

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002884-MR

HULEN JUNIOR WARRINER

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 93-CR-013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GARDNER, KNOPF, AND MCANULTY, JUDGES.

KNOPF, JUDGE. Hulen Junior Warriner (Warriner) appeals, pro se, from an order of the Russell Circuit Court which denied his motion to vacate, set aside or correct sentence pursuant to RCr 11.42. We affirm.

In April 1993, a Russell County Grand Jury indicted Warriner for murder, KRS 507.020. Before trial, the circuit court granted a motion by Warriner's trial counsel to commit him to the Kentucky Correctional Psychiatric Center (KCPC) in order to determine if Warriner was competent to stand trial. Based on the evaluation conducted at KCPC and evidence presented at a hearing held on October 21, 1993, the circuit court found

Warriner competent to stand trial. On March 21, 1994, the circuit court accepted Warriner's motion to enter a plea of guilty on the amended charge of first-degree manslaughter, KRS 507.030, and sentenced him to imprisonment for eighteen (18) years.

On September 24, 1997, Warriner filed a motion for appointment of counsel, a motion for an evidentiary hearing, a motion for findings of fact and conclusions of law pursuant to CR 52.01, and an RCr 11.42 motion. On October 30, 1997, the circuit court denied Warriner's RCr 11.42 motion without a hearing. This appeal followed.

When the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing or appointment of counsel is required. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

In Warriner's RCr 11.42 motion, he alleges that: (1) the circuit court failed to conduct a competency hearing; (2) he was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution; (3) the imposition of fifty percent (50%) of his sentence was arbitrary,

and; (4) he was not afforded the opportunity to controvert the contents of his Presentence Investigation (PSI) report.

The circuit court erroneously found that Warriner had filed his RCr 11.42 motion outside the three (3) year time period required by RCr 11.42(10). This finding was based on the time period that ran between the date of Warriner's judgment of conviction, March 21, 1994, and the date he filed his RCr 11.42 motion, September 24, 1997. RCr 11.42(10) states: "[i]f the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule." Because Warriner's judgment of conviction became final before the effective date of the rule, which was October 1, 1994, Warriner had until October 1, 1997 to file his RCr 11.42 motion. Warriner's RCr 11.42 motion was timely filed on September 24, 1997. While the circuit court erred in its interpretation of RCr 11.42(10), it did address the merits of Warriner's motion.

Warriner alleges that the circuit court failed to conduct a competency hearing. The record, however, establishes that the circuit court did conduct a competency hearing on October 21, 1993. Warriner does not contest the evidence presented at the hearing or the circuit court's judgment; his challenge is separately based solely on his mistaken belief that a hearing did not take place.

Second, Warriner claims that he was denied effective assistance of counsel because his trial counsel failed to investigate the defenses of insanity and extreme emotional

disturbance; failed to hire or present any expert witnesses during the penalty phase; and failed to investigate the law, facts, and circumstances of the case. In order to succeed on a claim of ineffective assistance of counsel, Warriner must show:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.

Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990);

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80

L.Ed.2d 674 (1984). Warriner has failed to demonstrate that his trial counsel's performance was deficient in any manner.

The record shows that trial counsel moved the court to have at least one psychologist or psychiatrist examine Warriner. Pursuant to KRS 504.070, Warriner's trial counsel also gave notice that he intended to introduce evidence concerning mental illness and/or mental defect. Warriner's claim that trial counsel failed to investigate the defenses of insanity and extreme emotional disturbance is rebutted by the record.

Next, Warriner argues that his trial counsel failed to call his doctor as a witness during the penalty phase to offer mitigating evidence. Failing to produce a witness for the defendant is not error absent an allegation that the testimony of the witness would have compelled a significantly more favorable result. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986). Warriner does not specify who his doctor was or what

mitigating evidence he or she would have presented. Warriner's unsupported allegation does not rise to the level of ineffective assistance of counsel nor does it meet the standard of specificity established in RCr 11.42(2).

Warriner next claims that his trial counsel failed to investigate the law, facts, and circumstances of his case. As just noted, RCr 11.42(2) requires a movant to state specifically the grounds for challenging a conviction and the specific facts in support of such grounds. Mere allegations without specific demonstrations of prejudice are subject to summary dismissal. Lucas v. Commonwealth, Ky., 465 S.W.2d 267 (1971). Warriner has failed to allege any specific facts to support his bare allegation.

Third, Warriner argues that fifty percent (50%) of his sentence was arbitrary because he was not sentenced in accordance with KRS 532.025(2) and (3). The sentencing requirements set forth in KRS 532.025 are only applicable when the death penalty is a sentencing option. Thus, they were not applicable to Warriner's conviction of first-degree manslaughter.

Finally, Warriner alleges that he was denied the opportunity to controvert the contents of the PSI report. Warriner does not challenge the contents of the PSI report, but challenges the fact that he did not receive a copy of the PSI report prior to sentencing. This argument fails because Warriner was not entitled to receive an actual copy of the PSI report. See Commonwealth v. Bush, Ky., 740 S.W.2d 943, 944 (1987). The

record establishes that Warriner had the opportunity to controvert the PSI report but he chose not to do so.

For the reasons stated above, the order of the Russell Circuit Court denying Warriner's RCr 11.42 motion without an evidentiary hearing is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hulen Junior Warriner  
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky