

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002152-MR

GEORGE G. SMITH

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE JOHN T. DAUGHADAY, JUDGE  
ACTION NOS. 01-CR-00044 AND 01-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: George G. Smith appeals from an order of the Graves Circuit Court denying his RCr<sup>1</sup> 11.42 motion to vacate his convictions for the offenses of criminal attempt to commit murder and first-degree wanton endangerment. Smith contends that the court erred in denying his motion without granting an evidentiary hearing. We vacate and remand.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

On the evening of March 31, 2000, Denise Beasley and her four-year-old daughter were sitting on their living room couch when gunshots were fired through the screen of an open window. Before she was able to grab her daughter and hide in a closet, Beasley was struck four times in the arms and chest. During the ensuing investigation, police discovered Beasley's sister, acting as a confidential informant, had purchased crack cocaine from Smith several days prior to the shooting. Beasley had been with her sister at the time of the transaction. Smith thereafter became a suspect not only in the shooting at Beasley's residence, but also in a similar incident at Beasley's brother's residence.

Following a trial in July 2002, Smith was found guilty of criminal attempt to commit murder and first-degree wanton endangerment. He was sentenced to twenty years on the attempted murder charge and five years on the wanton endangerment charge. The sentences were ordered to run consecutively for a total sentence of twenty-five years. The Kentucky Supreme Court affirmed the convictions in an opinion that was made final on May 20, 2004.

On July 15, 2004, Smith filed a motion to vacate the convictions pursuant to RCr 11.42. Although the Commonwealth did not respond by filing an answer, the court denied Smith's motion without an evidentiary hearing in an order entered on

July 30, 2004. The court reasoned that it was "able to determine from the record that the Defendant's motion for RCr 11.42 relief is without merit." This appeal by Smith followed.

Smith argues on appeal that the court erred in denying his motion for an evidentiary hearing. He asserts that he was entitled to an evidentiary hearing because there was a fact issue that could not be determined from the face of the record concerning his claim of ineffective assistance of counsel. Specifically, he contends that he is entitled to relief under RCr 11.42 because his attorney failed to advise him prior to trial that the Commonwealth had communicated a plea offer whereby he would serve a sentence of only three years on a reduced charge if he pled guilty rather than going to trial. He points to a portion of the trial record recorded outside the presence of the jury where the judge, the prosecutor, and Smith's attorney made reference to a three-year plea offer. He argues that had he been aware of the plea offer, he would have accepted it and pled guilty rather than risked a jury trial.

The Commonwealth responds in several ways to Smith's arguments. First, the Commonwealth asserts that Smith "cannot claim ineffective assistance when he in fact was counsel, and acting as such, waived any complaint he may have had." The record reveals that Smith had different attorneys at different times and that he may have represented himself on some

occasions.<sup>2</sup> Because Smith was represented by counsel in connection with the incident about which he complains, we reject the Commonwealth's argument that he waived complaints with counsel during the time he was represented by an attorney.

Second, the Commonwealth argues that "the evidence from the Commonwealth was overwhelming, and no logical inference can be made that any serious offer of a three or a ten year plea bargain would have been officially made." We question whether the evidence was "overwhelming" since Smith was not tied to the crime by any physical evidence but was implicated through the testimony of witnesses who stated he had confessed committing the crime to them. At any rate, whether or not the evidence was overwhelming is irrelevant to the issue of whether he received ineffective assistance of counsel in connection with an alleged plea offer that was allegedly not communicated to him.

As to the Commonwealth's assertion that no logical inference could be drawn that the prosecutor had "officially made" a "serious offer," the Commonwealth cites no authority to support its position and states only that a plea offer is generally submitted on an AOC form. We know of no requirement that a plea offer be made on an AOC form. Furthermore, whether or not the offer was "officially made" is a matter subject to a factual determination.

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<sup>2</sup> Smith was represented by an attorney at his trial.

Third, the Commonwealth argues that Smith's claim is only a "conclusionary allegation," that insufficient facts to support the claim are alleged, and that an RCr 11.42 proceeding may not be used by a defendant as an opportunity to search for possible grievances. We agree with the Commonwealth that RCr 11.42 proceedings are not to be used to provide an opportunity to search for grievances. See Gilliam v. Commonwealth, 652 S.W.2d 856, 858 (Ky. 1983). We also agree with the Commonwealth that conclusory allegations that are not supported by specific facts do not justify an evidentiary hearing. See Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998). Smith, however, has made a specific allegation of how he received ineffective assistance of counsel. Further, he has alleged specific facts to support his allegation.

We conclude that Smith has stated a claim that, if true, would constitute ineffective assistance of counsel. In Johnson v. Duckworth, 793 F.2d 898 (7<sup>th</sup> Cir. 1986), the court held as follows:

[I]n the ordinary case criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments. Apart from merely being informed about the proffered agreement, we also believe that a defendant must be involved in a decision-making process

regarding the agreement's ultimate acceptance or rejection.

Id. at 902. Smith's claim is that the prosecutor communicated a plea offer to his attorney but that the offer was never communicated to him for his consideration. The portion of the record cited by Smith gives some indication that his allegation might be true. If it is true, he is entitled to relief under RCr 11.42.

An evidentiary hearing on an RCr 11.42 motion is "not necessary when the record in the case refutes the movant's allegations." Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985). See also Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003). Smith's allegation that the Commonwealth made his attorney a plea offer that was not communicated to him is not refuted by the record. In fact, there is some indication in the record to support Smith's claim. We conclude that the court should have conducted an evidentiary hearing on Smith's motion to determine the facts.

The order of the Graves Circuit Court denying Smith's RCr 11.42 motion without an evidentiary hearing is vacated, and this case is remanded for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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