

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000700-MR

CHARLES A. JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NO. 01-CR-001434

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Charles A. Jones (Jones) entered a guilty plea to a number of charges stemming from several incidents of purse snatching. He appeals the order of the Jefferson Circuit Court denying his motion under RCr 11.42 to vacate or set aside his judgment. Jones argues on appeal that his defense counsel provided ineffective assistance of counsel. Because we conclude that his claim is founded on a clerical mistake that the trial court rectified and the record conclusively refutes Jones's

other arguments in support of his ineffective assistance claim, we affirm.

In June of 2001, Jones was indicted by a Jefferson County Grand Jury for first degree robbery (three counts), second degree robbery, fraudulent use of a credit card (two counts), first degree escape, receiving stolen property over three hundred dollars, illegal possession of a controlled substance (marijuana), and being a persistent felony offender in the first degree (PFO I). The charges followed several purse snatching incidents that the police were able to trace to Jones after he later used a stolen credit card to purchase merchandise.

On August 30, 2002, he entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Pursuant to the Commonwealth's offer, Jones pled guilty to all offenses charged in the indictment.

In return for the guilty plea, the Commonwealth recommended a total of thirteen years to serve. Specifically, the recommended sentences were as follows: twelve years for each count of first degree robbery, ten years for second degree robbery, five years for each count of fraudulent use of credit card, ten years for first degree escape, five years for receiving stolen property over three hundred dollars, and twelve months for illegal possession of a controlled substance.

Jones's guilty plea to PFO I enhanced the recommended sentences on the two counts of fraudulent use of a credit card and the one count of receiving stolen property over three hundred dollars from five years to ten years each. All sentences were to run concurrently, and a one year sentence Jones received in indictment 02-CR-1409 for bribing a witness, to run consecutively, for a total of thirteen years to serve. But under the plea agreement, Jones was eligible for parole after three years. On November 15, 2002, the trial court entered a judgment of conviction and sentence.

In April 2003, Jones filed a *pro se* RCr 11.42 motion requesting that the court vacate or set aside his judgment. In that motion, Jones moved for appointment of counsel and an evidentiary hearing. He alleged that his counsel provided ineffective assistance; thus, his guilty plea was involuntary. He claimed his defense counsel was not familiar with Kentucky statutes. One statute in particular is KRS 532.080(7), which states: "A person . . . found to be a persistent felony offender in the first degree . . . [and] . . . [i]f the offense the person presently stands convicted of is a Class A, B, or C felony, the person shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years." Jones claims that had his defense counsel

been aware of KRS 532.080(7), he would have known that the plea agreement was unenforceable.

The trial court appointed counsel to represent Jones and conducted an evidentiary hearing. At the conclusion of the hearing, the trial court entered an Amended Judgment of Conviction and Sentence. To reflect the intention of the parties that Jones be eligible for parole in three years, the amended judgment reduced Jones's charge from PFO I to PFO II. In addition, the amended judgment denied Jones's motion to set aside his guilty plea after the court reviewed the record and found his guilty plea was knowingly and voluntarily entered. Jones appeals that order.

Jones argues that there is an issue that is not refuted by the record as to whether counsel investigated the statutes relevant to his case before advising him to plead. Jones states that his attorney mistakenly advised him to enter an Alford plea to an unenforceable plea agreement. Jones further contends that his attorney induced his plea of guilty by providing a misleading explanation of an Alford plea. Thus, he believes ineffectiveness was shown because he would not have pled guilty to an invalid plea agreement or would not have done so but for the misleading advice.

The Commonwealth states that Jones's judgment was properly amended to reflect the parties' intention regarding

Jones's parole eligibility because the Department of Corrections and the Parole Board misinterpreted the order of the court. The Commonwealth asserts there is allegedly nothing for this court to review because Jones is appealing a non-existent order because the Jefferson Circuit Court never issued an order denying Jones relief under RCr 11.42. The Commonwealth adds that Jones's complaints that he was denied due process and equal protection of the law are unfounded because the record reflects that Jones was present in the courtroom during the evidentiary hearing when the judgment was amended.

First, the Commonwealth is incorrect in asserting that there is nothing for this court to review. Under RCr 11.42(7), the movant may appeal from the final order or judgment of the trial court in a proceeding brought under the rule. In this case, the trial court conducted an evidentiary hearing. Upon hearing Jones's claim, the trial court corrected the sentence. As to the substance of Jones's ineffective assistance claim, however, the trial court found that the record refuted Jones's claim that he entered his plea unknowingly and involuntarily. So under RCr 11.42(7) Jones was entitled to appeal the trial court's amended judgment and order denying relief.

We now move to the merits of Jones's ineffective assistance claim. In order to prove ineffective assistance of counsel when a defendant enters a guilty plea, the defendant

must show (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the sixth amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different. See Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky. App. 1990) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

In this case, although the trial judge heard the issue of the sentencing error, he apparently limited the hearing to that issue as he ruled on Jones's ineffective assistance claims based only on the record. The issue upon review of the denial of an RCr 11.42 motion -- based solely on a review of the record -- is whether the motion on its face states grounds that are not conclusively refuted by the record and which if true would invalidate the conviction. See Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967).

RCr 11.42 motions must state specifically the grounds on which the conviction is being challenged as well as state the facts relied on in support of such grounds. See Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). Without a minimum of factual basis in the verified RCr 11.42 motion, the motion

should be summarily overruled. See id. at 748. Conclusory and meager allegations are insufficient to require an evidentiary hearing. See Wedding v. Commonwealth, 468 S.W.2d 273 (Ky. 1971).

Jones supports his ineffective assistance claim by arguing that his attorney made two mistakes. The first mistake is that Jones's sentence did not reflect the terms of the plea agreement, making the plea agreement invalid. Even if we were to find that this mistake was such a serious flaw that it fell "outside the range of professional competent assistance," it could not satisfy the second prong of the Strickland test. He does not satisfy the second prong because he does not offer any evidence to show that he suffered any prejudice from the sentencing error.

The record contains proof that a sentencing error was made, but the plea agreement is clear. "[T]he incorrect reduction of an oral judgment to writing is a clerical error, which can be corrected under RCr 10.10 when the record unmistakably reveals what the oral judgment was." Viers v. Commonwealth, 52 S.W.3d 527, 528-29 (Ky. 2001). The court corrected the error before Jones served three years in prison; therefore, his eligibility for parole was never adversely effected.

The second alleged mistake is that defense counsel improperly advised Jones to enter into an Alford plea. Jones argues that Kentucky statutes only authorize pleas of (1) guilty, (2) not guilty, or (3) guilty but mentally ill. But the Kentucky Rules of Criminal Procedure were amended in 1991 to allow courts to accept a conditional plea of guilty. See RCr 8.09. Jones provides no substantiation of his claim that his defense counsel was not familiar with Kentucky statutes.

Jones's final argument is that his defense counsel mislead him into pleading guilty. The record reflects that at the time he entered his plea of guilty, Jones declared his plea "of guilty is freely, knowingly, intelligently and voluntarily made" and that his attorney had "fully explained" his constitutional rights to him. Jones simply provides no basis for his bald allegation that his attorney mislead him.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court amending the judgment and denying the motion to vacate sentence and set aside his plea.

ALL CONCUR.

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