

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001581-MR

WILBURN DAY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 98-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING  
\*\* \*\*

BEFORE: GUIDUGLI, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Wilburn Day brings this appeal from an order entered June 27, 2001 in the Laurel Circuit Court. Subsequent orders were entered July 5, 2001 and July 16, 2001. We vacate and remand.

In 1999, appellant was convicted of assault in the second degree, Kentucky Revised Statutes (KRS) 508.020, resisting arrest, KRS 520.090, and public intoxication, KRS 525.100. He was sentenced to ten years, twelve months and ninety days of imprisonment. Appellant took a direct appeal in Appeal No. 99-CA-001490-MR. The appeal was dismissed upon appellant's motion. Thereafter, appellant filed a motion to vacate under Ky. R. Civ.

P. (CR) 60.02. The motion was denied by order entered by the Laurel Circuit Court on June 6, 2000. On December 27, 2000, appellant filed a motion to vacate under Ky. R. Crim. P. (RCr) 11.42. Laurel Circuit Court denied the motion without an evidentiary hearing on June 27, 2001. Subsequently, appellant filed a "supplemental motion for RCr. 11.42 relief and for an evidentiary hearing and appointment of counsel" on June 28, 2001. This supplemental motion was denied by order of the Laurel Circuit Court entered July 5, 2001. Appellant then filed a motion to alter, amend or vacate under CR 59.05 and 60.02. The Court denied same on July 16, 2001. This appeal follows.

Appellant contends that the circuit court committed error by summarily denying his December 2000 RCr 11.42 motion. Specifically, appellant contends that he was entitled to an evidentiary hearing and appointment of counsel. To support this contention, appellant argues that prior to trial the Commonwealth Attorney presented his trial counsel with an offer of plea agreement. Under the plea agreement, appellant was to plead guilty in exchange for a sentence of one year imprisonment; however, appellant alleges that neither the prosecutor nor his trial counsel ever advised him of this plea agreement. Appellant maintains that he would have accepted the Commonwealth's plea offer and, thus, the one year prison sentence. In his motion, he claimed that it was only after trial and through another attorney, Hon. Brenda Popplewell, that he finally learned of the plea offer. It appears that Popplewell represented appellant in his direct appeal to this court.

In denying appellant's RCr 11.42 motion, the circuit court cited to the fact that appellant failed to obtain Popplewell's affidavit. We, however, believe that appellant has demonstrated entitlement to an evidentiary hearing and appointment of counsel. In the case at hand, the face of the record does not refute appellant's allegation. See Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985). We believe there remains a material issue of fact concerning whether such plea agreement was offered to defense counsel without appellant's knowledge. We note that the record does not refute appellant's allegation, and only upon an evidentiary hearing will the matter be properly determined. RCr 11.42(5) provides:

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 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. (Emphasis added).

If appellant's allegations are proved true, we are of the opinion that he would be entitled to RCr 11.42 relief. See Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860 (1998).

Appellant also contends that the trial court committed error by not considering his supplemental RCr 11.42 motion. Upon remand, we believe the circuit court should address appellant's supplemental RCr 11.42 motion upon the merits. We note that appellant mailed his supplemental RCr 11.42 motion from the Eastern Kentucky Correctional Facility days before the circuit

court's denial of his original 11.42 motion. Considering the unique circumstances of this case, we believe that justice would be served by the circuit court addressing the merits of appellant's supplemental RCr 11.42 motion upon remand.

We view appellant's remaining arguments as moot or without merit.

For the foregoing reasons, the order of the Laurel Circuit Court is vacated and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Wilburn Day, *Pro Se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky  
Frankfort, Kentucky

Kent T. Young  
Assistant Attorney General  
Frankfort, Kentucky