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**Commonwealth of Kentucky
Court of Appeals**

NO. 2014-CA-000290-MR

MARCUS D. JACKSON

APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: CHIEF JUDGE ACREE; STUMBO AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Marcus D. Jackson brings this appeal from a January 30, 2014, order of the McCracken Circuit Court summarily denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence of imprisonment. We affirm.

Jackson was indicted by the grand jury upon the offenses of trafficking in marijuana over five pounds, possession of drug paraphernalia, and with being a persistent felony offender in the first degree. The Commonwealth offered Jackson a plea bargain. Thereunder, the Commonwealth would recommend a total sentence of eleven-years' imprisonment in exchange for Jackson's entry of a guilty plea. Jackson's trial counsel advised him to accept the plea bargain, and he initially indicated that he would do so. But, three days before Jackson was to enter a guilty plea, Jackson decided not to accept the plea bargain. On September 22, 2008, the day originally scheduled for entry of Jackson's guilty plea, the circuit court questioned Jackson as to why he rejected the plea bargain:

Jackson: I didn't understand that the eleven was doing ten flat. That the plea bargain that they offered me.

Trial judge: That – I didn't understand what you said, that the eleven would be 'doing ten flat'?

Jackson: Right.

Prosecutor: The way the guilty plea is, it's an eleven year offer, but he's ten flat to the Parole Board, that he has to serve.

Jackson: Ten years, that I would have to serve.

Trial judge: Okay. Why would that – Why would that be?

Prosecutor: Because he's a first[-]degree persistent felony offender, and he's pleading guilty to a Class C felony.

Trial judge: Oh.

Prosecutor: So.

Trial judge: Oh, okay. So, he was, the offer – I didn't know what the offer was. It was for him to plead guilty on a first[-]degree PFO?

Prosecutor: Correct.

Jackson: yes.

Defense counsel: Yes.

Trial judge: All right.

Defense counsel: Judge, we had discussed that earlier in the case, Judge, but –

Trial judge: Well, if we discussed it earlier, how'd you not understand it?

Jackson: Because I thought it was for ten years for the PFO and a year for the drug paraphernalia charge, twelve months. Meaning that ten, I would have been able to get good time on the ten year sentence.

Trial judge: Okay.

Jackson: Meaning that I would have served six years and six months to serve the ten year sentence out.

Defense counsel: Before going to the Board.

Jackson: Before, you know, that what I thought.

Trial judge: All right.

Jackson: I didn't know it was one of the things where you have to do ten consecutive years and then start on the other time after that.

Trial judge: Well, that's not correct, is it?

Defense counsel: Yes.

Prosecutor: He's got –

Trial judge: Ten years and then start on the other?

Prosecutor: Unless he's referring to his felony parole time that he's got.

Defense counsel: I'm referring to the eleven.

Prosecutor: Well the eleven years, the way this is all going to work, is that it's an eleven year offer in lieu of Count 1 and 2. So you're pleading guilty as to first[-] degree PFO, so you serve ten years and then you are parole eligible. That's the way it works.

Jackson: After – After serving time for the year.

Prosecutor: For what year?

Jackson: The extra year that's over the eleven.

Defense counsel: You're parole eligible –

Prosecutor: You have to serve – Out of that eleven-year sentence, whether you got a twenty-year sentence or whether you got an eleven-year sentence, you serve ten years, and then you are parole eligible. Now, it's up to the Parole Board when they have your hearing and all that business.

Jackson: So, so, right.

Prosecutor: I don't know how they figure your credits. That's the way this is going to work.

Jackson: So this is my understanding. Okay, that's fine. So your telling me that if I take the plea bargain today, I have to give away all my grounds for appeals, everything like that. But, I'm in the same situation if I get the max from a jury, but I have a right to appeal. Why is that a plea bargain?

Prosecutor: Well, because you have a serve out date that's eleven years instead of being twenty years, which is what you're going to get if we go to trial.

Jackson: Right, and I totally understand that. But what I'm saying to you is, I'm going to do ten years flat from a jury or from you, right?

Prosecutor: Correct.

Defense counsel: [Inaudible] from the Board.

Jackson: Right, but then, I'm losing all my rights to appeals. Right? After doing ten years in prison, what's the point in coming home in a month? After ten years? I mean, seriously.

* * *

Trial judge: What he's saying is, is true – Let's say he went to trial and got twenty years, he would be parole eligible then after the ten years.

Prosecutor: Correct.

Trial judge: Same as he would be here.

Prosecutor: Correct.

Trial judge: Of course, I guess the difference would be, of course, the Parole Board would see that the jury found you guilty and sentenced you to twenty. And whether – I don't know what the Parole Board would make of that, if they gave him twenty, so we shouldn't let him out in ten, or if they would just disregard that, or what. I would see – think it would be some benefit to go to the Parole Board on a ten-year sentence and look for parole as opposed to going with a twenty[-]year sentence on your back and asking for parole. But I'm not on the Parole Board, and I don't know how the[y] operate. What you all – Mr. Vidmer, you all didn't already go through all of this?

Defense counsel: We have, earlier on, Judge, yes, after the first pretrial conference we had here. I gave him the offer that was given to me, and we discussed it and

told him – And I had talked with Mr. Hancock that day, and it was – told him he was going to have to serve ten.

Commonwealth's Brief at 5 – 7.

A jury trial ensued, and Jackson was found guilty upon all charges. By judgment entered February 12, 2009, the circuit court sentenced Jackson to a total of fifteen-years' imprisonment. Jackson undertook a direct appeal (Appeal No. 2009-CA-000297-MR) to the Court of Appeals. This Court affirmed Jackson's conviction by Opinion entered August 20, 2010.

Jackson then filed the instant RCr 11.42 motion alleging ineffective assistance of trial counsel. Specifically, Jackson claimed he rejected the Commonwealth's plea bargain based upon trial counsel's erroneous advice that he would be required to serve a minimum of ten-years' imprisonment. Jackson asserted that he was entitled to good-time and other sentence credits and would have completely served his sentence under the plea bargain well before ten years. Jackson argued that if he had been properly informed concerning good-time and other sentence credits he would have accepted the plea bargain and not gone to trial.

In a January 30, 2014, order, the circuit court denied Jackson's RCr 11.42 motion without an evidentiary hearing and concluded:

1. [Jackson] alleges that his trial counsel failed to render effective assistance of counsel when counsel failed to correctly advise [Jackson] of sentence ramifications of the plea offer. [Jackson] was found guilty by a jury of Trafficking in Marijuana Greater Than Five Pounds and First Degree Persistent Felony

Offender. The jury set [Jackson's] punishment as ten (10) years on the Trafficking in Marijuana Greater Than Five Pounds and fifteen (15) years on the First[-]Degree Persistent Felony Offender.

At a hearing on September 22, 2008, the Court, the Commonwealth, and Defense Counsel all discussed with [Jackson] the ramifications of accepting the plea deal offered by the Commonwealth and what the possible outcomes were if [Jackson] chose to take his case to trial. At the hearing [Jackson] put a great amount of emphasis on when he would become parole eligible. [Jackson] was advised pursuant to KRS 532.080 that as a convicted First[-]Degree Persistent Felony Offender he would not see the parole board until he had served a minimum of ten (10) years, regardless of whether his total sentence was ten (10) or twenty (20) years. [Jackson] chose to take his chances at trial since his main concern was when he would become parole eligible and that time was the same whether he took the plea deal or got the maximum sentence at trial. [Jackson's] argument must fail, because even accepting it as true, [Jackson] suffered no prejudice. [Jackson's] sentence received after the jury trial was substantially the same as was offered in the plea deal. Especially since [Jackson's] main concern with the plea deal was when he would become parole eligible.

Order at 2-3. This appeal follows.

Jackson contends the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing or appointment of counsel. Jackson asserts trial counsel erroneously advised him that he would have to serve a minimal of ten-years' imprisonment under the plea bargain with the Commonwealth. Jackson argues that this advice was incorrect as he would have been eligible for good-time and other sentence credits. According to Jackson, these credits would have operated to reduce the eleven-year sentence by several years and resulted in the

sentence being completely served well before ten years. If correctly advised concerning application of good-time and other sentence credits, Jackson claims that he would have accepted the plea bargain. But, because of trial counsel's erroneous advice, he rejected the plea bargain, demanded a jury trial, was convicted of all charges, and sentenced to a total of fifteen-years' imprisonment.

It is well-established that a defendant is entitled to competent trial counsel during the plea-bargain process. *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Osborne v. Com.*, 992 S.W.2d 860 (Ky. App. 1998). For Jackson to prevail upon his claim, he must prove that trial counsel's performance was deficient, as it "fell below an objective standard of reasonableness," and that he suffered prejudice. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). To demonstrate prejudice, Jackson must show:

[B]ut for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S. Ct. at 1385. And, where allegations of ineffective assistance of trial counsel are refuted upon the face of the record, there is no entitlement to an evidentiary hearing or appointment of counsel. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001).

In this Commonwealth, a prisoner has no vested right or reasonable entitlement to meritorious good-time credit and other sentence credit. These credits are a privilege and must be earned. *Martin v. Chandler*, 122 S.W.3d 540 (Ky. 2003). Consequently, good-time credit and other sentence credit are a speculative benefit that may or may not be received by the prisoner. *Id.* Considering their inherent speculative nature, we cannot say that incorrect information by trial counsel concerning good-time credit or other sentence credit is prejudicial. Thus, Jackson allegation of ineffective assistance of counsel was refuted upon the face of the record.

In sum, we conclude that Jackson failed to demonstrate that he received ineffective assistance of counsel and that the circuit court properly denied the RCr 11.42 motion without an evidentiary hearing or appointment of counsel.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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