

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000843-MR

JAMES MATTINGLY

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 04-CR-00328

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

DIXON, JUDGE: Appellant, James Mattingly, appeals *pro se* from an order of the Nelson Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Because we conclude that his claims cannot be refuted from the face of the record, we remand the matter to the trial court for an evidentiary hearing.

In August 2004, Appellant was indicted by a Nelson County Grand Jury for first-degree fleeing or evading police (in a motor vehicle), first-degree fleeing or evading

police (on foot), first-degree wanton endangerment, resisting arrest, and three counts of failure to give a turn signal. The charges stemmed from a July 2004 incident, during which Appellant fled from a Nelson County Police officer.

On January 6, 2005, Appellant pled guilty to both fleeing and evading charges, as well as to wanton endangerment, all felony offenses. Pursuant to the plea agreement, Appellant was sentenced to four years' imprisonment on each count, to run consecutively for a total of twelve years, with one year to serve and the remaining eleven years probated for a period of five years. Appellant's probation was subsequently revoked in December 2005, and he was remanded into custody to serve the remaining eleven years of his sentence.

Appellant thereafter filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel, as well as a motion for the appointment of counsel. Appointed counsel later filed a supplemental RCr 11.42 motion. Appellant claimed, in relevant part, that his trial counsel was ineffective for failing to advise him of an October 2004 plea offer from the Commonwealth recommending five years on each felony count, twelve months on the misdemeanor and a \$25 fine for each of the three traffic violations. The prison time, however, was to run concurrent with two years to serve and three years probated for a period of five years.

The Commonwealth failed to file any response to Appellant's RCr 11.42 motion. In March 2007, the trial court denied Appellant's motion for relief. With respect to Appellant's argument concerning the prior plea offer, the Court noted,

Movant claims he filed with his RCr motion a copy of a more lenient offer which the Commonwealth made available to his counsel and which he never saw. The Court has diligently perused the file and found no evidence of such document of record. Thus, the claim is negated by the record.

Since Movant's motion has been resolved by resort to the record, his motion for an evidentiary hearing shall be denied. Robbins v. Com., Ky. App., 719 S.W.2d 752 (1986); Maggard v. Com., Ky., 394 S.W.2d 893 (1965).

Appellant thereafter appealed to this Court.

Appellant argues herein that the trial court erred in failing to hold an evidentiary hearing because his claims were not refuted from the face of the record. Appellant points out that contrary to the trial court's findings, he did, in fact, attach a copy of the October 2004 plea offer, which he contends he did not become aware of until he requested his file from his prior trial counsel. Appellant maintains that his counsel's failure to inform him of the more lenient offer constituted ineffective representation and rendered his subsequent guilty plea involuntary.

The Commonwealth responds that even though the October plea offer was attached to Appellant's motion, it is somehow not part of the record. Further, the Commonwealth states that the Assistant Commonwealth's Attorney who signed the plea offer did not participate in any plea negotiations in Appellant's case. Thus, it is the Commonwealth's position that “[A]ppellant's counsel never received the plea offer [A]ppellant complains of.”

We find the Commonwealth's response disingenuous at best. Clearly, Appellant's trial counsel received the September 30, 2004, plea offer as it was contained in the file and made a part of Appellant's RCr 11.42 motion. Furthermore, on October 1, 2004, the same Assistant Commonwealth's Attorney filed the Commonwealth's Response to Discovery and Pre-Trial Order of Compliance, which stated that “[t]he Commonwealth has provided Defendant's counsel with a copy of Commonwealth's offer on a plea of guilty.” A review of the video record establishes that the plea offer Appellant ultimately accepted was not negotiated until December 2004. As such, we can only conclude that the offer referred to in the Commonwealth's compliance pleading is the prior offer of which Appellant alleges he was never informed.

RCr 11.42(5) requires an evidentiary hearing on the motion “if the answer raises a material issue of fact that cannot be determined on the face of the record.” In *Mills v. Commonwealth*, 170 S.W.3d 310, 325-26 (Ky. 2005), *cert. denied*, 547 U.S. 1005 (2006), the Kentucky Supreme Court opined,

We have established a two-part test for determining whether an evidentiary hearing is necessary to evaluate an RCr 11.42 motion. First, the movant must show that he “is entitled to relief under the rule.” [*Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001)]. This can be done by showing that “there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.” [*Id.* (quoting *Lay v. Commonwealth*, 506 S.W.2d 507, 508 (Ky. 1974))]. Second, the movant must show that “the motion raises an issue of fact that cannot be determined on the face of the record.” [*Id.* (quoting *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky.1993))].

It is clear that the trial court herein was unable to locate the copy of the October 2004 plea offer that was attached to Appellant's motion. As such, it ruled that his claim was refuted from the face of the record. However, as the plea offer was, in fact, attached to the motion, and the Commonwealth provided no evidence to explain the circumstances of its existence, Appellant's claim that he was never informed of such agreement is not refuted from the face of the record. While we render no opinion as to whether Appellant's counsel failed to inform of the offer or whether such constituted ineffective assistance, we must conclude that Appellant was entitled to an evidentiary hearing on the matter. RCr 11.42(5); *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

The order of the Nelson Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is reversed and the matter is remanded for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Mattingly, *Pro Se*
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BRIEF FOR APPELLEE:

Gregory D. Stumbo
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