

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002556-MR

CURTIS MCGRUDER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE  
ACTION NO. 01-CR-002808

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND THOMPSON; HENRY,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Curtis McGruder appeals from an order of the Jefferson Circuit Court denying post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On October 30, 2001, McGruder was observed stealing property from a residence in Jefferson County. After being observed, McGruder drove away but was

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<sup>1</sup> Senior Judge Michael L. Henry 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.

pursued by police. As McGruder fled, his attempts to evade police resulted in a high-speed chase. Unfortunately, the high-speed chase terminated when McGruder lost control of his vehicle and collided with three other vehicles. Mary Scharre, who drove one of the vehicles, was injured as a result of the collision.

A Jefferson County grand jury indicted McGruder on December 5, 2001, charging him with first-degree assault, second-degree burglary, two counts of first-degree wanton endangerment, first-degree fleeing or evading police, second-degree escape, theft by unlawful taking over \$300, failure to transfer registration of a motor vehicle, reckless driving, and operating a motor vehicle without insurance.

On February 22, 2002, McGruder entered into a plea agreement to the charges specified in the indictment. In exchange for his guilty plea, the Commonwealth recommended that he be sentenced to ten years' imprisonment for the assault charge and to lesser sentences for the other charges. All sentences were to be served concurrently for a total ten-year sentence. Following a plea colloquy with McGruder, the trial court accepted the plea after finding that McGruder's guilty plea was made knowingly, intelligently, and voluntarily. On April 17, 2002, the trial court sentenced McGruder in accordance with the plea agreement.

On February 6, 2003, McGruder filed a motion to vacate his judgment of conviction pursuant to RCr 11.42. In his motion, McGruder alleged that his guilty plea was not intelligently and voluntarily entered because he was deprived of effective assistance of counsel. Subsequently, the trial court appointed counsel for McGruder and

conducted an evidentiary hearing. On January 13, 2005, the trial court denied the motion and made extensive findings of fact concerning the allegations made in McGruder's motion. This appeal followed.

On appeal, McGruder raises two grounds for relief: (1) that he was denied effective assistance of counsel when his defense counsel gave him erroneous advice regarding minimum parole eligibility; and (2) that he was denied effective assistance of counsel when his defense counsel failed to adequately investigate the facts of the case and the law as it applied to the facts of his case.

As an introductory matter, the standard employed on judicial review to determine the merit of ineffective assistance of counsel claims has been set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the *Strickland* test is modified when the ineffective assistance of counsel is alleged to have resulted in the entering of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under the modified test, the movant must "show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different." *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App.1990).

“In determining whether the degree of skill exercised by the attorney meets the proper standard of care, the attorney's performance is judged by the degree of its departure from the quality of conduct customarily provided by the legal profession.” *Id.* Moreover, “[i]n considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441-442 (Ky. 2001). Appellate courts must indulge a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Id.* at 442. With this standard of review, we now consider McGruder’s allegations of error.

McGruder first alleges that he was denied effective assistance of counsel when his defense counsel grossly misadvised him concerning his minimum parole eligibility. Specifically, McGruder alleges that his defense counsel advised him that his acceptance of the plea agreement would permit him to become eligible for parole after serving twenty (20) percent of his sentence. However, pursuant to KRS 508.010, when McGruder pled guilty to first-degree assault, he admitted that he caused a “serious physical injury to another person” during the commission of a Class B felony. In pertinent part, KRS 439.3401(1) provides that any person who pleads guilty to the commission of a Class B felony involving the serious physical injury to another person is a “violent offender.” Finally, KRS 439.3401(3) provides that a violent offender who has

been convicted of a Class B felony shall not be released on probation or parole until he has served at least eighty-five percent (85%) of his sentence. Consequently, when McGruder accepted the plea agreement containing a first-degree assault charge, McGruder became ineligible for parole until eighty-five percent of his sentence is served.

In its order denying the RCr 11.42 motion, the trial court noted that there was "...no credible evidence that defense counsel affirmatively and erroneously represented to Defendant that he would be eligible for parole after serving 20% of his sentence." The trial court based its finding on two occurrences that took place during McGruder's sentencing hearing and from McGruder's RCr 11.42 brief filed on February 6, 2003.

First, during the sentencing hearing, McGruder's counsel informed the court that he had been unable to determine McGruder's parole eligibility. The trial court's order noted that "[i]f, in fact, Mr. Carr [McGruder's defense counsel] had previously represented to Defendant that he would be eligible for parole after serving 20% of his sentence, it is hard, if not impossible, to reconcile that with his statements to the Court." The court further noted that McGruder made no attempt during the sentencing hearing to inform the court that his defense counsel had "previously and repeatedly" informed him that he would be eligible for parole after serving 20 percent of his sentence.

Next, the trial court noted that Mr. Schuler, then-Assistant Commonwealth Attorney, made clear that McGruder would have to serve 85 percent of the ten-year

sentence before he would become eligible for parole. The court noted that “Defendant did nothing at that time to suggest that this flatly contradicted the advice which he had been given by his counsel.” Lastly, the court noted that McGruder did not claim that his defense counsel had misadvised him when he filed his RCr 11.42 brief on February 6, 2003. The court noted that in this brief that McGruder argued that his defense counsel was ineffective because he ““failed to discover the correct parole eligibility date prior to advising and allowing the movant to plead guilty.”” The court concluded that “at no point, significantly, does Defendant allege that Mr. Carr affirmatively represented to him that he would be eligible for parole after serving 20% of the ten (10) year sentence.” Accordingly, the court concluded that McGruder had not been misadvised.

On appellate review of a trial court’s findings in an RCr 11.42 case, we will not set aside a trial court’s findings of fact unless they are clearly erroneous. *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky.App. 1983). In *Commonwealth v. Harrelson*, 14 S.W.3d 541, 548 (Ky. 2000), the Court held “due deference is given to the findings of the trial court.” “Mere doubt as to the correctness of a finding would not justify reversal, and the appellate court does not consider and weigh evidence de novo. However, if a finding is without adequate evidentiary support or occasioned by erroneous application of the law, the reviewing court may regard it as clearly erroneous.” *Id.* at 548-549. After reviewing the record, we conclude that the evidence contained in the record adequately supported the trial court’s finding. Consequently, McGruder was not deprived of his constitutional right to effective assistance of counsel.

McGruder next alleges that he was denied effective assistance of counsel when his defense counsel failed to adequately investigate the facts of the case and the law as it applied to the facts of his case. He alleges that his defense counsel did not conduct an independent investigation of the injuries suffered by the victim in the case. Consequently, he argues that his defense counsel was not able to present an adequate defense to the first-degree assault charge.

First, although McGruder alleges that his counsel failed to adequately investigate his case, he fails to offer any specific evidence of what his counsel would have found had he adequately investigated the case. He also fails to demonstrate how such purported evidence could have potentially improved the outcome of his case. Lastly, as the trial court noted, even with the help of his appointed counsel for the RCr 11.42 hearing, McGruder failed to produce any evidence that casted doubt on the seriousness of the victim's injury. Put simply, McGruder's claim amounts to no more than a vague allegation of constitutional error that does not warrant relief pursuant to RCr 11.42. *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005) (holding that "we have previously held that vague allegations, including those of failure to investigate, do not warrant an evidentiary hearing and warrant summary dismissal of the RCr 11.42 motion.").

Second, McGruder's allegation that his attorney failed to properly investigate the facts of his case is refuted by the record. At the RCr 11.42 evidentiary hearing, Schuler testified that he had several conversations with McGruder's counsel

prior to the acceptance of the plea agreement. Schuler testified that he informed defense counsel that the victim was physically incapable of coming to court because of the injuries that she sustained as a result of the collision. Schuler further testified that he told defense counsel that he was unwilling to amend the first-degree assault charge to a reduced offense because of the seriousness of the victim's injuries. Based on these facts, we agree with the trial court that the quality of defense counsel's investigation did not result in the deprivation of McGruder's constitutional right to effective assistance of counsel.

For the forgoing reasons, the order of the Jefferson Circuit Court denying McGruder's motion for post-conviction relief under RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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