

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

NO. 2009-CA-000763-MR

VERNON D. TOWNSEND

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE JEAN C. LOGUE, JUDGE  
ACTION NO. 04-CR-00077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, KELLER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Vernon D. Townsend appeals from an order of the Clark Circuit Court denying his motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42 without an evidentiary hearing. For the following reasons, we reverse and remand.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

In May 2006, Townsend pled guilty to first-degree manslaughter, first-degree trafficking in a controlled substance, first-degree wanton endangerment (two counts) and possession of a handgun by a conviction felon. The trial court sentenced him to twenty-five years' imprisonment. Thereafter, Townsend filed a motion to vacate the judgment and sentence pursuant to RCr 11.42 alleging that he received ineffective assistance of counsel and moved for an evidentiary hearing. The trial court denied the motion for a hearing and the motion to vacate. This appeal followed.

RCr 11.42 does not mandate that an evidentiary hearing be held each time a motion is made pursuant to it. The rule provides, in relevant part:

(5) 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[.]

Restated, “[w]here the movant’s allegations are refuted on the face of the record as a whole, no evidentiary hearing is required.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985)). In cases such as the present in which the trial court “denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion ‘on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.’” *Sparks*,

721 S.W.2d at 727 (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

On appeal, Townsend reiterates his allegations that he received ineffective assistance of counsel as a result of his trial counsel's failure to consider extreme emotional disturbance (EED) and voluntary intoxication as defenses to the charge of first-degree manslaughter and his trial counsel's failure to interview witnesses. Townsend further avers that the court erred by denying his motion for a hearing since his claims concerning ineffective assistance of counsel were collateral to the record and could not be adjudicated by reference to the record alone. Since we find that the court erred by denying his motion for a hearing, we decline to address the merits of his allegations.

The record reflects that in his motion to vacate, Townsend asserted that at the time of the shooting incident, he was intoxicated as a result of xanax pills and whiskey and was in an argument with someone who had broken into his house. He claimed that he had brandished a gun to frighten the intruder and that when his girlfriend Jolene grabbed his arm, the gun accidentally discharged and shot her. He argued that since he was intoxicated and since the fatal shooting of Jolene was accidental, he lacked the "intent" element requisite for a conviction of first-degree manslaughter. Accordingly, he maintained that the affirmative defenses of EED and voluntary intoxication should have been included in the jury instructions and that the jury should have received instructions on any lesser-included offenses.

In addition, Townsend asserted that his attorney failed to interview witnesses as requested. Townsend contended that Jolene's mother, had she been interviewed, would have stated that she did not think Townsend killed Jolene and that if Jolene had been drunk or high she would have tried to take the gun from him. Townsend also claimed that an interview of the other people who were present in the house at the time of the shooting would have revealed conflicting stories regarding whether Jolene tried to take the gun from Townsend and that no one actually observed the shooting since a wall in the house blocked their view.

While the record contains an ample guilty plea colloquy, Townsend's allegations specifically address advice his trial counsel gave, or failed to give, and steps his trial counsel took, or failed to take, leading up to Townsend's decision to plead guilty. These matters are not reflected in the record. Thus, a conclusion that Townsend's allegations are refuted on the face of the record as a whole would be based on mere speculation. Accordingly, we find that the trial court erred by denying Townsend's motion for a hearing.

The order of the Clark Circuit Court is reversed and this case is remanded with directions for the trial court to conduct an evidentiary hearing consistent with this opinion. We express no opinion as to the merits of Townsend's allegations.<sup>2</sup>

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<sup>2</sup> Nonetheless, we note that a claim of ineffective assistance of counsel in the context of a guilty plea has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Sparks*, 721 S.W.2d at 727-28 (citations omitted).

ALL CONCUR.

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