

RENDERED: OCTOBER 30, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2014-CA-001009-MR

HENRY LEE BUTLER JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERICK J. COWAN, JUDGE  
ACTION NO. 08-CR-00184-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

KRAMER, JUDGE: Henry Lee Butler Jr. appeals from the order of the Jefferson Circuit Court denying his post-conviction motion made pursuant to Kentucky Rules of Procedure (RCr) 11.42. We affirm.

In September, 2009, while in the custody of the Kentucky Department of Corrections (KDOC), Butler was temporarily released to the Federal Bureau of

Prisons (FBOP) in order to enter a plea of guilty in federal court for being a felon in possession of a firearm. For that offense, Butler was sentenced in federal court to six years imprisonment. Soon after sentencing, Butler was returned to the custody of the KDOC, where on November 19, 2009, he entered into a plea agreement in the present case. In exchange for Butler's plea of guilty to four counts of second-degree robbery and one count of second-degree burglary, Butler received a sentence of seven years' imprisonment for each count, to run concurrently with one another for a total of seven years. The sentence was ordered to run consecutive to any state sentence Butler was serving, and concurrent with his federal sentence.

On February 17, 2011, Butler was paroled by the KDOC into the custody of the United States Marshals Service to commence service of his federal sentence. Soon after being transferred to the FBOP, Butler discovered that he would not receive any credit for the time he had spent in state custody.

Thereafter, Butler filed a *pro se* motion to vacate his sentence under RCr 11.42. In his motion he argued that he only accepted the plea on the condition that his Jefferson County sentence and his federal sentence run concurrently. Because his sentences did not run concurrently, he claimed that his plea was not entered knowingly and voluntarily. He further argued that he received ineffective assistance of counsel for trial counsel's failure to inform him that the plea into which he was entering into could not be fulfilled. Butler retained counsel, who

supplemented the *pro se* motion. On January 26, 2014, while in federal custody, Butler completed his parole with the KDOC.

On February 24, 2014, the circuit court denied Butler's motion concluding that 1) Butler failed to offer sufficient evidence to prove that the FBOP is running his sentence contrary to the Judgment of Conviction, and 2) Butler failed to show that RCr 11.42 gives the court jurisdiction to order the FBOP to recalculate his sentence. It is from that order that Butler presently appeals.

On appeal, Butler contends that the circuit court erred when it overruled his motion without conducting an evidentiary hearing. We disagree. The circuit court is only required to hold an evidentiary hearing if there are material issues of fact that cannot be conclusively resolved by an examination of the record. *Fraser v. Commonwealth*, 59 S.W. 3d 448, 452-453 (Ky. 2001). Here, the record was sufficient to deny Butler's motion without a hearing.

RCr 11.42 states:

A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence, to vacate, set aside or correct it.

“RCr 11.42 is a procedural remedy designed to give a convicted prisoner a direct right to attack the conviction *under which he is being held*. It is supplemental to the right of habeas corpus and we must accept the plain meaning of the language of the rule.” *Wilson v. Commonwealth*, 403 S.W. 2d 710, 712 (Ky. 1966) (emphasis

added). “RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody.” *Sipple v. Commonwealth*, 384 S.W.3d 332 (Ky. 1964). The remedy available under RCr 11.42 is the “right to be released” from a sentence that is subject to collateral attack. RCr 11.42(1). “It is axiomatic that a person cannot be released from a sentence which has been completed.” *Parrish v. Commonwealth*, 283 S.W.3d 675, 677. (Ky. 2009).

Having completed his Kentucky sentence on January 26, 2014, Butler is no longer in custody under the sentence for which he seeks relief. As such, RCr 11.42 provides Butler no remedy. An evidentiary hearing was unnecessary as the record was sufficient to allow the trial court to make its determination.

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

ALL CONCUR.

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