

RENDERED: MARCH 9, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001479-MR  
AND  
NO. 2016-CA-001559-MR

MICHAEL ALAN WELLS

APPELLANT

v. APPEALS FROM EDMONSON CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 10-CR-00144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN APPEAL NO. 2016-CA-001479-MR  
AND VACATING AND REMANDING IN APPEAL  
NO. 2016-CA-001559-MR

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BEFORE: CLAYTON, DIXON AND MAZE, JUDGES.

DIXON, JUDGE: In these consolidated appeals, Appellant, Michael Alan Wells, appeals *pro se* from separate orders of the Edmonson Circuit Court denying his motion for resentencing pursuant to KRS 532.050 and his motion for post-

conviction relief pursuant to RCr 11.42. For the reasons set forth herein, we affirm the trial court's denial of the motion for resentencing, but vacate the order denying Appellant's RCr 11.42 motion and remand for further proceedings.

In 2010, Appellant was indicted on ten counts of first-degree rape, six counts of first-degree sodomy, twenty counts of first-degree sexual abuse, thirty counts of first-degree unlawful transaction with a minor, and three counts of second-degree unlawful transaction with a minor for offenses that occurred between February 2006 and November 2010. Appellant initially pled not guilty to all charges. However, on January 30, 2012, the second morning of trial, Appellant withdrew his not guilty pleas and entered an *Alford*<sup>1</sup> plea of guilty to ten counts of second-degree rape and five counts of first-degree sexual abuse. He was subsequently sentenced to a total of fifteen years' imprisonment.

On August 7, 2013, Appellant filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42. Therein, Appellant contended that (1) the indictment violated his due process rights because it failed to specify any dates, times, actions or circumstances upon which the charged offenses occurred; (2) his counsel was ineffective for failing to appeal the trial court's denial of his motion to quash the indictment based upon the same due process grounds; and (3) his plea was not knowing and voluntary. The Commonwealth did not file a response to

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 915 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Appellant's RCr 11.42 motion. The record indicates that on February 9, 2014, Appellant sent a letter to the circuit court clerk inquiring about the status of his motion and on June 30, 2014, filed a renewed copy of the motion.

In October 2015, Appellant filed a *pro se* supplemental RCr 11.42 motion alleging additional claims of ineffective assistance of counsel, including counsel's failure to investigate Appellant's claim that he had been in a severe car accident and was hospitalized and under heavy medication during part of the time period in question, and also his claim that the victims had a motive to lie. Again, the Commonwealth did not file a response to Appellant's supplemental motion.

In June 2016, Appellant filed a *pro se* motion for resentencing pursuant to KRS 532.050 based on a corrected presentence investigation report (PSI). Therein, Appellant argued that his PSI contained false, misleading and irrelevant information and that such caused him to be mis-classified by the Department of Corrections (DOC). Appellant argues that his counsel was aware of errors in the report and assured him that the report would be corrected. However, Appellant contends that counsel never followed through and, in fact, conspired with the court clerk to prevent correction of the report. The Commonwealth responded that Appellant and counsel confirmed on the morning of sentencing that

they had reviewed the PSI report and did not refute the contents thereof.<sup>2</sup> Further, the Commonwealth pointed out that although Appellant's motion identify numerous page, paragraph and line numbers where he contended the information was wrong, he did not actually explain what the perceived errors were. Finally, the Commonwealth argued that Appellant did not contend the PSI affected his sentence but rather his classification by the DOC, which is an administrative issue. any errors with the PSI. By order entered September 14, 2016, the trial court denied Appellant's motion. Appellant filed a *pro se* appeal in this Court on October 3, 2016 (2016-CA-1479).

In the interim, however, on September 22, 2106, Appellant filed a *pro se* Petition for a Writ of Mandamus in this Court requesting that we issue a writ directing the trial court to rule upon the merits of his RCr 11.42 motions. On October 4, 2016, the trial court entered an order denying Appellant's RCr 11.42 motion. On that same day, the trial court filed a response in this Court to the mandamus action, stating,

While this Petitioner has filed a number of *pro se* motions and while this Court has attempted to diligently review and rule upon these various *pro se* motions, upon review of the file in this matter, this Court cannot find where it has ruled upon the Petitioner's RCr 11.42

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<sup>2</sup> Counsel commented during the hearing that there were several technical errors and that he would file a memorandum to correct such. Defense counsel did subsequently file a memorandum on June 21, 2012, correcting the technical error, none of which were relevant to the sentencing itself.

motion. The Court does not have all of the record in this case as a portion of the record is still at the Court of Appeals. In order to simplify this matter, the Court has on this date issued its Order overruling Petitioner's pro se motion for relief pursuant to RCr 11.42.

Appellant filed a *pro se* appeal in this Court on October 18, 2016 (2016-CA-001559). By Order of this Court entered on January 23, 2017, the two appeals were consolidated.

2016-CA-001469

In this Court, Appellant argues that he is entitled to be resentenced because the trial court relied upon a PSI that contained false and misleading information. Further, Appellant contends that use of the incorrect PSI resulted in him being mis-classified by the DOC. We find Appellant's arguments to be without merit.

KRS 532.050(6) provides in relevant part,

(1) No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation.

...

(6) Before imposing sentence, the court shall advise the defendant or his or her counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court

shall provide the defendant's counsel a copy of the presentence investigation report. It shall not be necessary to disclose the sources of confidential information.

Appellant complains that although he reviewed the PSI with counsel, he was unable to truly understand its contents or its effect on his conditions in prison because he was heavily medicated. We find Appellant's reliance on KRS 532.050(6) to be misplaced. The record indicates that the trial court followed the requirements of that statute. Defense counsel was provided a copy of the PSI prior to the sentencing hearing and discussed the contents with Appellant as shown by counsel's statement on the record that there were no corrections to the PSI necessary prior to sentencing. The trial court also specifically asked Appellant if he had reviewed the PSI, which he replied affirmatively. As such, the record establishes that Appellant was aware of and given a fair opportunity to controvert the contents of the PSI. *See Commonwealth v. Bush*, 740 S.W.2d 943 (Ky. 1987). The statute does not require the trial court to correct a PSI after the conviction has become final. Thus, the trial court complied with the requirements of KRS 532.050(6).

Furthermore, even if Appellant could raise a belated challenge to the PSI, he has not shown that any misinformation in the PSI has actually negatively affected his conditions of imprisonment. First, it is unclear that the substantive information in the PSI was actually incorrect. While Appellant challenges several

items in the report, he fails to explain in what manner any are “false or misleading.” In addition, it is well established that a prisoner has no inherent right to a particular security classification or to be housed in a particular institution.

*Mahoney v. Carter*, 938 S.W.2d 575, 576 (Ky. 1997).

Appellant has not demonstrated that he suffered any cognizable injury because of alleged inaccuracies or problems with the content of the PSI. Consequently, we conclude that the trial court did not err in denying his motion for resentencing.

2016-CA-001559

In this Court, Appellant argues that (1) the trial court erred in summarily overruling his motion in response to the mandamus action; (2) trial counsel rendered ineffective assistance which resulted in him entering an *Alford* plea “while under influence of pain medication”; and (3) the trial court erred in denying an evidentiary hearing where the grounds asserted in his motion could not be refuted from the record. The Commonwealth responds that Appellant’s motion was subject to summary dismissal because it was not verified, and further that the motion was “an improper, successive motion under RCr 11.42(3) since another appeal on an RCr 11.42 motion is pending in [2014]-CA-000169.”<sup>3</sup>

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<sup>3</sup> The Commonwealth erroneously cited to 2016-CA-000169, which is actually styled *Hammons v. Commonwealth*.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only “if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (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 pled guilty, but would



have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). See also *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to “consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel.” *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (quoting *Bronk*, 58 S.W.3d at 486 (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

The Commonwealth erroneously argues that this is Appellant's second appeal from the denial of an RCr 11.42 relief. A cursory review of the court records indicates that Appellant's 2014 appeal concerned a separate issue. As the trial court did not rule on the RCr 11.42 motion until 2016, Appellant could not have appealed his claims in 2014. Furthermore, we need not reach the merits of Appellant's appeal because we are of the opinion that his motion was not afforded sufficient review in the trial court. As previously noted, an evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). However, the trial court was obligated to conduct a review of the record to determine if Appellant's claims could, in fact, be refuted from the record. Herein, it is clear from the trial court's response to the mandamus action in this Court that it was not even in possession of the entire record at the time it summarily denied Appellant's motion. Given that Appellant had filed his original RCr 11.42 motion three years earlier and the Commonwealth had not responded to Appellant's claims, we simply cannot conclude that the trial court's consideration of Appellant's RCr 11.42 motions was sufficient. As such, this matter must be remanded to the trial court for review of Appellant's claims in light of the full record.

The trial court's order in 2016-CA-001479 denying Appellant's motion for resentencing is affirmed. The trial court's order in 2016-CA-001559 denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is vacated and the matter is remanded to the Edmonson Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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