

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000649-MR

MELVIN CARSON

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE KAREN LYNN WILSON, JUDGE  
ACTION NO. 08-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Melvin Carson appeals the Henderson Circuit Court's order denying his RCr<sup>1</sup> 11.42 motion to vacate, set aside, or correct his sentence. After a careful review of the record, we affirm because his claims of the ineffective assistance of counsel lack merit.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

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

Carson was indicted on the charges of: first-degree robbery, second-degree robbery, two counts of theft by deception over \$300.00, second-degree criminal mischief, and of being a second-degree persistent felony offender (PFO-2nd).

At his arraignment, Carson entered a “not guilty” plea and his bail was set at \$32,500.00 “full cash.” The Commonwealth subsequently provided Carson two different offers on a plea of guilty. The first offer noted that, based upon the charges against Carson, he was facing the following potential sentences of imprisonment: (1) for the first-degree robbery charge, Carson faced ten to twenty years of imprisonment, which would be enhanced by the PFO-2nd charge to twenty to fifty years or life imprisonment; (2) for the second-degree robbery charge, Carson faced five to ten years of imprisonment, which would be enhanced by the PFO-2nd charge to ten to twenty years of imprisonment; (3) for the two counts of theft by deception over \$300.00, Carson faced one to five years of imprisonment per count, which would be enhanced by the PFO-2nd charge to five to ten years per count; and (4) for the second-degree criminal mischief charge, Carson faced twelve months of imprisonment. The first offer continued and provided that if Carson entered a guilty plea to the charges, the Commonwealth would recommend the following sentences: (1) for the first-degree robbery charge enhanced by the PFO-2nd charge, twenty years of imprisonment; (2) for the second-degree robbery charge enhanced by the PFO-2nd charge, twenty years of imprisonment; (3) for the two charges of theft by deception over \$300.00 enhanced

by the PFO-2nd charge, ten years of imprisonment per count; and (4) for the second-degree criminal mischief charge, twelve months of imprisonment. In the first offer, the Commonwealth further offered to recommend that all of the aforementioned recommended sentences be served concurrently with each other, and consecutively to any other sentence Carson may have received from any other court proceeding.

The Commonwealth also made a second offer on a plea of guilty, which was an alternative, conditional offer. In that offer, the Commonwealth agreed to amend the first-degree robbery charge to second-degree robbery, and to dismiss the PFO-2nd charge in regard to the two robbery charges. The Commonwealth proffered that if Carson entered a guilty plea to the two charges of theft by deception over \$300.00, second-degree criminal mischief, and two charges (after one of them was amended) of second-degree robbery, then the Commonwealth would recommend the following sentences: (1) for the two charges of second-degree robbery, ten years of imprisonment per count; (2) for the two charges of theft by deception over \$300.00 enhanced by the PFO-2nd charge, ten years of imprisonment per count; and (3) for the second-degree criminal mischief charge, twelve months of imprisonment. The Commonwealth further offered to recommend that all of these sentences be served concurrently with each other. However, this second plea offer was conditional, in that it stated that the offer would only be made if Carson paid \$7,500.00 in restitution to the Commonwealth's Attorney's Office before sentencing.

Carson accepted both of the Commonwealth's plea offers on the same day and moved to enter a guilty plea to the charges pursuant to *North Carolina v. Alford*,<sup>2</sup> 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), in accord with the plea agreements. The circuit court accepted Carson's guilty plea pursuant to *Alford* and adjudged him guilty of the crimes charged. Subsequently, the sentencing hearing was postponed multiple times so that Carson could try to obtain the \$7,500.00 he needed to pay restitution, in order to receive the lesser sentence recommendation stated in the second plea offer/agreement. However, Carson was ultimately unable to obtain enough money to pay the restitution in full. Therefore, the circuit court sentenced Carson pursuant to the first plea offer/agreement to: twenty years of imprisonment for the first-degree robbery conviction; twenty years of imprisonment for the second-degree robbery conviction; ten years of imprisonment for each of the two theft by deception over \$300.00 convictions; and twelve months of imprisonment for the second-degree criminal mischief conviction. The court ordered the twenty-year sentence for first-degree robbery to be served concurrently with the other sentences in this case, and consecutively to any other sentence Carson had been sentenced to serve in other court proceedings.

Carson thereafter filed his *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence. In that motion, Carson alleged that he had received the ineffective assistance of trial counsel because: (1) counsel had misadvised him

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<sup>2</sup> This type of plea, known as an *Alford* plea, "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

regarding parole eligibility before he entered his guilty plea; and (2) counsel had failed to move for Carson's conditional discharge prior to his sentencing so that he could attempt to obtain the \$7,500.00 he needed to pay full restitution before sentencing, in order to receive the lesser sentence. Carson requested an evidentiary hearing in regard to his RCr 11.42 motion, as well as the appointment of counsel.

The circuit court denied Carson's request for an evidentiary hearing and for the appointment of counsel. The court further denied Carson's RCr 11.42 motion, reasoning that Carson's attorney was not required to move for a bond reduction because Carson had entered a guilty plea to first-degree robbery and was being "held on a bond of \$32,500.00 full cash," and it was unlikely that "the bond could be reduced to something Carson could afford." The court noted that attorneys are not required to file motions that they believe would be futile. The circuit court also reasoned that the record refuted Carson's argument that his guilty plea was unknowingly and unintelligently entered based on alleged misadvice from counsel regarding parole eligibility. The court stated that during the plea colloquy, the court "specifically asked Carson whether he was relying on anyone's advice as to when he would be released on parole," and Carson responded that he was not. The circuit court noted that it had "advised Carson that he might never be granted parole and could have to serve every day of his sentence in state prison," and that the record was clear that Carson understood this.

Carson now appeals, contending that he received the ineffective assistance of trial counsel because counsel: (a) misadvised him regarding parole

eligibility, resulting in his guilty plea being involuntary, unknowing, and unintelligent; and (b) failed to file motions for conditional release prior to sentencing. Carson also alleges that he was prejudiced due to the cumulative effect of trial counsel's errors, and he argues that the circuit court should have held an evidentiary hearing and appointed post-conviction counsel before denying his RCr 11.42 motion.

## **II. STANDARD OF REVIEW**

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.* Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .”

## **III. ANALYSIS**

### **A. ADVICE REGARDING PAROLE ELIGIBILITY**

Carson first asserts that he received the ineffective assistance of trial counsel when counsel misadvised him regarding parole eligibility. Specifically, Carson contends that counsel failed to inform him that for his first-degree robbery

conviction he would be classified as a violent offender and he would have to serve eighty-five percent of his sentence before becoming eligible for parole. Carson also argues that counsel attempted to coerce him into pleading guilty by telling him that if he did not enter into the plea agreements, he would be sentenced to up to 100 years in prison.

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

*Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001) (quotation marks omitted).

As previously noted, the circuit court found that Carson's claim that defense counsel rendered ineffective assistance in allegedly misadvising him regarding the eighty-five percent requirement for parole eligibility was refuted by the record. Upon review of the plea colloquy, it is evident the court asked Carson whether he understood that he may never be paroled, and that he may have to serve every day of his prison sentence, to which Carson responded in the affirmative. The court further asked whether he was relying on anyone's promise that he was automatically going to be paroled at a given time, to which Carson responded that he was not. Therefore, even if Carson could prove that counsel performed

deficiently in misadvising him about the eighty-five percent requirement for parole eligibility, he could not show that he would not have entered his guilty plea but for the incorrect advice because he acknowledged during his plea colloquy that he understood he may never be paroled; that he may have to serve every day of his prison sentence; and that he was not relying on anyone's promise of parole in deciding to enter his guilty plea. Consequently, the circuit court did not err in denying relief based upon this claim.

Carson also asserts that counsel rendered ineffective assistance by attempting to coerce him into pleading guilty when counsel allegedly told Carson that if he did not enter into the plea agreements, he would be sentenced to up to 100 years in prison. However, due to the charge of PFO-2nd, if he went to trial and was convicted of first-degree robbery and PFO-2nd, he could have received a life sentence for those two charges alone, not to mention if he was also convicted of the remaining charges against him. Therefore, Carson cannot prove that counsel rendered ineffective assistance in advising him that he would have to serve up to 100 years of imprisonment if he did not enter into the plea agreements.

## **B. FAILURE TO FILE MOTIONS FOR RELEASE**

Carson next alleges that counsel rendered ineffective assistance when counsel failed to file motions for Carson's conditional release prior to sentencing so that he could obtain the money he needed to pay the \$7,500.00 restitution and get the benefit of the Commonwealth amending the charges and recommending a ten-year total sentence. The circuit court treated Carson's claim that counsel



should have filed motions for his “conditional release” as a claim that counsel should have moved for a reduction in bond because Carson’s bond had been set at \$32,500.00 full cash at his arraignment. The court found that the record reflected that “Carson had been arrested in another state and transported to Kentucky by federal marshals. He was being held on a bond of \$32,500.00 full cash. He had just entered a plea to first[-]degree robbery. That the bond could be reduced to something Carson could afford was unlikely at best.” The court reasoned that lawyers are not required to file motions that they believe would be futile.

It is reasonable for the circuit court to have found that if Carson was unable to obtain \$7,500.00 to pay the restitution he needed to pay in order to get the Commonwealth to amend his charges and recommend the lesser sentence, then it is also likely that he would have been unable to pay whatever amount the court could have reduced his bond to in order for him to get out of jail and obtain the funds for his restitution. “It is not ineffective assistance of counsel to fail to perform a futile act.” *Williams v. Commonwealth*, 336 S.W.3d 42, 47 n.16 (Ky. 2011) (internal quotation marks and citation omitted). Therefore, because it would have been futile for counsel to have moved for a reduction in bond, Carson cannot show that counsel rendered ineffective assistance in failing to file that motion.

On appeal, Carson also cites the cases of *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), and *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), in support of his argument that he should not be imprisoned longer, *i.e.*, be sentenced to an additional ten years of imprisonment,

simply because he is poor. However, Carson's reliance on *Bearden* and *Marshall* is misplaced, as both of those cases concern probation revocation, rather than a defendant's failure to satisfy the terms of a conditional plea agreement. Plea agreements are contracts between the Commonwealth and the defendant, and we interpret plea agreements using principles of contract. *See McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010). Carson should have known prior to entering into the conditional plea agreement in this case whether he would be able to obtain the money he needed to pay restitution prior to sentencing, as that was what he agreed to do when he signed the conditional plea agreement. Because he failed to satisfy his part of the conditional plea agreement, he is not entitled to receive the benefit of that bargain. Therefore, *Bearden* and *Marshall*, which concern the revocation of probation, are distinguishable from the present case and they have no relevance to Carson's failure to uphold his end of the conditional plea agreement.

### **C. CUMULATIVE EFFECT OF ERRORS**

Carson next contends that he was prejudiced due to the cumulative effect of trial counsel's errors. However, because there was no merit to his individual claims of the ineffective assistance of trial counsel, this claim likewise lacks merit. *See McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986).

### **D. FAILURE TO HOLD EVIDENTIARY HEARING AND APPOINT POST-CONVICTION COUNSEL**

Finally, Carson asserts that the circuit court should have held an evidentiary hearing and appointed post-conviction counsel before denying his RCr 11.42 motion. Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .” However, that was not the case here, as all of the material issues of fact were able to be determined based upon the record. Therefore, the circuit court did not err in failing to hold an evidentiary hearing.

Regarding Carson’s claim that the circuit court should have appointed post-conviction counsel for him, Carson filed his RCr 11.42 post-conviction motion *pro se*. Thus, he did not have the assistance of counsel in his initial-review collateral proceedings. Recently, in *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012), the United States Supreme Court reasoned that

[w]here . . . the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and defendants pursuing first-tier review . . . are generally ill[-]equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error . . . .

As *Coleman [v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991)]* recognized, an attorney’s errors during an appeal on direct review may provide cause to excuse a procedural default; for if the

attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. . . . Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . .

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. . . . While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

*Martinez*, 132 S.Ct. at 1317 (internal quotation marks omitted).

We agree with the United States Supreme Court's logic, *i.e.*, that the initial RCr 11.42 proceeding in this action should have effectively operated as the direct appeal for Carson's ineffective assistance of trial counsel claims. However, the Kentucky Supreme Court has specified that there is no right to the effective assistance of counsel in post-conviction proceedings in Kentucky, and we are bound by that decision. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010); *see also Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

Alternatively, even if the Kentucky Supreme Court recognized the right to the effective assistance of counsel in post-conviction proceedings, we note that in the present appeal, Carson is represented by appointed counsel and,

although the claim has been raised that the circuit court should have appointed counsel for Carson's initial RCr 11.42 proceedings, no allegation has been made in this appeal regarding what other claims should have been raised in the initial RCr 11.42 proceedings that Carson failed to raise on his own. Thus, this claim appears to be speculative.

Accordingly, the order of the Henderson Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I would reverse and remand this case for an evidentiary hearing on Carson's ineffective assistance of counsel claims regarding counsel's failure to properly advise him on his parole eligibility and advising him to agree to an order of restitution without reference to the amount of damages incurred by the victim and with no viable means to pay.

I cannot characterize the guilty plea procedures in this case as anything other than bizarre. Carson appeared in court with two unrelated defendants, all who entered pleas simultaneously. Carson's *Alford plea* was the result of accepting two plea offers. Under the first, he accepted a total concurrent sentence of twenty-years' imprisonment. He alleges that he was unaware that a plea to first-degree burglary would make him ineligible for parole until he served eighty-five percent of his sentence. Under the second plea agreement, he would be

sentenced to ten-years' imprisonment, but would receive the lesser sentence only if he paid \$7,500 restitution to the Commonwealth Attorney's office prior to sentencing. Pending his sentencing, Carson remained in custody and defense counsel did not file a motion requesting his release.

Not surprisingly, because he remained in custody with no income, when the date for Carson's sentencing hearing arrived, Carson did not have the entire \$7,500 restitution. Therefore, the trial court sentenced Carson in accordance with the first plea agreement.

My initial concern is the lack of specificity in the "restitution" order. By definition, restitution is not arbitrary, but made to compensate the victim for damages caused by the defendant's conduct. Therefore, there must be a factual basis for the amount paid to the victim. *See* KRS 532.033; *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky.App. 2003). Although certainly a defendant can agree to pay restitution as part of a plea agreement, I believe it is incumbent upon the Commonwealth to submit documentation regarding the amount due and identity of the victim to be paid. Otherwise, there is at least the appearance of, if not the potential for, "cash register justice."

In this case, the order is particularly troublesome. There is no indication on the face of the record establishing the actual amount of damages or who was damaged. The order only states that it is payable to the Commonwealth Attorney without reference to a victim ultimately entitled to receive the payment. With nothing more in the order, under the plea agreement, it appears that Carson

was not paying restitution, but purchasing a lesser sentence from the Commonwealth.

I also believe an evidentiary hearing is required on Carson's ineffective assistance of counsel claims for related reasons. Carson entered a guilty plea based on two distinct plea agreements with vastly different parole consequences. In *Edmonds v. Commonwealth*, 189 S.W. 3d 558, 567 (Ky. 2006), the Court held that parole is not a direct consequence of a guilty plea and cannot be the basis for an RCr 11.42 motion. However, since the United States Supreme Court issued its opinion in *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), it is questionable whether that case remains good law. In *Jacobi v. Commonwealth*, \_\_ S.W.3d \_\_ (Ky.App. 2011), 2011 WL 1706528, this Court relied on *Padilla* and held that parole eligibility is a foreseeable and material consequence of a guilty plea intimately related to the criminal process and automatic following certain criminal convictions. This Court remanded for an evidentiary hearing regarding the defendant's allegation that he was misled into believing he would be eligible for parole after serving twenty percent of his sentence rather than eighty-five percent required by the violent offender statute.

After the Commonwealth filed a motion for discretionary review, the Kentucky Supreme Court ordered *Jacobi* held in abeyance pending its decision in three cases presenting identical issues. *Stiger v. Commonwealth*, 2008-SC-000864-DG, *Cox v. Commonwealth*, 2010-SC-000733-DG, and *Commonwealth v. Pridham*, 2011-SC-000126-DG. Consequently, in the interest of judicial economy,

I would hold this case in abeyance until our Supreme Court brings finality to the issue. However, because the majority has decided the issue, I comment.

The majority believes that because the trial court informed Carson that he was not entitled to automatic parole, counsel's allegedly erroneous advice could not be prejudicial. I strongly disagree. The issue is whether Carson would have insisted on going to trial if he had known that he would not be eligible for parole until he served eighty-five percent of his sentence. Although he may have been aware that parole was not automatic, he claims that if he had been aware that he was not even eligible for parole until serving eighty-five percent of his sentence, he would not have pleaded guilty. I believe he is entitled to an evidentiary hearing.

The final issue I address is intertwined with the restitution order. Carson alleges that his counsel was ineffective for advising him to accept an agreement to pay \$7,500 to the Commonwealth Attorney without filing a motion for his presentencing release. The majority holds that this case does not fall within the ambit of *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) and *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011). I disagree.

Carson alleges that he signed the plea agreements because defense counsel informed him that he would have several months to earn \$7,500 and would obtain a conditional release for him pending sentencing. Instead, he remained in custody unable to comply with the terms of the second plea agreement and destined to be sentenced to twenty years under the first plea agreement. The existence of two plea agreements entered into simultaneously with those of two



unrelated defendants and the extraordinary condition of payment to the Commonwealth's Attorney, compound the possible confusion surrounding Carson's understanding of the agreements. Under the highly unusual circumstances of his guilty plea, I am convinced that an evidentiary hearing is warranted to ensure that he was fully aware of the consequences of both pleas and that he would not be conditionally released pending his sentencing.

For the reasons stated, I would reverse and remand for an evidentiary hearing.

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