

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001898-MR

GREG SIMPSON

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 10-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: JONES, J. LAMBERT AND STUMBO, JUDGES.

JONES, JUDGE: Greg Simpson appeals from the October 14, 2013, order of the Knox Circuit Court denying his RCr<sup>1</sup> 11.42 motion without an evidentiary

hearing.<sup>2</sup> In so doing, the circuit court relied on and incorporated the record from

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

<sup>2</sup> On Simpson's motion, we consolidated this appeal with Simpson's appeal No. 2013-CA-472-MR, to the extent that we ordered both appeals to be heard by the same panel. Both appeals are now ripe. While the issues are somewhat interrelated, they are discrete enough that we believe it better to issue separate opinions in each matter.

an unrelated RCr 11.42 motion Simpson filed in Laurel Circuit Court ("the Laurel Action"). While the Laurel Action also concerned Simpson's mental capacity with respect to the effectiveness of counsel, the time periods at issue, the procedural posture of the cases, and the counsel were different.

Having reviewed the record, we conclude that the Knox Circuit Court erred when it relied on the Laurel Action to deny Simpson's motion on its face without conducting its own evidentiary hearing. Accordingly, we REVERSE and REMAND for an evidentiary hearing.

### I.

In 2009, Simpson was indicted on the following charges: trafficking in a controlled substance, first degree, two counts; trafficking in a controlled substance, second degree; trafficking in a controlled substance, third degree; possession of marijuana; possession of a controlled substance in an improper container; possession of drug paraphernalia; and being a persistent felony offender (PFO), second degree. As a result of an agreement, Simpson entered a guilty plea to a single amended charge of first-degree possession of a controlled substance and was sentenced to four years' imprisonment by an April 26, 2010, order. The remaining charges were dismissed.

On April 29, 2013, Simpson filed a motion to vacate his judgment, pursuant to RCr 11.42. Therein, Simpson argued that his trial counsel had been ineffective during the guilty plea proceedings. In particular, Simpson argued that his trial counsel had failed to investigate potential defenses and had failed to move

the court for funding to determine Simpson's competency. In short, Simpson maintained that his trial counsel failed to discover that he was mentally ill.

Without holding an evidentiary hearing, the trial court denied Simpson's motion in an order entered on October 14, 2013. As its basis for denying Simpson's motion, the trial court cited to Simpson's plea colloquy and then took judicial notice of factual findings rendered eight months earlier by the Laurel Action.

This appeal followed.

## II.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (citation omitted). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

In order to succeed on a claim of ineffective assistance of counsel under RCr 11.42, a movant must fulfill both requirements of the two-prong test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Therefore, the trial court’s inquiry is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. at 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Simpson’s main argument on appeal is that the trial court erred when it denied his RCr 11.42 motion without conducting an evidentiary hearing. He maintains that the trial court erred when it chose to simply disbelieve Simpson’s factual allegations, and when it supplemented the record with findings outside the record. After careful review, we agree.

Typically, an evidentiary hearing on an RCr 11.42 motion is only required “when there is a material issue of fact that cannot be determined on the face of the record.” *Commonwealth v. Searight*, 423 S.W.3d 226, 231 (Ky. 2014) (citation omitted). When a trial court denies an RCr 11.42 motion without an evidentiary hearing, “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." *Fuston v. Commonwealth*, 217 S.W.3d 892, 895 (Ky. App. 2007) (citation omitted).

The present situation is unique, in that the trial court refuted the allegations of Simpson's motion by taking judicial notice of factual findings found in a separate, and unrelated, criminal proceeding. KRE<sup>3</sup> 201 allows a trial court to take judicial notice of adjudicative facts that are generally known in the county of venue, or facts that are capable of ready and accurate recognition by resort to unquestionable resources. KRE 201(b).

While the Commonwealth attempts to persuade this Court that the findings in question are permissible under KRE 201, we find this unorthodox method of RCr 11.42 fact-finding troubling. First, the Laurel Circuit Court record from which the trial court took its findings is not part of this record. Thus, it cannot be said that Simpson's allegations are truly refuted by the record herein. *See Fuston*, 217 S.W.3d at 892.

Most importantly, the two cases are not factually related in any meaningful way that would make the Laurel Action relevant to the issues presented by Simpson in this matter. While only a few months separated the RCr 11.42 orders, over a decade separated the two crimes.<sup>4</sup> Additionally, different trial counsel represented Simpson in the Knox and Laurel Actions. Leslie Brown

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<sup>3</sup> Kentucky Rules of Evidence.

<sup>4</sup> Simpson did not file the motions contemporaneously with one another. Our Supreme Court ordered the Laurel Circuit Court to conduct an evidentiary hearing in the Laurel Action in 2002. For unknown reasons, eleven years passed before the Laurel Circuit Court conducted the ordered hearing. But for the delay, Simpson's RCr 11.42 motions would not have been decided even remotely close in time to one another.

represented Simpson in the Laurel Action. Greg Crabtree initially represented Simpson in the Knox Action, until he withdrew; Randall Jewell represented Simpson thereafter. Additionally, the facts underlying the two criminal cases were unrelated. The Laurel Action involved Simpson's escape from jail in 1997; the Knox Action involved the unlawful selling of prescription medications in 2009.

The trial court in Simpson's Laurel County proceeding denied his motion for RCr 11.42 relief based upon a finding that Simpson had actively concealed his intellectual disabilities from his trial attorney in 1997. That finding does not mean that Simpson's behavior and mental state were necessarily the same when he pled guilty in 2010. As part of the Laurel Action, Ms. Brown testified that she had no reason to suspect Simpson was intellectually deficient. Conversely, the record reflects that Simpson's first counsel in the Knox Action believed that Simpson had some sort of mental issue and did not believe that Simpson understood "the whole roles of attorney client."

The trial court erred in relying on the record from the Laurel Action to support its conclusion that Simpson's attorneys in this entirely separate action were not ineffective. Because the trial court made factual findings based on information found outside of the record, they are also unsupported by substantial evidence. RCr 9.78. The record is otherwise silent with regard to Simpson's alleged mental disability. Accordingly, the denial of Simpson's RCr 11.42 motion was an abuse of discretion and we reverse and remand for an evidentiary hearing that will reveal

case specific facts. We note, however, that this holding makes no assertion with regard to the veracity of Simpson's allegations.

Simpson next argues that the trial court erred when it failed to provide him with funding for expert testimony at his evidentiary hearing. We note that because this case is only now being returned for an evidentiary hearing, this argument is premature. Nonetheless, we offer guidance. If the trial court should determine that expert testimony is reasonably necessary in order for Simpson to effectuate a full presentation of his RCr 11.42 argument, then it may grant the funding for such testimony. *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008). However, the decision to provide such funding is within the discretion of the trial court and is not compulsory. *Id.*

Because Simpson's remaining arguments pertain to his trial counsel's performance, namely an alleged failure to discover any intellectual disability and to investigate potential defenses, in light of our remand, they are not ripe at this time.

### **III. Conclusion**

For the foregoing reasons, the October 14, 2013, order of the Knox Circuit Court is reversed and remanded for an evidentiary hearing.

ALL CONCUR.

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