

RENDERED: MARCH 23, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001255-MR

ROY NEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NOS. 00-CR-001557; 00-CR-002531; 00-CR-002661;  
00-CR-002714; 01-CR-000366; 01-CR-000659; AND 01-CR-000898

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, JUDGE: Roy Neal appeals from a May 17, 2005, Opinion and Order of the Jefferson Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion without an evidentiary hearing. We vacate and remand.

Neal was indicted by a Jefferson County Grand Jury (Indictment Nos. 00-CR-001557, 00-CR-002531, 00-CR-002661, 00-CR-002714, 01-CR-000366, 01-CR-000659, and 01-CR-000898) on eight counts of theft by failure to make required disposition of property over \$300.00, four counts of theft by deception over \$300.00, and two counts of failure to transfer registration of a motor vehicle. Kentucky Revised Statutes (KRS) 514.070, KRS 514.040, and KRS 186.190. Pursuant to seven plea agreements, Neal pleaded guilty to the above charges. Five of the plea agreements contained language that Neal agreed to pay restitution. Three of these five agreements included specific amounts of restitution while two merely contained language that Neal “agreed to restitution.” Two other plea agreements did not contain any reference to restitution. However, neither the total amount of restitution nor a payment schedule was included in any of the plea agreements.

On July 13, 2001, Neal was sentenced to a total of ten years' imprisonment. The sentence was probated for five years. A condition of Neal's probation was that he pay restitution. On October 16, 2001, a restitution order was entered requiring Neal to pay total restitution of \$91,882.00 plus interest. The restitution was to be paid in monthly payments of \$1,893.59 for a period of sixty months.

Appellant was subsequently indicted upon additional charges. A probation revocation hearing was conducted and the circuit court found that appellant was in

violation of the conditions of probation for failure to pay restitution. The court did not revoke appellant's probation pending the outcome of the new indictment. In February 2003, a second revocation hearing was conducted. Following the hearing, the court revoked appellant's probation for nonpayment of restitution.

Appellant subsequently filed a *pro se* RCr 11.42 motion to vacate sentence. The circuit court entered an order appointing counsel for appellant. Counsel entered an appearance and filed a supplemental memorandum in support of appellant's motion. The Commonwealth subsequently responded. The court denied appellant's motion without an evidentiary hearing on May 17, 2005. This appeal follows.

When reviewing the denial of an RCr 11.42 motion without an evidentiary hearing, we must determine whether movant's allegations are refuted upon the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). If there were material issues of fact that could not be conclusively proved or disproved upon the face of the record, the circuit court erred by denying the RCr 11.42 motion without an evidentiary hearing. *Id.*

Appellant contends the circuit court committed error by denying his RCr 11.42 motion to vacate sentence without an evidentiary hearing. Specifically, appellant contends he received ineffective assistance of trial counsel when counsel failed to insist that restitution payments be established prior to entry of his guilty plea, failed to object to the payment schedule when the restitution order was entered, and failed to inform appellant that the five-year probationary period could be extended to allow smaller monthly restitution payments.

We are persuaded that probation should not be conditioned upon payment of restitution without consideration of defendant's ability to pay. 21A Am. Jur. 2d *Criminal Law* § 908 (1998). However, it is incumbent upon a defendant, once put on notice that the court is considering restitution as a condition of probation, to object at sentencing. *Id.*

In the case *sub judice*, there is no evidence on the face of the record to refute appellant's allegation regarding counsel's ineffective assistance. The record reveals that the circuit court did not make a formal inquiry regarding appellant's ability to pay at the October 15, 2001, restitution hearing.<sup>2</sup> If trial counsel failed to inquire as to appellant's ability to meet the restitution payments, and if appellant lacked such ability, counsel's performance was ineffective. *See id.* Thus, pursuant to the mandates of *Fraser*, we are compelled to remand this matter to the circuit court for an evidentiary hearing. *See Fraser*, 59 S.W.3d 448.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

PAISLEY, SENIOR JUDGE, CONCURS.

WINE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

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<sup>2</sup> The dissent intimates that during the restitution hearing the court asked if appellant could pay the restitution. The record reveals, however, that this question was not asked at the restitution hearing but instead was asked of appellant's counsel at the July 9, 2001, sentencing. Based upon the record before this Court, neither the exact amount of restitution, nor the payment terms were known or set at sentencing. This necessitates an evidentiary hearing in the majority's opinion.

WINE, JUDGE, DISSENTING: Respectfully, I dissent. During the plea colloquy in December 2000, the prosecutor advised that restitution would be about \$62,000. However, if there were additional charges, restitution could be higher. In fact, there were pleas to at least three more indictments. Following these pleas, the Appellant was released on bond. At the July 9, 2001 sentencing, the Appellant received a ten-year sentence instead of a possible twenty years. Without objection, a restitution hearing was to be scheduled if the parties could not agree to a definite amount of restitution. Further, at the sentencing hearing, the trial court was able to review the pre-sentence investigation report which detailed the Appellant's finances. The court asked the Appellant's counsel if the Appellant could make the restitution payments. The Appellant did not object when counsel responded yes. During the restitution hearing, the total restitution was discussed and a payment plan implemented. Although the Appellant may now wish he had received more favorable terms, to wit lower payments and an extended period of time to repay, in fact, the prosecutor was unwilling to agree to more lenient terms.

The Appellant failed to make the agreed \$1,893.59 monthly payments and in fact made no payments in six out of eleven months. This in spite of the fact he claimed he wanted his attorney to secure an agreement that he pay \$1,000 per month. As a result, the Commonwealth moved to revoke the ten-year sentence. During the September 11, 2004 hearing, the Appellant admitted the prosecutor would not agree to an extension in the period to pay restitution. The probation officer testified he encouraged the Appellant to pay as much as he could each month.

The court granted the Appellant's request to continue the hearing. On February 3, 2003, the probation officer advised the Appellant had made no payments since August 2002. The Appellant's probation was revoked.

It is within the trial court's discretion to extend a period of probation beyond the statutory five years. KRS 533.020(4). *See also Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997).

The Appellant now claims he would have insisted on going to trial had he known the standard probationary period could have been extended beyond five years. However, he fails to articulate why the Commonwealth or court would have been more amenable to extending the probationary period after a jury found him guilty. Thus, the Appellant fails to meet the second prong of the *Strickland* test – that the deficient performance so seriously affected the outcome of the plea process. Rather, it is unlikely the Commonwealth would have recommended probation, thus exposing Appellant to substantial time in the penitentiary. It is the goal of every defense counsel to secure the best outcome for the client. The record clearly shows Appellant's counsel succeeded in a plea of a term of years one-half the maximum and a probated sentence, as well as his immediate release from the county jail pending final sentencing. His failure to pay restitution or to at least seek an amendment in the terms of his probation are not the result of ineffective assistance of counsel.

As set out in the trial court's order, the record obviates the need for a hearing pursuant to RCr 11.42. I would affirm the trial court.

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