

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001351-MR

CLARENCE J. CALLOWAY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 03-CR-00115

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Clarence J. Calloway appeals from an order of the Laurel
Circuit Court denying his motion for post-conviction relief pursuant to Kentucky
Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On June 20, 2003, Calloway was indicted on six counts of knowingly exploiting an adult for financial gain. Three of the counts were for exploitations resulting in the loss of over \$300 to the victim, Class C felony offenses. The remaining three counts were for amounts under \$300, Class A misdemeanor offenses.

After he was appointed counsel, Calloway appeared in open court and entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Under the terms of the plea agreement, the first count of the indictment would be amended from the exploitation of an adult to theft by unlawful taking of property valued over \$300. Calloway would receive a two-year sentence, which would be probated for two years. As a condition of the agreement, Calloway was required to make full restitution to the victim in the amount of \$1,100 within twelve months of his sentencing. The plea agreement provided for the dismissal of the remaining five counts.

On May 24, 2004, the trial court accepted the plea agreement and sentenced Calloway in accordance to its terms. Subsequently, on May 23, 2007, Calloway filed a motion for post-conviction relief pursuant to RCr 11.42. Finding that Calloway was not imprisoned or on probation or parole, the trial court ruled that he could not collaterally attack his conviction pursuant to RCr 11.42. After the trial court dismissed Calloway's motion, this appeal followed.

Calloway contends that the trial court erred by finding that he was not on probation at the time he filed his RCr 11.42 motion. Specifically, he contends

that he must have been on probation because he had not satisfied a necessary condition of his probation, the full payment of restitution to the victim. Therefore, he contends that he had the legal authority to bring an action under RCr 11.42 and have it decided on the merits. We disagree.

On appellate review of the denial of an RCr 11.42 motion without a hearing, our consideration is limited to determining whether Calloway's motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000), quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). If a defendant's allegations are refuted by the record or have not convincingly established the deprivation of a substantial right, the defendant's RCr 11.42 motion must necessarily fail. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

RCr 11.42(1) provides the following:

A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

From the plain meaning of the language, a defendant is only permitted to utilize RCr 11.42 if he is in custody or under some other form of penal supervision. Thus, our issue is limited to determining whether the face of the record conclusively

refutes Calloway's claim that he is on probation, which would preclude his ability to seek relief pursuant to RCr 11.42.

Kentucky Revised Statutes (KRS) 533.020(4) provides the following:

The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. *Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked* [emphasis added].

Our Supreme Court has held that a trial court loses jurisdiction to revoke a defendant's probation if the defendant is not facing a pending warrant or his probation has not been revoked at the time the probationary period terminates. *Curtsinger v. Commonwealth*, 549 S.W.2d 515, 516 (Ky. 1977). Similarly, in cases of conditional discharge, KRS 533.020(3) provides, in pertinent part, that a "court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge."

Calloway was placed on probation on May 24, 2004, for a period of two years. Although he claims that he did not make full restitution to the victim

within twelve months as required by the probationary order, Calloway's probation was not revoked, nor was he facing a pending warrant at the time of the termination of his probationary period. By operation of the statute, Calloway's probation terminated on May 24, 2006, which divested the Laurel Circuit Court of jurisdiction to revoke his probation. Thus, when he filed for post-conviction relief after May 24, 2006, he could not proceed pursuant to RCr 11.42 because he was no longer under any form of penal supervision. Accordingly, Calloway's motion was properly dismissed.

Furthermore, even if Calloway is correct that he continues to owe restitution in his criminal case, the operation of KRS 533.020(4) terminated his probation. The clear legislative mandate from KRS 533.020 is to provide certainty for defendants. If a defendant is not abiding by his probationary conditions, the Commonwealth must take action within the prescribed period of probation. To hold otherwise would subject defendants to perpetual supervision and control from of our courts, which is an unacceptable outcome.

For the foregoing reasons, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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