

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000515-MR

RONDALE LAMONT MCCANN

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 08-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Rondale Lamont McCann appeals the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Finding no error, we affirm.

In 2008, McCann was indicted by the Mercer County Grand Jury on two counts of First-Degree Trafficking in a Controlled Substance. The

Commonwealth offered five-year sentences on each charge to run concurrently if McCann pled guilty and returned the \$300.00 controlled-buy money and \$300.00 informant fee to the Kentucky State Police prior to final sentencing. McCann accepted the offer and moved the trial court to enter a guilty plea, acknowledging as part of his motion:

10. I understand that because of my conviction here today, **I may be subject to greater/enhanced penalties if found guilty and/or convicted of any future criminal offenses.**

(Emphasis in original).

On May 12, 2009, McCann was sentenced to five years' imprisonment. After McCann completed his sentence, he was arrested on federal drug charges, the punishments for which McCann asserts were enhanced due to his 2009 Mercer County judgment and sentence. McCann then filed an RCr 11.42 motion to have the 2009 Mercer County conviction vacated. McCann claimed his guilty plea was neither intelligently nor voluntarily made because his attorney allegedly failed to thoroughly investigate his case and to explain to McCann the conviction could be used to enhance future convictions.

In an order entered November 14, 2014, the trial court denied the RCr 11.42 motion, noting it reviewed the guilty plea colloquy and found no error:

This Court's review of the record shows the specific detail and inquiry made by the Court at the time of the entry of the plea and indicates the Court questioned the defendant extensively and thoroughly regarding the consequences of entering same.

.....

All aspects and consequences of the entry of a plea were fully explained by this Court, with subsequent assurances by the defendant that he understood the proceedings. It is clear that defendant's plea was knowingly, intelligently, and voluntarily made, and that counsel's strategy to forego a jury trial was a sound one.

The trial court also denied McCann's motion for an evidentiary hearing and for appointment of counsel. On March 9, 2015, the trial court granted in part McCann's *in forma pauperis* motion, giving McCann thirty days to pay a partial filing fee. On April 6, 2015, McCann tendered the filing fee. His notice of appeal was filed the same date.

McCann now raises two claims on appeal: (1) the trial court's April 16, 2015 order is erroneous because it found McCann's RCr 11.42 motion was untimely filed outside the three-year statute of limitations imposed by RCr 11.42(10); and, (2) the trial court's order denying an evidentiary hearing is erroneous. The Commonwealth filed a responsive brief arguing that McCann's RCr 11.42 motion is time-barred; McCann is not entitled to equitable tolling; and, the trial court properly denied McCann's motion.

Concerning McCann's first claim, that the trial court's April 16, 2015 order is erroneous, this Court has scoured the record and is unable to find an April 16, 2015 order. The Mercer Circuit Court Clerk's certified docket sheet contains no notation for an April 16, 2015 order. Even McCann's notice of appeal, which was tendered on December 15, 2015, and filed on April 6, 2015, pre-dates the

alleged April 16, 2015 order. McCann's timeliness claim is further complicated by the November 14, 2014 order denying McCann's RCr 11.42 motion, which makes no mention of timeliness or equitable tolling. The order denies McCann's motion substantively: the trial court reviewed the guilty plea colloquy and found McCann's plea was knowingly, intelligently, and voluntarily made.

Simply put, this Court finds neither an April 16, 2015 order nor a statute-of-limitations ruling by the trial court from which McCann can appeal. The trial court reviewed McCann's guilty plea colloquy and denied McCann's motion on substantive grounds, not procedural grounds. We agree with the decision of the trial court. McCann's first allegation of error is thus denied. This Court also finds no error with McCann's second claim, that the trial court erred by denying him an evidentiary hearing. An evidentiary hearing is required on an RCr 11.42 motion only "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted).

Here, McCann summarily argued in his RCr 11.42 motion that his attorney's performance was deficient in the plea process because she simply instructed McCann to plead guilty, and McCann was never advised "to what I was actually pleading guilty, any of the rights I was waiving by my plea, or what I would receive beyond an actual prison term." McCann further alleged, "at no time was I ever told that I could encounter or suffer an enhanced sentence should I

commit another crime in the future.” These summary allegations are conclusively disproved by an examination of the record.

The Commonwealth’s Offer on a Plea of Guilty explicitly details the two crimes to which McCann was pleading guilty and the prison terms he would receive. The Motion to Enter a Guilty Plea likewise delineates the numerous rights McCann waived, and it expressly warned McCann that he “may be subject to greater/enhanced penalties if found guilty and/or convicted of any future criminal offenses.” McCann’s signature is on both forms. Thus, a review of the transcript of record reveals that McCann’s allegations are conclusively refuted by the record. As the material issues of fact could be resolved by reference to the record, an evidentiary hearing was not required.

Furthermore, the trial court reviewed the videotape of the guilty plea colloquy and found the plea was entered knowingly, intelligently, and voluntarily. This video recording is not included in the record on appeal. Though McCann is proceeding *pro se*, he is still required to present a complete record for this Court to review. *Graves v. Commonwealth*, 283 S.W.3d 252, 255-256 (Ky. App. 2009). McCann was notified by the Commonwealth’s Appellee Brief that the video is not included in the record. McCann filed a Reply Brief and did not attempt to correct the dearth of video record. “As a result, meaningful review by us is hampered, if not impossible, and we will assume any missing items, such as the . . . videotape of the guilty plea colloquy, support entry of an intelligent, voluntary and knowing

plea.” *Id.* at 256. Accordingly, McCann’s substantive claim fails as a matter of law.

For the foregoing reasons, this Court affirms the Mercer Circuit Court’s order denying McCann’s RCr 11.42 motion.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, CONCURS AND WILL FILE SEPARATE
OPINION.

JONES, JUDGE, CONCURRING: I concur entirely with the result reached by the majority. However, I write separately because I do not believe RCr 11.42 is applicable here.

On page 5 of his brief, Appellant states that "he had completed the sentence in this case" when he was arrested on federal charges. The Appellant is not being held in state custody. He is being held by the federal government in a federal prison located in Terre Haute, Indiana. While the Appellant's state conviction may have affected the length of his current federal sentence, it is clear that he is no longer being incarcerated by this Commonwealth.

RCr 11.42 was not designed to be used in the manner advanced by Appellant. “RCr 11.42 is a procedural remedy designed to give a convicted prisoner a direct right to attack the conviction under which he is being held. It is supplemental to the right of habeas corpus and we must accept the plain meaning of the language of the rule.” *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). “RCr 11.42 does not provide, expressly or by implication, for the review of

any judgment other than the one or ones pursuant to which the movant is being held in custody.” *Sipple v. Commonwealth*, 384 S.W.3d 332 (Ky. 1964). The remedy available under RCr 11.42 is the “right to be released” from a sentence that is subject to collateral attack. RCr 11.42(1). “It is axiomatic that a person cannot be released from a sentence which has been completed.” *Parrish v. Commonwealth*, 283 S.W.3d 675, 677. (Ky. 2009).

Having completed his Kentucky sentence long before he was arrested by the federal authorities, Appellant is no longer in custody under the sentence for which he seeks relief. An order under RCr 11.42 would not provide Appellant with any meaningful relief. ¹

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

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¹ This is not to say that someone in Appellant’s position would be completely without a remedy if he had a truly meritorious claim. Unlike an RCr 11.42 motion, a “CR 60.02 motion survives the completion of [a defendant’s] sentence.” *Id.* However, as detailed by the majority, the ineffective assistance of counsel claim advanced by Appellant is refuted by the record, and therefore, would not provide a means to set aside the state court judgment under CR 60.02, even if Appellant had pursued such relief.