

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-002286-MR

BRECK McCracken

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CR-002460

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Breck McCracken appeals a denial of his RCr¹ 11.42 motion. Because we hold the Jefferson Circuit Court erred in denying the motion without an evidentiary hearing, we vacate the trial court's order and remand this matter for further proceedings.

¹ Kentucky Rules of Criminal Procedure.

In October 2002, Steven Hutchens and Breck McCracken were indicted, under a complicity theory, for the murder of Dakota Marcum. In addition, both were indicted for Robbery in the First Degree and for Tampering with Physical Evidence. These charges were also indicted under complicity theories, and the murder charge was initially pursued as a death penalty-eligible case.

On the day set for trial, September 2, 2003, McCracken agreed to waive his right to a jury trial and moved to enter a guilty plea. In exchange for the guilty plea, the Commonwealth recommended that McCracken receive a life sentence on the murder charge. McCracken waived his right to a presentence investigation and was sentenced that day. The trial court entered judgment on September 4, 2003. In 2006, McCracken filed a motion to set aside his sentence under RCr 11.42, alleging numerous counts of ineffective assistance of counsel. The trial court denied the motion without an evidentiary hearing and without appointing counsel for McCracken. McCracken appeals.

To show ineffective assistance of counsel, McCracken must establish:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001). In considering the issue of ineffective assistance, the reviewing court must focus on the totality of

evidence before the judge, and assess the overall performance of counsel throughout the case, in order to determine whether the identified omissions overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Since the trial court denied McCracken's RCr 11.42 motion without a hearing, our appellate review is limited to determining whether the motion states, on its face, grounds which were not conclusively refuted by the record and which would invalidate the conviction if true. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

In this instance, McCracken has made a number of allegations implicating the advice he received from trial counsel. Since that advice obviously is not contained within the record, McCracken's claims cannot be conclusively refuted by the record. Therefore, we vacate the order of the Jefferson Circuit Court denying McCracken's RCr 11.42 motion, and remand with instructions to appoint counsel for McCracken, permit any supplemental pleading such counsel or the Commonwealth may wish to file, hold an evidentiary hearing regarding McCracken's allegations, and enter appropriate findings of fact and conclusions of law. In vacating the trial court's order, we express no opinion as to the merits of McCracken's allegations.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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