

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000329-MR

JAMES CREEKMORE, JR.

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE PAUL K. WINCHESTER, JUDGE  
ACTION NO. 13-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Creekmore, Jr., brings this *pro se* appeal from a December 2, 2014, order of the McCreary Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We vacate and remand.

On July 22, 2013, appellant was indicted by the McCreary County Grand Jury upon theft by unlawful taking over \$500 but less than \$10,000 and for being a persistent felony offender in the first degree. Eventually, appellant and the Commonwealth reached a plea agreement. Under the plea agreement, appellant would receive a total of ten years' imprisonment, and the Commonwealth would recommend that the ten-year sentence be served concurrently with "the sentence the defendant has in Tennessee." Appellant's Brief at 1. The circuit court ultimately accepted the guilty plea, and by Final Judgment and Sentence on Plea of Guilty entered on March 25, 2014, the circuit court sentenced appellant to a total of ten years' imprisonment to be served "concurrent with sentence the defendant has in Tennessee."

On October 23, 2014, appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of trial counsel. Therein, appellant claimed that his counsel was ineffective for failing to adequately advise him concerning the guilty plea. After entering the guilty plea, appellant maintained that he learned that he must completely serve his ten-year sentence in Kentucky before being transferred to Tennessee for service of his Tennessee sentence of imprisonment. If trial counsel had properly advised him of same, appellant claimed that he would not have pleaded guilty but would have insisted upon going to trial. By order entered December 2, 2014, the circuit court summarily denied appellant's RCr 11.42 motion without an evidentiary hearing and without any legal reasoning or analysis as to why the motion was being denied. This appeal follows.

Appellant contends that trial counsel rendered ineffective assistance and that the circuit court erred by denying him an evidentiary hearing. In particular, appellant argues:

Besides the plain language of the plea agreement, counsel for Appellant assured him that service of his Kentucky sentence was service of his Tennessee sentence. He was not told that Tennessee had the option to not run their sentence concurrent with Appellant's Kentucky sentence. Appellant, as a lay person, relied on his attorney's advice and the precepts of fundamental fairness that govern[s] the conduct of the court and the prosecutor. Appellant was not told and had no idea that Kentucky's judgment would not bind Tennessee. Appellant was led to believe his Kentucky judgment would bind Tennessee on the question of concurrent sentencing. If Appellant had been told the truth, he would not have entered the plea agreement. The bargain he was led to believe he made was not the bargain he received.

Appellant's Reply Brief at 2. For the following reasons, we conclude that appellant's claim of ineffective assistance of counsel was not adequately refuted upon the face of the record and that appellant is entitled to an evidentiary hearing and appointment of counsel.

To prevail upon an ineffective assistance of counsel claim, defendant must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As to a guilty plea, defendant must specifically demonstrate that absent trial counsel's deficient performance there exists a reasonable probability that defendant would not have pleaded guilty but would have insisted

upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). And, an evidentiary hearing is not required when defendant's allegations concerning ineffective assistance of trial counsel are refuted upon the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

In this case, the plea agreement clearly states that appellant's ten-year sentence of imprisonment would run concurrently with his sentence of imprisonment in Tennessee. This language was also included in the final judgment entered on March 25, 2014. At that time, appellant was on probation from a sentence of imprisonment he received in Tennessee on February 19, 2013. While serving his sentence of imprisonment in Kentucky, appellant received the following letter from the Kentucky Department of Corrections:

This correspondence is in reference to your recent appeal under the Administrative Review Process according to Corrections Policy and Procedure 17.4.

You were sentenced to probation in Scott County, TN[,] on 2/19/2013. On 3/10/2014, you were sentenced in Kentucky on the current charges and it was ordered to run concurrent with your Tennessee case. We contacted Tennessee Department of Corrections to get the amount of time you served in TN. They gave us the amount of 51 days of jail credit prior to sentencing. Those days have now been applied to your sentence as other sentence credit. It was only when we contacted Tennessee that they knew where you were located so they could serve a probation violation warrant.

The Interstate Agreement on Detainers (IAD) Act does not apply to probation violations. You will serve your Kentucky sentence and once you are released from Kentucky Department of Corrections, you will be extradited back to TN to be sentenced on your probation

violation. At that time, the TN courts will make the decision whether to run the TN sentence concurrent with your KY sentence and give you credit for the time you serve here. Because you were sentenced to serve time in Kentucky first, the only thing you are entitled to is credit for actual time you served in TN – which is the 51 days.

As noted by the Department of Corrections, the Interstate Agreement on Detainers does not apply to a probation violation. Kentucky Revised Statutes 440.450; *see Carchman v. Nash*, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985).<sup>1</sup> Consequently, appellant only received 51 days credit upon his ten-year sentence in Kentucky. We are troubled by the fact that appellant’s plea agreement and the March 25, 2014, final judgment clearly state that appellant’s Kentucky sentence of imprisonment would run concurrently with his Tennessee sentence of imprisonment. And, appellant has alleged that trial counsel advised him that he would serve the sentences concurrently and that “service of his Kentucky sentence was service of his Tennessee sentence.” Appellant’s Reply Brief at 2.

So, we are unable to conclude from the face of the record that appellant’s counsel adequately advised him concerning the service of his Kentucky and Tennessee sentences of imprisonment. We also think a reasonable probability exists that had appellant been properly advised by trial counsel he would have forgone the guilty plea and insisted upon going to trial. *See Hill*, 474 U.S. 52. We, thus, vacate and remand for an evidentiary hearing and appointment of counsel. After the evidentiary hearing, the circuit court shall make findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedure 52.01.

<sup>1</sup> *See also State v. Warren*, 740 S.W.2d 427 (Tenn. Crim. App. 1986).

In sum, we are of the opinion that appellant's claims of ineffective assistance of counsel concerning entry of his guilty plea were not refuted upon the face of the record and that appellant is entitled to an evidentiary hearing and appointment of counsel.

For the foregoing reasons, the order of the McCreary Circuit Court is vacated and remanded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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