

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000119-MR

DANNY ELLIS

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Danny Ellis appeals, *pro se*, from an order of the Rowan Circuit Court that denied (without a hearing) his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to set aside his entry of a guilty plea along with his subsequent convictions of robbery and of being a persistent felony offender. After our review, we vacate and remand for further proceedings.

¹Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On January 21, 2005, the Rowan County Grand Jury indicted Ellis on one count of first-degree robbery pursuant to Kentucky Revised Statutes (KRS) 515.020 and on one count of being a second-degree persistent felony offender pursuant to KRS 532.080(2). Ellis appeared in open court with counsel on March 18, 2005, and entered a plea of “not guilty” to the charges.

Ellis withdrew his plea on July 28, 2005, with a motion for the trial court to allow him to enter a plea of guilty. In exchange for this plea, the Commonwealth offered to amend the robbery charge to a second-degree count and to recommend a twenty-year sentence – to be served consecutively with respect to any existing sentences then being served by Ellis. The trial court entered a judgment accepting Ellis’s guilty plea and sentencing him consistently with the Commonwealth’s recommendations.

On November 16, 2005, Ellis filed a motion to vacate judgment pursuant to RCr 11.42. As grounds for his motion, Ellis set forth a number of claims to support a general argument that he had received ineffective assistance of counsel. On January 3, 2006, the trial court entered an order summarily denying Ellis’s motion without a hearing. The order provided in its entirety:

This matter coming before the Court on the defendant’s motion for relief pursuant to RCr 11.42 and the Commonwealth having filed a response, IT IS HEREBY ORDERED the defendant’s motion is DENIED. The judgment shall stand as entered in the record.

This appeal followed.

On appeal, Ellis argues that the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion because there were issues of fact that were not refuted by the record. He specifically complains that his counsel failed to conduct adequate pre-trial investigations and failed to render competent advice as to the possibility of relief pursuant to KRS 500.110. Because the trial court's order provides no indication that it utilized the procedures that are required in considering motions for relief pursuant to RCr 11.42, we conclude that the case must be remanded for further proceedings.

A movant is not entitled to an evidentiary hearing on an RCr 11.42 motion unless there is a material issue of fact that cannot be resolved on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993); *see also* RCr 11.42(5). When the record fails either to prove or to refute a material issue of fact, a hearing is required: "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 (Ky. 2001).

Fraser and companion cases required the trial court to determine specifically whether Ellis's allegations could be resolved on the face of the record. It is a critical, threshold finding, and it has not been made in the case in the manner directed by our Supreme Court. The trial court's order has given no indication as to whether it followed the explicit mandates of RCr 11.42(5) and the relevant case law in considering whether a hearing was required as to Ellis's motion. As a reviewing court, it is not our

proper role to search the record to determine whether Ellis's allegations raised questions of fact necessitating a hearing. We cannot usurp that function of the trial court. Accordingly, we are compelled to remand this case to the trial court so that such a determination can be made.

Because we are remanding this matter for further proceedings as dictated by RCr 11.42(5) and applicable case law, we need not consider Ellis's remaining arguments. Therefore, we vacate and remand the judgment of the Rowan Circuit Court for further proceedings consistent with this opinion.

KELLER, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: I respectfully dissent because I disagree with the majority's view that the trial court's order denying Ellis's motion was insufficient for our review.

When this court reviews trial court orders granting or denying RCr 11.42 motions where no evidentiary hearing was held, we must determine whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). While the trial court here denied the motion, the majority vacates that order because the court gave no indication as to the basis of its ruling or whether it followed RCr 11.42(5).

When trial courts deny RCr 11.42 motions without an evidentiary hearing, no findings are required.² *See Stanford*, 854 S.W.2d at 744. Such is the case here. I believe that in such cases it is incumbent on this court to conduct its review in accordance with *Lewis, supra*. Thus, I would affirm because I conclude that Ellis’s motion was insufficient on its face to warrant an evidentiary hearing.

While I respect the majority’s view of this case, I suspect that this court will consider this matter again after the trial court enters a new order that will likely contain findings that “the movant’s allegations are refuted by the record.” At that point, we will be back to where we should be now.

BRIEF FOR APPELLANT *PRO SE*:

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BRIEF FOR APPELLEE:

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² While I disagree with the majority that the trial court was required to enter findings demonstrating that it gave proper consideration to the motion, I agree that findings are always helpful to our review of matters such as this.