

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002443-MR

JERALD B. MORRIS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN, III, JUDGE  
ACTION NO. 97-CR-00262

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING  
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BEFORE: JOHNSON, SCHRODER, JUDGES, AND MARY COREY, SPECIAL JUDGE.<sup>1</sup>

SCHRODER, JUDGE: Jerald B. Morris appeals from the Daviess Circuit Court's denial of his motion to vacate judgment and sentence pursuant to RCr 11.42 without an evidentiary hearing. As Morris's allegations were not conclusively refuted on the face of the record, we vacate and remand to the trial court for an evidentiary hearing.

On July 8, 1997, Morris was charged, in indictment no. 97-CR-00262, with three counts of criminal solicitation to commit

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<sup>1</sup>Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

murder, two counts of criminal solicitation to commit assault in the first degree, four counts of criminal solicitation to commit kidnapping, and persistent felony offender in the second degree.<sup>2</sup> On August 27, 1998, Morris filed a motion to enter a guilty plea to all charges pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), in exchange for the Commonwealth's recommendation of a total of ten years' imprisonment. On September 3, 1998, the court entered a final judgment and sentence in accordance with the plea agreement.

On June 6, 2000, Morris filed an RCr 11.42 motion to vacate the judgment and sentence entered on September 3, 1998, and requested an evidentiary hearing. The motion stated that from approximately May 3, 1997 through July 30, 1998, Morris, David Mills, Roger Swanagan, and Brian Herron were all lodged in the Daviess County Jail. Morris alleged that the Assistant Commonwealth's Attorney, Michael Lee, solicited the assistance of Robert Render, an attorney from the public defender's office, to have Mills, Swanagan, and Herron fabricate stories against Morris, in exchange for a lesser sentence, probation or release, that Morris solicited them to commit murder, assault, and/or kidnapping, resulting in the charges set forth in indictment no. 97-CR-00262. Morris further alleged that the Commonwealth Attorney Jay Wethington was aware of and involved in the plot.

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<sup>2</sup> The record indicates that the alleged intended victims of the murder and/or assault were Morris's ex-wife, her boyfriend, and the circuit judge. The alleged intended victims of the kidnapping were Morris's child, and children of the circuit judge, Commonwealth Attorney, and Assistant Commonwealth Attorney.

Morris alleged that only Mills and Swanagan took the "deal", while Herron refused to do so.

The motion asserted as grounds for relief that 1) the plea was void because certain counts in indictment no. 97-CR-00262 were barred by Morris's former prosecution in indictment no. 97-CR-00137 for charges based upon the same facts; 2) that he was denied his constitutional rights to due process and equal protection because of prosecutorial misconduct; 3) the plea was not entered knowingly, voluntarily, and intelligently; and 4) he was denied effective assistance of counsel. In an order dated September 15, 2000, and entered on September 20, 2000, the court denied the motion without an evidentiary hearing. This appeal followed.

Morris contends on appeal that the trial court erred by refusing to hold a hearing on his RCr 11.42 motion. Where a trial court denies a motion for an evidentiary hearing on the merits of allegations raised in an RCr 11.42 motion, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986), quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). An evidentiary hearing is not required if the allegations are refuted on the face of the record as a whole. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985). In the present case, Morris raises serious allegations of prosecutorial misconduct, and argues ineffective assistance of counsel for counsel's failure to investigate the

misconduct. From our review of the record, we cannot say that Morris's allegations are clearly refuted on the face of the record, which appears incomplete. The motion refers to a letter written by Swanagan, in which Swanagan allegedly states that the Commonwealth had told him what to say in court to "bust" Morris, and also refers to Kentucky Supreme Court opinion 98-SC-0367-MR, which reversed a jury verdict against Morris on prior criminal solicitation charges due to a conflict of interest on the part of the prosecutor.<sup>3</sup> These documents are listed in the appendix to the motion as attachments 3 and 5, and are referred to in the motion as "attached". However, these documents are not included in the record, and their absence was not addressed by the trial court. Attached to the motion was an affidavit from Herron which stated that the Commonwealth had asked him to testify against Morris, but that he "refused the offer to lie under oath."

As we cannot say that Morris's allegations could be conclusively refuted from the face of the record, we believe an evidentiary hearing should have been held to determine whether Morris could substantiate his claims. Sparks, 721 S.W.2d 726.

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<sup>3</sup> The appeal addressed by 98-CR-0367-MR was pursuant to indictment no. 97-CR-137, filed March 4, 1997, in which Morris was charged with one count of criminal solicitation to commit assault in the first degree and criminal solicitation to commit kidnapping. Morris was tried by a jury and convicted of both charges. In 98-CR-0367-MR, rendered August 26, 1999, the Kentucky Supreme Court reversed the conviction and remanded the case for a new trial on grounds that the prosecutor, Michael Lee, had a conflict of interest as he was an alleged victim of Morris in a separate criminal action. The record indicates that this separate criminal action was indictment no. 97-CR-00262, which resulted in the guilty plea upon which the present appeal is based.

Accordingly, we vacate the order denying Morris's RCr 11.42 motion and remand for an evidentiary hearing on said motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw  
Richmond, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III  
Attorney General

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky