

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002190-MR

JAMES L. WASHINGTON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 03-CR-00260

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: James Washington, *pro se*, appeals an order of Hardin Circuit Court denying RCr 11.42 post-conviction relief without an evidentiary hearing. We affirm.

On April 22, 2004, Washington pleaded guilty in Hardin Circuit Court to complicity to commit trafficking in a controlled substance and being a second degree persistent felony offender. In exchange for his guilty plea, the Commonwealth

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<sup>1</sup> Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

recommended a sentence of thirteen years imprisonment to run concurrently with a ten year sentence Washington had already been serving in an unrelated case. Washington was sentenced in accordance with his plea agreement on July 6, 2004.

On May 5, 2006, Washington filed a *pro se* motion in Hardin Circuit Court seeking RCr 11.42 relief and an evidentiary hearing. Washington alleged, due to ineffective assistance of counsel, he was deprived of the opportunity to accept a ten year sentence during plea negotiations. Washington sought to have his thirteen year sentence vacated and then have the ten year sentence imposed. The court issued an opinion denying post-conviction relief without a hearing, and this appeal followed.

A movant is only entitled to an evidentiary hearing on an RCr 11.42 motion if the trial judge determines there is a material issue of fact not refuted by the record. RCr 11.42(5), *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). As such, our review in this case is limited to determining whether the trial court properly denied Washington an evidentiary hearing. *Id.*

Normally, judicial review of alleged ineffective assistance of counsel is controlled by the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). However, where alleged ineffective assistance of counsel results in a guilty plea, a modified *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). The modified standard requires the movant to prove, first, “that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and

[second] that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

While Washington's *pro se* appellate brief is well-organized, a careful review of the record reveals he argues a different set of facts before this Court than he argued in his RCr 11.42 motion before the circuit court. However, after considering the various factual scenarios urged by Washington, we find no material issues of fact exist which would warrant an evidentiary hearing.

The crux of Washington's argument is that his attorney, Francis Holbert, failed to secure a ten year plea agreement with the Commonwealth.<sup>2</sup> However, in his motion before the trial court, Washington admitted that, when told about the ten year offer, he still wanted to go to trial. Holbert explained the risks involved in proceeding to trial because two co-defendants were willing to testify against Washington. As such, Holbert advised Washington to think about whether he wished to go to trial. However, when Washington met with Holbert prior to trial, the ten year offer had been withdrawn and replaced with an offer of thirteen years. We must point out, though, that the Commonwealth is free to withdraw an offer before it is accepted or detrimentally relied upon by the defendant. *Commonwealth v. Reyes*, 764 S.W.2d 62, 65 (Ky. 1989).

Furthermore, a review of the April 22, 2004, hearing shows that Washington admitted

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<sup>2</sup> We note that there is no evidence in the record relating to this alleged ten year offer by the Commonwealth.

guilt and knowingly, voluntarily and intelligently entered a plea of guilty in exchange for a thirteen year sentence. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969).

In sum, we find Washington's allegations are self-serving, contradictory, and speculative. Washington fails to establish Holbert's representation was deficient and does not otherwise raise any factual issues warranting an evidentiary hearing.

For the reasons stated herein, the decision of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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