

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001753-MR

KENNETH E. GREEN

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
INDICTMENT NO. 03-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, LAMBERT AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Kenneth E. Green *pro se*, appeals from an order of the Estill Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In September 2003, Appellant was indicted by an Estill County grand jury for murder, stemming from the shooting death of Larry Collett. Appellant was

subsequently indicted on one count of complicity to tampering with physical evidence in connection with Collett's death. On March 15, 2005, Appellant filed a motion to enter a guilty plea in reliance on a plea offer from the Commonwealth, wherein Appellant would plead guilty to an amended charge of first-degree manslaughter, as well as complicity to tampering with physical evidence in exchange for recommended sentences of twelve years and four years respectively, with the sentences to run concurrently.

On April 7, 2005, the trial court held a sentencing hearing, during which Appellant was represented by two attorneys. Following a brief colloquy, Appellant was sentenced in accordance with the plea agreement – i.e., twelve years on the manslaughter charge and four years on the tampering charge, with the sentences to run concurrently for a total of twelve years' imprisonment.

On September 19, 2006, Appellant filed a *pro se* RCr 11.42 motion seeking to have his sentence corrected. Appellant claimed that pursuant to the plea agreement, he was to have been sentenced to ten years on the manslaughter charge and four years on the tampering charge. Appellant alleged that both the transcript of the sentencing hearing and the judgment had been altered to reflect a twelve year sentence rather than the ten years he accepted.

On February 7, 2007, the trial court entered an order denying Appellant RCr 11.42 relief without an evidentiary hearing. Therein, the court noted,

The timeline and the facts in the record flush out the truth:

1. March 15, 05 – Motion to Enter Guilty Plea filed by [Appellant] in reliance on the Commonwealth’s offer which stated “a sentence of 12 years . . .” This figure is clearly altered and, at first would give some merit to [Appellant’s] claim if not for subsequent documents.
2. March 15, 05 – The Court’s colloquy between [Appellant] and his TWO lawyers clearly shows the deal that was made between the parties. The Court asks: *What is your understanding of the Prosecutor’s recommendation as to the sentence or punishment imposed will be?* The response, which was signed by [Appellant] and his attorney Rowady, states, “12 years Manslaughter, 4 years Tampering, concurrent.”
3. April 7, 2005 Sentencing transcript – The Assistant Commonwealth’s Attorney, Phillip Owen, [Appellant’s] attorney Hon. Thomas K. Hollon, and the trial judge all three state on separate occasions that the sentence was 12 years and [Appellant] is sentenced by the trial judge to the exact amount of time set out in the offer of the Commonwealth and to exact amount of time in the Court’s colloquy signed by [Appellant].

The trial court thereafter dismissed Appellant’s motion. This appeal ensued.

On appeal to this Court, Appellant argues that he was told that a ten-year sentence and a four-year sentence run concurrently equaled a twelve-year sentence. Appellant claims that had he been aware that the two sentences concurrently totaled twelve years rather than ten years, he would have brought it to the court’s attention at the sentencing hearing. Further, Appellant again alleges that the transcript of the sentencing hearing has been altered and implores this Court to review the audio tape of the hearing which he contends reflects the truth.

A hearing on an RCr 11.42 motion is only required if there is an issue of fact that cannot be determined on the face of the record. RCr 11.42(5); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). When a trial court denies a motion for an evidentiary hearing, appellate review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record, and which, if true would invalidate the conviction. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

There is absolutely no factual basis in the record to support Appellant's allegations. The trial is correct that it does appear the Commonwealth's plea offer was altered. However, the offer was evidently faxed or photocopied, resulting in a portion of the right-hand side of the document becoming illegible. The "alteration" appears to be nothing more than an attempt to write in what was originally there. Certainly, there is no indication that the sentence was altered from ten to twelve years.

Furthermore, as noted by the trial court, Appellant was represented by two attorneys during the proceedings and the transcribed hearing of their conversation with the court and the Commonwealth unquestionably contradicts his claim that the sentence was only ten years. As the record clearly refutes all of the claims raised in Appellant's RCr 11.42 motion, the trial court did not error in dismissing the motion without an evidentiary hearing. *Bowling, supra*.

The order of the Estill Circuit Court denying Appellant post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Burgin, Kentucky

BRIEF FOR APPELLEE:

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