

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002442-MR

DONALD THOMAS LOCKRIDGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 98-CR-002685

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Donald Thomas Lockridge brings this appeal from September 26, 2001 and October 5, 2001 opinions and orders of the Jefferson Circuit Court. We reverse and remand.

In July of 1999, appellant entered a guilty plea to assault in the first degree, Kentucky Revised Statutes 508.010, and was sentenced to twelve years' imprisonment. In May of 2000, appellant filed the instant Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. As a basis for the motion, appellant contended that his trial counsel gave him "gross misadvice" about parole eligibility. Specifically, appellant contended that trial

counsel advised him that he would be eligible for parole after serving only two years and five months of his sentence. In fact, appellant discovered that he was required to serve fifty percent of his sentence, or six years, before becoming eligible for parole. The circuit court appointed counsel but held no evidentiary hearing. On September 26, 2001, and October 5, 2001 the circuit court entered opinions and orders denying appellant's RCr 11.42 motion. This appeal follows.

Appellant argues the circuit court committed reversible error by denying his RCr 11.42 motion without holding an evidentiary hearing. Appellant specifically argues that his guilty plea was not knowingly and voluntarily entered into because of trial counsel's ineffective assistance. In order to obtain relief, appellant must demonstrate that trial counsel's performance was deficient, and that such deficiency so seriously affected the outcome of the plea process that but for counsel's errors, there is a reasonable probability that appellant, rather than having pled guilty, would have insisted upon going to trial. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

In the case at hand, appellant alleges that trial counsel rendered ineffective assistance of counsel by erroneously informing him that he would be eligible for parole after only some two and a half years' imprisonment. It appears the record was supplemented with statements from appellant's wife and

pastor. They stated that trial counsel had told them that appellant would be eligible for parole after some two and a half years' imprisonment. As the record failed to refute the allegation that trial counsel supplied erroneous advice concerning parole eligibility, appellant claims entitlement to an evidentiary hearing. See Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-453 (2001) (holding that an evidentiary hearing is required if a material fact cannot be resolved by examination of the record). We are compelled to agree.

Without an evidentiary hearing, the circuit court concluded that trial counsel is not required to "advise a defendant as to all possible consequences of his plea" and, thus, rejected appellant's claim that misadvice concerning parole eligibility could amount to ineffective assistance by trial counsel. We believe the circuit erred by so concluding. We are persuaded that erroneous advice concerning parole eligibility can, indeed, satisfy the first prong of Strickland -- that trial counsel's assistance fell below the range of competency required of an attorney in a criminal case. See Sparks v. Sowders, 852 F.2d 882 (6<sup>th</sup> Cir. 1988) (reviewing a Kentucky case and holding "gross misadvice" concerning parole eligibility can result in ineffective assistance of trial counsel). We also think appellant's allegation that he would have insisted upon going to trial if supplied with correct parole eligibility information can satisfy the prejudicial prong of Strickland. As such, we think appellant's allegation of misadvice concerning parole eligibility sufficient to require an

evidentiary hearing upon his ineffective assistance of counsel claim.

For the foregoing reasons, the opinions and orders of the Jefferson Circuit Court are reversed and remanded for proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT.

KNOFF, JUDGE, CONCURRING IN RESULT BY SEPARATE OPINION:

I agree with the majority that gross mis-advice concerning parole eligibility can, in some instances, satisfy both prongs of an ineffective-assistance-of-counsel claim. I agree, therefore, that Lockridge is entitled to an evidentiary hearing on the matter and so concur in the majority's result. I write separately to emphasize that, in my judgment, whether the alleged mis-advice in this case satisfies either prong are questions of fact to be resolved by the trial court after the hearing. It is the function of the trial court, which will hear the evidence, not this court, to make those findings.

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