

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000252-MR

JOSEPH COLLINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 06-CR-000989

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REMANDING

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BEFORE: COMBS, CHIEF JUDGE; CAPERTON; JUDGE; WHITE,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: Joseph Collins appeals the denial by the Jefferson Circuit Court of his motion (filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42) which alleged that he had received ineffective assistance of counsel. After careful review, we remand.

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On August 8, 2006, Collins pled guilty to complicity to second-degree burglary and to being a persistent felony offender in the first degree (PFO I). The plea agreement included a “hammer clause,” which provided that the Commonwealth would drop the PFO I charge and recommend a ten-year sentence contingent upon the conditions that Collins would: appear at sentencing, not obtain new charges, avoid contact with his co-defendant and with his victim, and cooperate with his pre-sentencing investigation.

Collins complied with all conditions of the hammer clause except one. He did not appear at his sentencing on September 26, 2006. Collins’s counsel appeared and told the court that he had not heard from Collins since he pled guilty. The court issued a bench warrant for Collins, and he was arrested in December 2006.

Collins’s sentencing was held on February 19, 2007. He testified that his stepmother had passed away and that her funeral was held on September 25, 2006 – the day before the sentencing date. Following her funeral, Collins and his father went to his attorney’s office. He said that they gave his attorney one thousand dollars (and two ounces of marijuana) in payment and asked him to request a continuance at the sentencing hearing the next morning. Collins said that he found out about the bench warrant a few days later but that he was afraid to turn himself in. The court applied the hammer clause and sentenced Collins to twenty-years’ incarceration.

In April 2008, Collins filed a motion under RCr 11.42 seeking to vacate his sentence because he had received ineffective assistance of counsel. Court-appointed counsel supplemented his motion and requested an evidentiary hearing in August 2008. The court denied the motions in December 2008. This appeal follows.

The Commonwealth first argues that Collins's original RCr 11.42 has not been preserved for appeal because it was not properly verified. However, the trial court disposed of the motion based on the merits; additionally, this issue was not raised before the trial court. Therefore, we will not address the alleged defect of lack of preservation. Kentucky Rule[s] of Civil Procedure (CR) 76.12(4)(c).

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States. It has prescribed a two-pronged test that a defendant must satisfy in order to sustain his burden of proof in these cases:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be demonstrated in order for the test to be met. The *Strickland* Court emphasized that

reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id.* at 695-96.

The Supreme Court refined the *Strickland* test in the context of guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), in which it held that “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

Collins argued that the trial court erred when it did not grant his motion for an evidentiary hearing to prove that he received ineffective assistance of counsel. We agree.

After an RCr 11.42 motion and the answer to it have both been filed, a trial court must determine if there are any “*material* issue[s] of fact that cannot be conclusively resolved . . . by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). (Emphasis added). *See also* RCr 11.42(5).

Collins first contends that the face of the record does not resolve his argument that his counsel should have requested a continuance as he allegedly agreed to do. Therefore, he believes that a hearing is required.

Collins claims that he contacted his counsel the day before his sentencing; but his counsel has denied speaking to him. He believes that this discrepancy in their version of the facts is a material fact meriting a hearing. He

believes that if his lawyer had appeared to request a continuance in light of a death in his immediate family, he would have been spared the application of the hammer clause.

On August 8, 2006, when Collins entered his guilty plea, the trial court patiently explained to him that he must comply with all the conditions of the hammer clause in order to receive the benefits of the plea agreement. Collins clearly indicated that he understood. At his next court appearing in February 2007, Collins admitted to the court that he had become aware of the bench warrant for his arrest within days of its issuance. However, he told the court that he had been too scared to turn himself in. The court told Collins that if he had come in **within a week**, “it would have made all the difference in the world.” Thus, Collins reasons that the timely explanation of his absence by his counsel would have made “all the difference.”

We note that the court had already accepted Collins’s guilty plea in September of 2006. Thus, pursuant to *Hill*, requesting the continuance was immaterial to the issue of whether Collins had received effective assistance of counsel prior to the plea, which preceded the need or request for a continuance in sentencing. However, the issue remains whether counsel was ineffective in failing to request a continuance **if** Collins indeed had so requested and whether Collins was entitled to rely on counsel at this juncture. Collins’s failure to appear at sentencing undoubtedly was a material issue according to the literal terms of the plea and the applicability of the hammer clause.

We are persuaded that the court should have held an evidentiary hearing to attempt to ferret out the truth in this case. The face of the record cannot resolve the contradiction in the versions of the story presented by Collins in his brief and the representations by counsel in open court that he had not seen Collins since his release.

Again, appearance by Collins at his sentencing was one of four material criteria upon which the plea and invocation of the hammer clause depended. If, after a hearing, the court is satisfied that Collins did not contact counsel to ask for a continuance, there will be no doubt that the sentence should stand. If, on the other hand, the court believes that counsel was indeed contacted and compensated and that he failed to ask for a continuance as agreed, Collins will be entitled to a new sentencing hearing.

We note that if counsel requested partial payment of marijuana for his services and/or that he lied in court in representing that he had not seen Collins, the court shall refer trial counsel to the Kentucky Bar Association for disciplinary proceedings. KRS. 26A.080.

In light of our decision at this juncture, we need not -- and shall not -- address Collins's argument as to failure of his attorney to advise him about parole eligibility.

Accordingly, we vacate the order of the Jefferson Circuit Court denying the motion for RCr 11.42 relief and remand for an evidentiary hearing.

ALL CONCUR.

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