

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001008-MR

PATRICK K. HUTCHINSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JUDGE  
ACTION NO. 09-CR-01338

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; KRAMER<sup>1</sup> AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: Patrick K. Hutchinson appeals, *pro se*, from a Fayette Circuit Court order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. He argues he is entitled to receive sentence credit for several years that he was involuntarily hospitalized. We disagree and affirm.

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<sup>1</sup> Judge Joy A. Kramer, formerly Judge Joy A. Moore.

On September 13, 2004, Hutchinson was indicted on two charges of murder, two charges of attempted murder and one charge of first-degree wanton endangerment. Following an evaluation at the Kentucky Correctional Psychiatric Center (KCPC) and a hearing before the Fayette Circuit Court, Hutchinson was found incompetent to stand trial. On November 18, 2004, he was involuntarily hospitalized pursuant to Kentucky Revised Statutes (KRS) 504.110(2) and KRS Chapter 202A. The indictment against him was dismissed without prejudice.

Over the next five years, the circuit court conducted annual reviews of Hutchinson's status, and found, in reliance on the sworn certification of KCPC mental health professionals, that he continued to meet the criteria of KRS 504.211(2) and KRS 202A.026, and ordered him to remain hospitalized.

In 2009, the circuit court was notified by KCPC that Hutchinson had become competent to stand trial, and on September 10, 2009, he was re-indicted on the original charges. He entered a plea of guilty but mentally ill to two counts of murder, one count of attempted murder, and one count of first-degree assault, and received a sentence of twenty-five years' incarceration. In the final judgment, Hutchinson was given credit for the period of 280 days between February 13, 2004, the date he was arrested, and November 18, 2004, the date the indictment was dismissed and he was involuntarily hospitalized.

On March 18, 2013, Hutchinson filed a CR 60.02 motion, claiming he also should have received credit for the lengthy period (67 months) that he was

involuntarily hospitalized. The trial court denied the motion and this appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). A movant must demonstrate that "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

On appeal, Hutchinson advances the same argument he presented to the trial court. He asserts, under KRS 532.120, he is entitled to custody credit for the time he spent involuntarily hospitalized. We, like the circuit court, find his argument to be directly refuted by this Court's opinion in *Commonwealth v. Todd*, 12 S.W.3d 695 (Ky. App. 1999). *Todd* stands for the proposition that the time spent in a mental health facility under a KRS 202A commitment does not qualify as confinement or custody under KRS 532.120 provided the criminal indictment is not pending during the period of hospitalization. In that case, Todd was found incompetent to stand trial on charges connected with an armed robbery. The indictment against him was dismissed without prejudice and he was committed to Central State Hospital. He remained confined for almost two years before he was re-indicted and entered a guilty plea. This Court held that he would not receive

credit for the time he spent involuntarily hospitalized because the indictment against him had been dismissed prior to the hospitalization. KRS 532.120(3) provides that “[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment.” The Court reasoned that Todd was not entitled to credit under the statute because he was not in custody “as a result of the charge[s]” arising from the commission of the crime, but as a result of the procedure for involuntary hospitalization set forth in KRS 202A.

As in *Todd*, the indictment against Hutchinson was dismissed, and he was involuntarily hospitalized, not as a result of the criminal charges, but as a result of the circuit court’s findings under KRS 202A.026, which provides that:

No person shall be involuntarily hospitalized unless such person is a mentally ill person:

- (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness;
- (2) Who can reasonably benefit from treatment; and
- (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

We agree with the circuit court that, because Hutchinson was not involuntarily hospitalized “as a result of the criminal charges,” he is not entitled to sentence credit under KRS 532.120 for the time spent involuntarily hospitalized. Because

the relevant facts of Hutchinson's case are virtually identical to those in *Todd*, the circuit court did not abuse its discretion in denying the CR 60.02 motion.

Hutchinson also argues he was denied effective assistance of counsel in the final sentencing proceedings because his attorney failed to request credit for the months he spent involuntarily hospitalized. When a defendant argues that his plea was rendered involuntary due to ineffective assistance of counsel, he must show the following:

- (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.

*Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations omitted). Hutchinson cannot meet the first prong of this test. In light of the precedent set by *Todd*, an argument by Hutchinson's counsel that he was entitled to credit for the time he spent involuntarily hospitalized would have been pointless. "An attorney cannot be ineffective for failing to raise a non-meritorious claim." *Williams v. Commonwealth*, 336 S.W.3d 42, 48 (Ky. 2011). "It is not ineffective assistance of counsel to fail to perform a futile act." *Id.* at 47 n.16 (internal quotation marks and citation omitted).

The Fayette Circuit Court's May 13, 2013 opinion and order denying the CR 60.02 motion is affirmed.

ALL CONCUR.

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