

RENDERED: MARCH 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000971-MR

JEFFERY L. CARPENTER, SR.

APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,¹ SPECIAL JUDGE.

ABRAMSON, JUDGE: Appellant Jeffery L. Carpenter appeals from a January 20, 2004, order of the Butler Circuit Court denying his RCr 11.42 motion, as well as two additional orders overruling Carpenter's motions to vacate or amend that decision. After careful review of the limited record before this Court, we are unable to discern whether

¹ Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Carpenter's claims are supported or contradicted therein. We therefore vacate the trial court's orders and remand for further proceedings consistent with this Opinion.

On April 17, 2003, Appellant Jeffery L. Carpenter was convicted by a jury of one count of first-degree sexual abuse and of being a persistent felony offender in the first degree. The Butler Circuit Court sentenced Carpenter to prison for fifteen years. This Court subsequently affirmed Carpenter's conviction on June 10, 2005.² Our Supreme Court denied discretionary review of the matter on March 15, 2006.³

On August 1, 2003, approximately two and one-half months after Carpenter appealed his conviction, he filed with the trial court a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel. Claiming that the Commonwealth failed to respond to his motion, Carpenter filed a “Motion for Default Judgment” on November 13, 2003. Carpenter later filed a petition in this Court seeking a writ of mandamus against the trial judge requiring him to rule on the motions.

On January 22, 2004, the trial court entered an order denying Carpenter's RCr 11.42 motion. Without providing any reasoning for the decision, the court stated simply:

The Defendant having filed a Petition For Writ of Mandamus in the Court of Appeals alleging that the Butler Circuit Court had not ruled upon various motions previously filed by the Defendant.

Specifically, the Defendant alleges that he has filed a Motion for Default Judgment, and a motion to vacate being based on

² Case No. 2003-CA-001005.

³ Case No. 2005-SC-000598.

ineffective assistance of counsel pursuant to RCr 11.42, and the Court being otherwise sufficiently advised does hereby find that said motion is not well taken and should not be granted.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant's motion to vacate sentence pursuant to RCr 11.42, and a motion for default judgment are hereby overruled.

Following the denial of his RCr 11.42 motion, Carpenter moved twice to alter or amend the trial court's decision. In ruling on each, the trial court entered a one-page order denying the motion without any discussion.⁴ This appeal followed.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice reasonably likely to have affected the outcome. *Strickland v. Washington*, 466 U.S. 668 (1984). An evidentiary hearing upon an RCr 11.42 motion “is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. 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, 452-53 (Ky. 2001).

In his RCr 11.42 motion, Carpenter appears to have raised seven grounds supporting his assertion of ineffective assistance.⁵ These are: (1) failure to allow

⁴ The first order denying Carpenter's motion to alter or amend the January 20, 2004, order was entered on February 13, 2004. The court entered its second order on March 12, 2004, denying Carpenter's motion to alter or amend the judgment pursuant to CR 52.02 and 59.05.

⁵ These are the grounds discussed in the parties' briefs. We do not know if these are all of the grounds alleged by Carpenter, or even if they are the correct grounds, since the RCr 11.42 motion was not included in the record on appeal.

adequate time for preparation for trial; (2) failure to call witnesses favorable to Carpenter's case; (3) failure to defend the PFO charge; (4) failure to obtain an expert witness; (5) failure to assert a speedy trial violation; (6) failure to preserve a claim of prosecutorial misconduct; and (7) cumulative error. Under Kentucky law, if these claims are refuted by the trial court's record, we should affirm the trial judge's decision to deny Carpenter's motion. Conversely, if one or more of the allegations cannot be refuted by reference to the record, we must reverse the trial judge's decision to deny the motion without first holding an evidentiary hearing. However, because of the deficient record before us in this matter, we are unable to reach either conclusion and are left with no option but to vacate the trial court's January 22, 2004 judgment and remand for further proceedings.

Carpenter freely admits that he filed his RCr 11.42 motion while the direct appeal of his conviction was already pending before this Court. Apparently because the majority of the trial court's record accompanied the direct appeal, the record that accompanied *this* appeal is woefully inadequate to the task before us. The first item found therein is Carpenter's November 13, 2003, motion seeking a default judgment against the Commonwealth on the matters raised in his RCr 11.42 motion. This means, of course, that the trial court's file prior to November 13, 2003, *including the RCr 11.42 motion that forms the basis of this matter*, is not included in the record on appeal before us.

Complicating our task is the fact that the trial court chose to make no findings when overruling Carpenter's RCr 11.42 motion other than a simple statement that the "motion is not well taken." We are cognizant of the fact that RCr 11.42(6) provides in part that a "final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02."⁶ However, the lack of both a record and any detailed findings by the trial court has rendered it impossible for us to determine whether the trial court's decision comports with the requirements of *Fraser v. Commonwealth, supra*. Under such circumstances, we simply are left with no alternative but to vacate the trial court's January 22, 2004, judgment and remand this matter for further proceedings so that Carpenter's motion can be reconsidered in light of a full record and the standard set forth in *Fraser*.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jeffery L. Carpenter, Sr., *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Office of Criminal Appeals
Frankfort, Kentucky

⁶ In its March 12, 2004, order, the trial court denied Carpenter's motion "pursuant to CR 52.02 and 59.05." Thus, it appears Carpenter may have made the requisite motion for findings but the CR 52.02 motion, like the RCr 11.42 motion, is not in the record before us.