

RENDERED: July 15, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001168-MR

CHRIS TUCKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE TOM MCDONALD, JUDGE  
ACTION NO. 01-CR-002778

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Chris Tucker brings this pro se appeal from a March 17, 2004, Order summarily denying his Ky. R. Civ. P. (RCr) 11.42 motion to vacate his 20 year sentence of imprisonment entered upon a guilty plea. We vacate and remand.

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In November 2001, the Jefferson County Grand Jury indicted appellant upon first-degree for trafficking a controlled substance, tampering with physical evidence, being in possession of drug paraphernalia, and being a second-degree persistent felony offender. Prior to trial, appellant's counsel filed motions to suppress any statements appellant made to police and to suppress evidence as a result of a warrantless stop and search of his person and automobile. The motion to suppress also sought to suppress evidence seized from his hotel room by a search warrant under the "fruit of the poisonous tree" doctrine. The motions were never heard by the circuit court. Rather, appellant entered into a plea agreement prior to the scheduled hearing. He plead guilty to all four charges in the indictment in exchange for a sentence of 20 years' imprisonment.

Subsequently, appellant filed a pro se RCr 11.42 motion to vacate sentence. On March 17, 2004, the circuit court entered an order denying appellant's RCr 11.42 motion without an evidentiary hearing and without the appointment of counsel. This appeal follows.

Appellant contends the circuit court committed reversible error by denying his RCr 11.42 motion without conducting an evidentiary hearing and without the appointment of counsel. Appellant argues that his trial counsel was ineffective for advising him to plead guilty instead of pursuing

the motions to suppress. If trial counsel had pursued the motions, appellant believes he would have been successful, and the evidence would have been suppressed. Because of his attorney's erroneous advice to plead guilty, appellant argues that his guilty plea was not entered knowingly and intelligently. He also argues that counsel failed to properly investigate the facts of the case and the law. Appellant points out that he was stopped by police for an alleged traffic violation, but the police, without reasonable suspicion, transformed the traffic stop into an investigatory stop. Specifically, appellant contends the police held him for an hour waiting for a K-9 unit without probable cause or reasonable suspicion of criminal activity. In essence, appellant argues that his continued detention following the traffic stop was unreasonable in scope and duration under the precepts announced in United States v. Burton, 334 F.3d 514 (6th Cir. 2003).

In determining whether a guilty plea is the product of ineffective assistance of counsel, we must initially consider whether trial counsel made errors so serious that counsel's performance fell outside the wide range of professional competent assistance and whether the deficient performance so seriously affected the outcome of the plea process that but for counsel's errors, there is a reasonable probability that appellant would have insisted upon going to trial. Kiser v.

Commonwealth, 829 S.W.2d 432 (Ky.App. 1992). An evidentiary hearing upon a RCr 11.42 motion "is required 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." Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001)(citations omitted).

In the case at hand, appellant basically asserts that his continued detention after the traffic stop was unreasonable in scope and duration. See id. As the circuit court denied appellant's RCr 11.42 motion without an evidentiary hearing, we are unable to determine whether appellant's continued detention was unreasonable and thus unconstitutional. Under these unique set of facts, we conclude that the trial court should have conducted an evidentiary hearing to determine the veracity of appellant's allegations. If appellant could prove that his continued detention was unreasonable and that a motion to suppress would have been successful, we believe appellant may have received erroneous advice from trial counsel to plead guilty to charges otherwise not sustainable without the suppressed evidence. Our opinion, however, should not be misconstrued as passing upon the validity or merits of appellant's claim of an unconstitutional seizure or his claim of

ineffective assistance of counsel. We simply believe under the facts of this case that appellant is entitled to an evidentiary hearing and appointment of counsel as his allegations cannot be adequately refuted upon the face of the record. See Fraser, 59 S.W.3d 448.

For the foregoing reasons, the Order of the Jefferson Circuit Court is vacated and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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