

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

NO. 2014-CA-001735-MR

JOSEPH MCCALED

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NO. 11-CR-00497

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,  
JUDGES.

KRAMER, CHIEF JUDGE: Joseph McCaleb, *pro se*, brings this appeal of an  
order of the Boone Circuit Court, entered September 14, 2014, summarily denying  
his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr)  
11.42. We affirm.

On June 6, 2013, following a plea of guilty, McCaleb was convicted of four counts of theft by unlawful taking property under \$500, and one count of bribing a witness. He received a one-year sentence of imprisonment. On October 9, 2013, McCaleb filed a *pro se* motion to vacate his guilty plea due to ineffective assistance of counsel. In his motion he claimed, *inter alia*, that his counsel gave him erroneous advice during the plea negotiations. On November 8, 2013, the trial court appointed the Department of Public Advocacy to represent McCaleb in his post-conviction motion. After reviewing the record in the case, the Department of Public Advocacy determined that McCaleb's post-conviction proceeding was not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, and moved to withdraw as counsel. The motion was granted on April 22, 2014.

Thereafter, McCaleb filed, *pro se*, a supplemental RCr 11.42 motion on May 8, 2014, along with a motion for an evidentiary hearing. On September 17, 2014, the trial court entered an order denying McCaleb's RCr 11.42 motion and request for an evidentiary hearing, finding that McCaleb's claims were refuted by the record. McCaleb filed a motion to reconsider, which was overruled on October 9, 2014. This appeal followed.

We decline to address the merits of McCaleb's RCr 11.42 motion because, although he was in custody at the time he filed the motion, his sentence has since been completed. Pursuant to RCr 11.42(1):

*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.

(Emphasis added).

In *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009), the Kentucky Supreme Court addressed the issue of whether a RCr 11.42 motion becomes moot if the movant completed his sentence while the RCr 11.42 motion was pending.

The Court held that it did, reasoning as follows:

The language of [RCr 11.42] is plain and unambiguous that relief is available only to “[a] prisoner in custody ... or on probation[.]” Our predecessor Court expressly rejected an identical argument in *Sipple v. Commonwealth*: “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.” 384 S.W.2d 332 (Ky. 1964). Likewise, in *Wilson v. Commonwealth*, our predecessor Court again explained: “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.” 403 S.W.2d 710, 712 (Ky. 1966) (emphasis added).

Parrish’s argument fails to consider the remedy available under RCr 11.42. By its plain language, the rule is a mechanism by which the party “claims a right to be released” from his sentence. It is axiomatic that a person cannot be released from a sentence which has been completed. For these reasons, we conclude the Court of Appeals did not err when it found that Parrish, by virtue of having completed his sentence during the pendency of

his appeal, could not seek appellate relief from the denial of his RCr 11.42 motion.

*Id.* at 677.

Here, there is no record of McCaleb currently being in held in custody in Kentucky, or being on probation parole, or conditional discharge.<sup>1</sup> In fact, the address on his pro se brief references a residence in Ohio. Accordingly because his sentence has been completed, the remedy McCaleb seeks—the right to be released from his sentence—is no longer available. Consequently, his RCr 11.42 motion is moot.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph McCaleb, *pro se*  
Franklin, Ohio

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Matthew R. Krygiel  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>1</sup> In an abundance of caution, the Court upon its own motion, ordered supplemental briefing on April 18, 2016, to allow McCaleb to establish that he “is still serving; is on probation; or has been conditionally discharged from the one-year sentence imposed upon him in Boone Circuit Court in Case No. 11-CR-00497.” McCaleb failed to comply with this Court’s order to establish he is still under the threat of the sentence imposed upon him in Boone Circuit Court in Case no. 11-CR-00497.