

RENDERED: JULY 29, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001250-MR

FLEMING LOGAN

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 01-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART  
REVERSING IN PART AND REMANDING

\*\* \*\* \* \* \*

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>  
TAYLOR, JUDGE: Fleming Logan brings this appeal from a May 25, 2004, order denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate judgment entered upon a guilty plea to one count of second-degree sodomy and four counts of first-degree sexual abuse. We affirm in part, reverse in part and remand.

---

<sup>1</sup> Senior Judge Joseph R. Huddleston 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 June 2001, the Carter County Grand Jury indicted appellant upon one count of first-degree sodomy and four counts of first-degree sexual abuse. Pursuant to a plea agreement, appellant entered a plea of guilty to the amended charge of second-degree sodomy and to four counts of first-degree sexual abuse. The Commonwealth recommended a total prison sentence of ten years. On November 19, 2002, the trial court entered its judgment and sentence; the court accepted appellant's plea of guilty and sentenced him to a total of ten years' imprisonment.

Thereafter, on February 11, 2004, appellant filed an RCr 11.42 motion to vacate judgment. The trial court summarily denied the motion without an evidentiary hearing and without appointment of counsel. This appeal follows.

Appellant contends the trial court committed reversible error by denying his RCr 11.42 motion without an evidentiary hearing and without appointment of counsel. Appellant raises several allegations of ineffective assistance of counsel. We have reviewed these allegations of error and believe all but one to be without merit. We are, however, troubled by appellant's contention that he received gross misadvice concerning parole eligibility from trial counsel. For the reasons hereinafter elucidated, we are of the opinion that appellant's allegation that trial counsel allegedly misadvised

him concerning parole eligibility cannot be conclusively resolved upon the face of the record.

Appellant is challenging the voluntariness of his guilty plea by alleging that trial counsel grossly misinformed him concerning parole eligibility requirements. To prevail upon such a claim, appellant must demonstrate that his trial counsel made errors that fell outside the range of professionally competent assistance, and except for counsel's defective performance, there exists a reasonable probability that appellant would not have pled guilty but would have insisted on going to trial. Hill v. Lockheart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d. 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

In his motion, appellant alleged that trial counsel informed him that by accepting the plea agreement and pleading guilty he "would be out in three or four months." If trial counsel did so inform appellant, such advice is patently incorrect. See KRS 197.045(4). Gross misadvice concerning parole eligibility has been recognized as ineffective assistance of trial counsel. Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988). Were appellant's allegations true, we think that trial counsel's performance was deficient and fell outside the range of reasonable competent counsel. Additionally, it is reasonable to conclude that appellant would not have viewed the plea

bargain so favorably if the true facts were known to him. If appellant were induced to plead guilty by the belief that he would only serve three or four months in jail, we are compelled to conclude that appellant was denied effective assistance of trial counsel. See Sowders, 852 F.2d 882; Sparks, 721 S.W.2d 726.

The Commonwealth postulates that if trial counsel did make such a statement it was merely in the hope that appellant would be released upon shock probation. However, there is nothing in the record to refute appellant's allegation that trial counsel misinformed him concerning parole eligibility. The Commonwealth's belief that trial counsel's statement was in relation to shock probation is merely conjecture at this point, absent an evidentiary hearing on this issue.

We are guided by the Supreme Court's decision in Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). The Supreme Court specifically held that an evidentiary hearing and appointment of counsel are required if the RCr 11.42 motion raises an allegation that cannot be refuted upon the face of the record:

[T]he trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing 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.

Id. at 452-453.

In this case, there is simply no evidence in the record refuting appellant's allegation that trial counsel misinformed him concerning parole eligibility. As directed in Fraser, the Court may not simply disbelieve appellant's allegation in the absence of evidence in the record refuting such allegation. Thus, we are compelled to remand this matter for an evidentiary hearing upon the narrow issue of whether trial counsel did in fact inform appellant that he would only serve three to four months in jail. As mandated by Fraser, we, likewise, believe that appellant is entitled to appointment of counsel. Accordingly, we hold that the circuit court erred by failing to grant appellant an evidentiary hearing upon the narrow issue of whether trial counsel grossly misadvised appellant concerning parole eligibility and erred further by failing to appoint appellant counsel.

We have reviewed appellant's remaining contentions concerning ineffective assistance of trial counsel and believe all to be refuted upon the face of the record.

For the foregoing reasons, the order of the Carter Circuit Court is affirmed in part, reversed in part and remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR  
APPELLANT:

Patrick Graney  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Wm. Robert Long Jr.  
Assistant Attorney General  
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Wm. Robert Long Jr.  
Assistant Attorney General  
Frankfort, Kentucky