth,* 89 S.W.3d 380 (Ky. 2002).

As to Patton's claim that his counsel should have presented his defense theory, the answer is that Patton accepted a guilty plea, and therefore waived the right to present a factual defense. *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970)

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[1] Patton argues that he did not own the guns nor know they were in the house. He claims that they were owned by either his wife or her son by a prior relationship and that he was set up by his wife and/or mother-in-law, who brought the guns to the house that morning without his knowledge and then called in an "anonymous tip" to his probation officer. We agree that this was, in theory, a viable defense, but it does not necessarily follow that it was ineffective assistance of counsel to advise him to enter into a plea agreement instead of going to trial, as will be discussed below.

(a voluntary plea of guilty waives all defenses except that an indictment charges no offense). The only remaining issue is whether his counsel was guilty of ineffective assistance of counsel for recommending that he plead guilty.

Patton's argument is that his guilty plea was not voluntary because his attorney "coerced" him to enter a guilty plea instead of going to trial. However, we note that Patton appears to have received a very reasonable plea agreement. He received a six-year sentence on each count, to run concurrently for a total of six years. Had he proceeded to trial, he could have faced up to ten years on each count, possibly to run consecutively, even before consideration of the PFO charge. The PFO 1st charge, if supported by the evidence, carried a possible sentence of twenty years to life upon conviction.[2] Advising a client to plead guilty in order to obtain a lesser sentence is not ineffective assistance of counsel. *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967).

Patton alleges that his attorney "coerced" him into pleading guilty, but he offers no evidence to support such an allegation. He filed no affidavits, not even his own, in support of his motion. Nor did he specifically allege anything his counsel said or did that would have constituted such "coercion." At one point in his motion, he stated only that his "attorney *advised, coerced or convinced* him to plead guilty." Based on the

[2] We cannot tell from the record if Patton's prior criminal record would support a PFO 1st conviction, or perhaps only PFO 2nd. The indictment alleges four prior felonies, but two of those appear to have been combined for sentencing, and another appears from the printout of his criminal record, attached to the indictment, perhaps to have been amended to a misdemeanor. Pursuant to *Eary v. Commonwealth,* 659 S.W.2d 198 (Ky. 1983) and *Dale v. Commonwealth,* 715 S.W.2d 227 (Ky. 1986), *cert denied,* 481 U.S. 1004, 107 S.Ct. 1626, 95 L.Ed. 2d 200 (1987), a conviction of possession of a firearm by a convicted felon can be enhanced by a PFO charge, but the same prior conviction[s] cannot be used both to prove the firearm charge and the PFO. In other words, in this case, it would have taken at least three prior felony convictions, one to support the firearm charges and two to support the PFO 1st charge. In any event, Patton received by virtue of the plea agreement far less time than he could have received if he had gone to trial and a jury had rejected his defense and convicted him.

record, we find no evidence of coercion, nor of ineffective assistance by Patton's trial counsel in advising him to accept the plea offer, rather than to go to trial.

The most difficult issue on this appeal is Patton's argument that the circuit court erred by failing to grant him an evidentiary hearing on his 11.42 motion, or to appoint an attorney to assist him with the motion. As noted above, *Rodriguez v. Commonwealth, supra,* holds that when a claim is made that a plea was not voluntary, an evidentiary hearing is "[g]enerally" required. *Id.* 87 S.W.3d at 11.

We agree with the Commonwealth that Patton's signed motion to enter guilty plea, declaring that the plea was entered voluntarily, is evidence of the voluntariness of the plea. Similarly, the Commonwealth correctly notes that Patton failed to designate the video record of the guilty plea hearing, and therefore that video record is not available to us on this appeal. Accordingly, we must assume that it supports the finding that the plea was voluntary. *Commonwealth v. Thompson,* 697 S.W.2d 143 (Ky. 1985). Clear statements by a defendant, in a guilty plea colloquy, that his plea is being made voluntarily, are "substantial evidence" of such voluntariness. *Edmonds v. Commonwealth,* 189 S.W.3d 558, 568 (Ky. 2006). We assume, in the absence of the video record, that such "clear statements" were made.

But while both the motion to enter guilty plea and the guilty plea colloquy are substantial evidence of voluntariness, they are not conclusive. As noted above, *Bronk v. Commonwealth* refers to a "presumption of voluntariness" arising from a plea colloquy. 58 S.W.3d at 486. In spite of such presumption, "[g]enerally," a defendant claiming his plea was not voluntary is entitled to an evidentiary hearing to determine the

"totality of the circumstances," including "what transpired between attorney and client that led to the entry of the plea[.]" *Rodriguez*, 87 S.W.3d at 10.

In this case, however, Patton offered no evidence in support of his motion, to show that his plea was not voluntary. He filed no affidavits, not even his own, and did not specifically allege in the motion anything his counsel said or did that might have constituted "coercion." Given the evidence of voluntariness, as set out above, Patton would need to offer the court substantial evidence of coercion, sufficient to refute that evidence and show that his plea was not, in fact, voluntary. On the face of his motion, he does not allege that any such evidence exists. On the contrary, it is clear to us that his complaint is merely that he received what he now regards as bad advice, and followed it. As the Kentucky Supreme Court stated in *Edmonds,*

> "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."

189 S.W.3d at 569, *quoting Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed. 2d 136 (1977).

Considering all of the above factors, we believe the "totality of the circumstances" indicates that Patton's plea was voluntary, that a "summary dismissal" of his 11.42 motion was appropriate, and that *Rodriguez* did not require an evidentiary hearing or the appointment of counsel in this case.

The order of the Jefferson Circuit Court denying the Appellant's RCr 11.42 motion is affirmed.

ALL CONCUR.

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