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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002231-MR

MARK LANE MATTINGLY — APPELLANT

v. — APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 00-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

VANMETER, JUDGE: Mark Lane Mattingly appeals *pro se* from an order entered by the Marion Circuit Court denying his petition seeking RCr[2] 11.42 relief. For the reasons stated, we affirm.

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[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Criminal Procedure.

In March 2002 Mattingly entered a guilty plea to a charge of attempted murder of a law enforcement officer. The Commonwealth's written plea offer form included the following recommendations: “Plead as charged. Serve 15 years. Assault 1st has previously been dismissed.” In May 2002 the court entered a judgment sentencing Mattingly to fifteen years' imprisonment and directing that he “receive treatment for mental health condition including medication.”

Some eleven months later, on April 1, 2003, the Commonwealth's Attorney faxed a letter to the Kentucky Parole Board regarding Mattingly's upcoming parole hearing. The letter stated in pertinent part:

> Counsel for [Mattingly] called me yesterday to tell me that I had agreed to write a letter to the Parole Board on behalf of Mark Mattingly . . . . I honestly do not have a written memo about my agreement to recommend his early release and I understand the victim is strongly against this.
>
> . . . If he has done well in the penitentiary, I would personally have no objection but, of course, the wishes of the victim should be given strong consideration.

When Mattingly met with the Parole Board the next day, parole was deferred for forty-eight months. In June 2004, Mattingly sent a letter to the trial court alleging that he had “tried in vain for six months prior to my parole hearing to get the Commonwealth attorney to write the letter” recommending parole, which Mattingly asserts the latter had agreed to do in exchange for Mattingly's guilty plea. Mattingly sought relief “due to the Commonwealth attorney's breach of the verbal contract he and I had.” The court forwarded the letter to the Commonwealth's Attorney, who then advised the Parole Board

that "[a]s I recall I did tell defense counsel that I would write a letter about my personal opinion about it, but we all knew that the victim probably would be opposed to [Mattingly's] making parole at the first meeting of the Board." The Commonwealth's Attorney noted that he expected Mattingly or his attorney to timely remind him to write the letter, and that "[i]t is completely untrue that [Mattingly] tried for six months to get me to write a letter because I keep copies of all such requests and there is nothing in my file." He noted that he faxed a letter to the Parole Board on April 1, that he continued to have no objection to Mattingly being paroled if he had a good prison record, and that "it would be fine" with him if the matter was reconsidered. Evidently the trial court took no formal action at this point.

Mattingly filed a motion seeking RCr 11.42 relief in March 2006, which was within three years of the date when he learned of the Commonwealth's Attorney's alleged failure to recommend him for early release from prison. RCr 11.42(10)(a). Mattingly asserted that his guilty plea was based on the Commonwealth's agreement to dismiss the assault charge, to recommend a fifteen-year sentence, and to recommend his early release to the Parole Board. He claimed that when he was denied parole and was given a forty-eight month deferment, "it became apparent that the Commonwealth Attorney had **not** forwarded a letter to the Parole Board recommending" his early release. Mattingly further asserted that the plea agreement constituted a constitutional contract, that his due process and equal protection rights were "flagrantly violated" by the Commonwealth's Attorney, and that his conviction and sentence should be vacated.

The trial court denied Mattingly's motion for RCr 11.42 relief, as well as his requests for the appointment of counsel, an evidentiary hearing, and the withdrawal of his guilty plea. The court found that neither the plea agreement nor the record of the proceedings showed any agreement by the Commonwealth's Attorney to recommend Mattingly's early release. Moreover, the court noted that the record showed that both before the parole hearing and some fifteen months later, the Commonwealth's Attorney advised the Parole Board in writing that he had no objection to Mattingly's release on parole if he had been a good prisoner. This appeal followed.

First, Mattingly contends that the trial court erred by failing to find that the Commonwealth violated the parties' plea agreement. We disagree.

As noted above, at the time of Mattingly's guilty plea there was nothing put in writing or discussed during the plea hearing to indicate that the Commonwealth's Attorney had agreed to recommend his early release. Moreover, even if we assume without deciding that an informal agreement in fact existed, we are not persuaded by Mattingly's bare assertions that the letters of the Commonwealth's Attorney breached the parties' agreement because they acknowledged the victim's opposition to early release and because they failed to recommend early release with sufficient enthusiasm.

Further, a different result is not compelled by the cases Mattingly cites on appeal. Unlike the matter before us, *Shanklin v. Commonwealth,* 730 S.W.2d 535 (Ky.App. 1987), involved this court's rejection of the Commonwealth's attempt to cancel an earlier plea agreement after the defendant satisfied his obligations thereunder. In

Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), *overruled on other grounds by Morton v. Commonwealth,* 817 S.W.2d 218 (Ky. 1991), the Kentucky Supreme Court prohibited the Commonwealth from reversing its earlier agreement to terminate a prosecution after the defendant satisfied his share of the terms which the parties had agreed would result in the prosecution's termination. Here, by contrast, at most there was an oral agreement that in exchange for Mattingly's guilty plea, the Commonwealth would recommend his early release. Even though the Commonwealth's letters and recommendations were not as enthusiastic as Mattingly wished, and even though the Parole Board exercised its prerogative to not parole Mattingly after his service of less than one year of his prison term, it cannot reasonably be said that the Commonwealth failed to make the agreed-upon recommendation for early release. The trial court did not err by failing to find otherwise.

Next, Mattingly asserts that the trial court erred by failing to consider the evidence supporting his motion for RCr 11.42 relief, and by finding that his claims are "clearly contradicted by the official record." However, as noted by the trial court, nothing in the written plea agreement or the record of the plea hearing supports Mattingly's claim, since both the agreement and the hearing include specific, uncontradicted assertions that no other promises had been made in exchange for the guilty plea. As stated in *Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977), "[s]olemn declarations in open court carry a strong presumption of

verity." It follows that the trial court did not err by finding that the Commonwealth's Attorney complied with the terms of the guilty plea agreement.

Finally, Mattingly asserts that the trial court erred by failing to appoint counsel or conduct an evidentiary hearing regarding his claim for RCr 11.42 relief. We disagree, as no "material issue of fact that cannot be determined on the face of the record" exists so as to entitle Mattingly to the requested relief. RCr 11.42(5).

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Lane Mattingly, *Pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky