

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001653-MR

EDWARD EUGENE STATTS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 99-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Edward Eugene Statts, pro se, has appealed from an order entered by the Daviess Circuit Court on July 18, 2002, which denied, without a hearing, Statts's motion to vacate his judgment of conviction pursuant to RCr<sup>1</sup> 11.42. Having concluded that the allegation of ineffective assistance of counsel and the claim that the guilty plea was not entered knowingly,

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

voluntarily and intelligently are refuted on the face of the record, we affirm.

On March 3, 1999, a Daviess County grand jury indicted Statts on two counts of sodomy in the first degree,<sup>2</sup> four counts of sexual abuse in the first degree,<sup>3</sup> and one count of indecent or immoral practices with a child under the age of 15 years.<sup>4</sup> Statts pled not guilty and his trial was scheduled for July 19, 2000.

On the day of trial, the Commonwealth made a written plea offer to Statts that based upon his plea of guilty to two counts of sexual abuse in the first degree, the Commonwealth would recommend dismissal of the remaining counts and it would recommend a four-year sentence on one conviction for sexual abuse and a five-year sentence on the other conviction, with the sentences to run consecutively for a total sentence of nine years. In reliance on this offer, Statts filed a motion to enter a guilty plea. After a thorough plea colloquy, the trial court determined that Statts's guilty plea was knowingly, voluntarily, and intelligently entered. On September 20, 2000, Statts was sentenced to nine years in the state penitentiary.

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<sup>2</sup> KRS 510.090.

<sup>3</sup> KRS 510.110.

<sup>4</sup> KRS 435.105.

On July 11, 2002, Statts filed a motion to vacate his judgment of conviction pursuant to RCr 11.42, a memorandum in support thereof, a motion for an evidentiary hearing, and a motion for appointment of counsel. Statts claimed that before he entered his guilty plea, his trial counsel told him that once he had pled guilty, the trial court would sentence him to five years' imprisonment regardless of the Commonwealth's offer of nine years. Statts claimed that, prior to sentencing, his counsel spoke with the trial judge and not only arranged for a five-year sentence but also arranged for probation. In support of his claims, Statts pointed out that during the plea colloquy, the trial judge stated that the four-year sentence and the five-year sentence were to run concurrently. Statts also claimed that the trial court had failed to inform him of his right to compulsory process. Lastly, Statts contended that defense counsel had failed to investigate the fact that his daughters had recanted their allegations and that defense counsel had failed to tell him about their recantations.

The Daviess Circuit Court denied all of Statts's motions, including his RCr 11.42 motion, without holding an evidentiary hearing. This appeal followed.

Statts argues that the record did not refute his allegations against defense counsel and that the circuit court erred when it failed to grant him an evidentiary hearing. In

support of this position, Statts presents the same arguments to this Court as he did to the circuit court. However, on appeal, Statts abandons his argument regarding the right to compulsory process and now insists that the trial court failed to inform him of his right to a speedy trial.

The United States Supreme Court has set forth a two-prong test to determine whether a criminal defendant received constitutionally effective assistance of counsel at trial.<sup>5</sup> According to Strickland, to succeed on a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that his trial counsel's representation fell below the objective standard of reasonableness for attorneys and he must show with reasonable probability that, but for counsel's ineffectiveness, the results would have been different.<sup>6</sup> The Strickland test applies not only to jury trials but also to guilty pleas.<sup>7</sup> To satisfy Strickland's second prong when there has been a guilty plea, a criminal defendant must show with reasonable probability that, but for defense counsel's advice, he would not have pled guilty but would have insisted on a trial.<sup>8</sup>

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<sup>5</sup> Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

<sup>6</sup> Id. at 687.

<sup>7</sup> Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

<sup>8</sup> Id.

According to the Supreme Court of Kentucky, once a criminal defendant has filed a motion pursuant to RCr 11.42, the trial court must determine whether the allegations contained therein can be resolved from the face of the record.<sup>9</sup> Further, the trial court must hold an evidentiary hearing,

if there is a material issue of fact that cannot be conclusively resolved, i.e. conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them [citations omitted].<sup>10</sup>

We conclude that Statts's arguments regarding concurrent sentencing and probation are without merit. The record shows that the Commonwealth presented a written plea offer and Statts accepted it by signing it. The plea agreement provided for the four-year sentence and the five-year sentence to run consecutively for a total of nine years. In reliance on this agreement, Statts filed his motion to enter a guilty plea. During the plea colloquy, the Commonwealth stated that its recommendation was for the sentences to run consecutively for a total of nine years. The trial judge confirmed this. Statts stated on the record that this was his understanding of the offer. He also stated that he was pleading guilty based solely on the Commonwealth's offer and that he had not been made any

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<sup>9</sup> Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

<sup>10</sup> Id. at 452-53.

other promise. He stated that he was satisfied with defense counsel's performance. While it is true that the trial judge stated the sentences were to run concurrently, this was clearly a misstatement since he added that the sentences would run for a total of nine years. Furthermore, after the trial court had taken a brief recess to consider the issue of work release, the trial judge reiterated that Statts had pled guilty and he would receive consecutive sentences totaling nine years.

Statts's argument that the trial court had failed to inform him of his right of speedy trial is simply without merit. The record shows that Statts filed a motion to enter a guilty plea that set forth his constitutional rights and both Statts and defense counsel signed this motion. Furthermore, the record shows that the trial judge informed Statts in detail of his constitutional rights during the plea colloquy.

Statts further claims that defense counsel failed to investigate his daughters' recantations of their allegations against him and that counsel failed to investigate any possible defenses these recantations may have raised. This argument is without merit as well. At sentencing, Statts's attorney stated that Statts's daughters had visited his office and told him that they did not want their father to go to prison. At a later date, they told defense counsel that they had fabricated the allegations against Statts. Statts's attorney sent the

daughters to the Daviess County Commonwealth's Attorney's Office. The record indicates that Statts' attorney spoke with Statts' daughters and knew about their recantations. Also, the record reveals that Statts's attorney knew that, despite their recantations, Statts's daughters intended to testify against Statts at trial. Thus, there was no need for further investigation.

In his memorandum to support his RCr 11.42 motion, Statts stated that defense counsel never told him that his daughters had recanted. However, in his pro se appellate brief, Statts stated that his other children had told him about his daughters' recantations, thus, refuting his claim that he did not know that his daughters had recanted.

Based on the fact that the record refutes Statts's claims, the Daviess Circuit Court's order denying Statts' RCr 11.42 motion without an evidentiary hearing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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