

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001028-MR

JAMES LONNIE PHELPS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 05-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: FORMTEXT CLAYTON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Lonnie Phelps brings this appeal from an April 18, 2007, Order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm in part, vacate in part, and remand.

Phelps was incarcerated at Luther Lucket Correctional Facility upon a ten-year sentence of imprisonment. On November 29, 2004, Phelps was transferred from Luther Lucket Correctional Complex to Blackburn Correctional Complex. On the date of his transfer, Phelps walked away from the facility. Phelps was subsequently indicted by a Fayette County Grand Jury upon the charge of second-degree escape and first-degree persistent felony offender. On March 11, 2005, Phelps entered a guilty plea upon second-degree escape and first-degree persistent felony offender and was sentenced to ten-years' imprisonment. Thereafter, Phelps filed a *pro se* RCr 11.42 motion to vacate sentence. The circuit court appointed counsel to represent Phelps, and counsel then filed a supplement to the *pro se* motion. The circuit court denied Phelps' RCr 11.42 motion without an evidentiary hearing by order entered April 18, 2006. This appeal follows.

Phelps contends the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. When an RCr 11.42 motion is denied without an evidentiary hearing, this Court must determine whether there is a "material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). The circuit court may not simply disbelieve movant's factual allegations in the absence of evidence in the record to refute same. *Id.* If a material issue of fact exists that cannot be resolved upon the face of the record, the circuit court must grant movant's motion for an evidentiary hearing. If movant's

allegations are refuted upon the face of the record, the circuit court may deny the RCr 11.42 motion without an evidentiary hearing.

Phelps argues that trial counsel was ineffective for “inadequately explain[ing] the plea deal, misleading him as to believe the length of his sentence would be one year” In fact, Phelps points out he was sentenced to ten-years’ imprisonment. He insists that had he known of the ten-year sentence he would not have pleaded guilty but would have elected to go to trial.

To prevail, Phelps must demonstrate that counsel’s assistance was deficient and that such deficiency resulted in prejudicial error. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As Phelps entered a guilty plea, he must specifically demonstrate that but for counsel’s deficient performance he would not have pleaded guilty and instead 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).

In this case, Phelps makes the bare allegation that trial counsel misled him into believing he would receive a one-year sentence of imprisonment under the plea agreement with the Commonwealth. However, the record in this case clearly refutes this allegation. Before pleading guilty, the trial judge specifically asked Phelps if he understood that ten-years’ imprisonment was “a pretty big sentence.” To this question Phelps responded in the affirmative. Additionally, the judge specifically asked Phelps if he understood that under the plea agreement the Commonwealth recommended a one-year sentence of imprisonment upon the

escape charge and ten-years' imprisonment upon the first-degree persistent felony offender charge. Phelps again answered in the affirmative. Hence, we believe Phelps's contention was adequately refuted upon the face of the record, and the circuit court properly denied the RCr 11.42 motion upon this issue without an evidentiary hearing.

Phelps next contends that trial counsel was ineffective for failing to investigate whether Phelps was mentally competent to enter the guilty plea. To prevail upon his ineffective assistance of counsel claim, Phelps must prove that trial counsel's performance was deficient and but for trial counsel's error he would not have pleaded guilty. *See Hill*, 474 U.S. 52 (1985). The Kentucky Supreme Court has held that a defendant is competent to enter a guilty plea if he possesses "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . has a rational as well as a factual understanding of the proceedings against him." *Thompson v. Com.*, 147 S.W.3d 22, 32 (Ky. 2004)(quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)).

The record indicates that trial counsel was aware that a question existed as to Phelps' competency before entry of the guilty plea. To resolve the question of Phelps' competency, trial counsel requested a continuance and then spoke to Phelps' prior counsel and a prison case worker. Based upon such information, trial counsel believed that Phelps was mentally competent to enter the guilty plea. It appears that trial counsel did not request a mental competency

evaluation or seek a medical opinion concerning Phelps' competency to enter the guilty plea.

To support his claim that counsel was ineffective for failing to investigate his competency to enter the guilty plea, Phelps cites to voluminous copies of medical records. A review of these records reveals that Phelps had been diagnosed as suffering from several mental conditions including: psychotic disorder, borderline intellectual function, and impulse control disorder. According to the medical records, Phelps was routinely prescribed psychotropic medications, such as trazodone and paxil. A "Psychology Progress Note" dated June 6, 2005, which is close in time to Phelps's March 11, 2005, guilty plea, depicted Phelps as possessing diminished cognitive abilities and as suffering from an impaired mental state. Therein, the psychologist noted that Phelps gave "frequently conflicting answers" due to his "limited cognitive abilities." Also, it was noted that Phelps possibly "experiences . . . auditory hallucinations." In an April 27, 2004, medical record entitled "Psychological Consultation," it was again observed that Phelps was experiencing "a decrease with hallucinations since taking this medication."

Upon a review of the medical records, we think such records reveal that Phelps at best suffered from limited cognitive ability and at worse suffered from psychosis with reoccurring hallucinations. In any event, we are convinced that Phelps raised material factual issues that cannot be refuted upon the face of the record concerning whether trial counsel was ineffective for failing to investigate

his alleged mental incompetency to enter the guilty plea. As such, we conclude that Phelps is entitled to an evidentiary hearing upon his RCr 11.42 motion.¹

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed in part, vacated in part, and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Alexander De Grand
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky

¹ We also direct the circuit court's attention to *Thompson v. Com.*, 56 S.W.3d 406 (Ky. 2001).