

RENDERED: February 19, 1999; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003270-MR

DELANCEY MCCARLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 95-CR-01763

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON AND KNOX, JUDGES.

JOHNSON, JUDGE. Delancey McCarley (McCarley) appeals pro se from an opinion and order of the Jefferson Circuit Court entered on November 24, 1997, that denied his motion to vacate, set aside or correct sentence under Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing.

In December 1994, eighteen-year-old McCarley was arrested and charged with murder (Kentucky Revised Statutes (KRS) 507.020) and robbery in the first degree (KRS 515.020). After finding probable cause, the Jefferson District Court, Juvenile Division, transferred jurisdiction to Jefferson Circuit Court. A

Jefferson County Grand Jury indicted McCarley on the charge of robbery in the first degree, but returned a "no true bill" on the charge of murder. McCarley accepted the Commonwealth's offer to plead guilty to the robbery charge in return for the Commonwealth's recommendation that he be committed to the Kentucky Cabinet for Human Resources (CHR) until age nineteen at which time the Commonwealth would ask the circuit court to probate the remainder of his ten-year sentence. In August 1995, the circuit court accepted McCarley's motion to enter an Alford plea.<sup>1</sup>

In February 1996, the circuit court accepted the Commonwealth's sentencing recommendation and placed McCarley on probation for five years. On December 4, 1996, the circuit court revoked McCarley's probation and imposed the remainder of his ten-year sentence. McCarley filed his RCr 11.42 motion on April 28, 1997. On November 24, 1997, the circuit court denied McCarley's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

On appeal, McCarley alleges that he was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Section Eleven of the Kentucky Constitution. McCarley alleges the following three grounds as the basis for his contention that he should be relieved from his prison sentence

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

and granted a trial: (1) counsel failed to move the trial court to dismiss the robbery indictment; (2) counsel failed to prepare a defense; and (3) counsel coerced him into pleading guilty.

When a movant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763, 773 (1970), and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the movant would not have pleaded guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 57-58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 209 (1985); accord Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-728 (1986). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694-695; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878-879 (1992).

In his brief, McCarley first argues that his "trial counsel should have asked for this charge to be dismissed because there was not any grounds for indictment." This argument lacks merit because "no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support indictment." See RCr 5.10. Thus, trial counsel had no basis upon which to seek

dismissal of the charge. See Commonwealth v. Hamilton, Ky.App., 905 S.W.2d 83 (1995).

Second, McCarley argues that his counsel failed to prepare a defense. It is well-established that conclusory allegations of ineffective assistance of counsel are insufficient to justify post-conviction relief. Bartley v. Commonwealth, Ky., 463 S.W.2d 321, 322 (1971); and Brooks v. Commonwealth, Ky., 447 S.W.2d 614, 617 (1969). In addition to the fact that the record refutes his assertions, McCarley's vague allegations of counsel's failure to investigate or prepare a defense are insufficient to support a claim of ineffective assistance of counsel.

Third, McCarley alleges that his trial counsel coerced him into pleading guilty. In return for pleading guilty, McCarley received the ten-year sentence which was the minimum sentence for robbery in the first degree. Additionally, this sentence was probated after McCarley was committed to the CHR for less than one year. When McCarley entered his guilty plea, his trial counsel also informed the circuit court that the Commonwealth had agreed not to pursue, at some later date, a murder charge against McCarley. In light of these facts, trial counsel's advice to McCarley to accept the guilty plea offer cannot be viewed as an error that fell outside the range of professionally competent assistance. As an alternative, McCarley was facing a twenty-year maximum sentence for robbery in the first degree without probation and the possibility of a murder indictment in the future.

In reviewing whether the circuit court erred by not holding an evidentiary hearing on McCarley's RCr 11.42 motion, we must determine whether the record refutes McCarley's allegations and whether his unrefuted allegations, if true, would invalidate his conviction. Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985). Because the record refutes McCarley's allegations, the circuit court did not err in denying his RCr 11.42 motion without a hearing.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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