

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001708-MR

CARL COWHERD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
INDICTMENT NOS. 02-CR-001253 & 02-CR-002000

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM,¹ DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: Carl Cowherd pled guilty to trafficking in marijuana over five pounds, first degree Persistent Felony Offender (PFO), trafficking in marijuana less than eight ounces with a firearm, illegal possession of drug paraphernalia with a firearm, and tampering with physical evidence. The Jefferson Circuit Court accepted Cowherd's plea and imposed the recommended sentence of fifteen years' imprisonment.

¹ Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

In an RCr 11.42 motion, Cowherd alleged ineffective assistance of counsel because he was misled regarding parole eligibility. Specifically, Cowherd claims that he was informed that he would be eligible for parole after serving twenty percent of a fifteen-year sentence. Cowherd claims that he would not have pled guilty had he been correctly informed that he would be required to serve a minimum of ten years before he would be eligible for parole because of his PFO status.

The rule in Kentucky is that an evidentiary hearing is required on an RCr 11.42 motion if the allegations contained therein cannot be resolved by the record. Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001). Additionally, a trial court may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. Id.

Gross misadvice regarding parole eligibility may amount to ineffective assistance of counsel. Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988). Our review of the record indicates and the Commonwealth concedes that Cowherd's allegations cannot be resolved from the face of the record. Therefore, he is entitled to an evidentiary hearing on the ineffective assistance of counsel claim.

The order of the Jefferson Circuit Court is vacated and this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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