

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

NO. 2008-CA-000762-MR

GARY D. OVERBAY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 05-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Gary D. Overbay appeals the order of the Laurel Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, we affirm.

On April 28, 2005, at a Dollar General Store, Overbay became involved in an altercation and shot a man. As a result of the shooting, a Laurel County grand jury indicted Overbay for first-degree assault and carrying a

concealed deadly weapon. On December 16, 2005, Overbay entered a guilty plea to the charges listed in his indictment in exchange for the Commonwealth's recommendation of a ten-year sentence.

During its plea colloquy with Overbay, the trial court asked him if he suffered from a past mental illness, current mental illness, or suffered from any other mental illness that would impair his judgment. Overbay responded in the negative. The trial court then specifically asked Overbay if he was under the influence of alcohol or drugs to which Overbay responded no. In response to the trial court's questions regarding the adequacy of his legal representation, Overbay stated that he was satisfied with his counsel, that he had no complaints with counsel's performance, and that his counsel complied with all of his requests.

At the conclusion of the plea colloquy, the trial court found that Overbay's guilty plea was knowing, voluntary, and intelligent. On January 20, 2006, the trial court sentenced Overbay in accordance with his guilty plea. On August 9, 2007, Overbay filed a motion pursuant to RCr 11.42 to vacate his conviction, alleging ineffective assistance of counsel. Subsequently, the trial court issued an order denying Overbay post-conviction relief. This appeal follows.

Overbay first argues that he was denied his constitutional right to effective assistance of counsel due to his counsel's failure to investigate the facts of his case and to prepare for trial. Overbay claims that his counsel did not discuss discovery with him, refused to investigate his claim of self-defense, and refused to

interview mitigating witnesses. Therefore, Overbay argues that his conviction must be vacated. We disagree.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the two-step test promulgated in *Strickland* is modified when the ineffective assistance claim is alleged to have resulted in the involuntary, unintelligent, and unknowing entry of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); see *Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky.App. 1996).

Pursuant to the two-step modified test, as stated in *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990), the defendant must demonstrate the following:

(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.

Finally, courts must analyze a defense counsel's performance under the presumption that counsel rendered reasonable professional assistance. *Shegog v. Commonwealth*, 275 S.W.3d 728, 730 (Ky.App. 2008).

We conclude that Overbay's arguments are lacking in the specificity required to warrant post-conviction relief and, thus, find no constitutional error.

While he makes broad generalizations of counsel error, he fails to state what evidence his counsel could have found to support his self-defense claim and what mitigating witness was willing and available to testify on his behalf. Without specific factual claims of error and prejudice, a defendant will not be entitled to post-conviction relief. *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Moreover, his claims are clearly refuted by the record. During his plea colloquy, he informed the trial court that he was satisfied with his counsel's representation, that his counsel complied with all of his requests, and that his counsel had fully discussed the nature of his case, including his possible defenses. While Overbay now claims error, his open-court declarations must be given a strong presumption of truthfulness, and his subsequent presentation of allegations that are refuted on the face of the record were subject to summary dismissal. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006).

Overbay next argues that his counsel coerced him into entering a guilty plea while he was under the influence of mind-altering drugs. He claims that his health problems and consumption of multiple medications rendered him mentally incapable of entering into a guilty plea. Based on his reduced mental state, he contends that his counsel's failure to prevent him from pleading guilty constituted ineffective assistance and necessitates the vacating of his conviction. We disagree.

In *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986), this Court stated that RCr 11.42 allegations that are clearly refuted on the face of the record are not entitled to relief. *Id.* at 727-28. In this case, during his plea colloquy, Overbay informed the trial court that he was not under the influence of any drugs or alcohol. In response to Overbay's drug claims in its order denying him relief, the trial court wrote the following:

The record reveals that the Movant appeared alert and coherent at the time when he entered his guilty plea. Movant stated that he was not operating under a disease or defect that would impact his ability to think or reason. Further and as previously mentioned, Movant assured the Court that he was satisfied with the performance of his attorneys at the time of his colloquy.

Our courts allocate great significance to an individual's sworn, open-court declarations. *Edmonds*, 189 S.W.3d at 569. Accordingly, based on Overbay's open-court declarations and the trial court's finding that Overbay was alert, coherent, and not under the influence of drugs, we conclude that Overbay's counsel did not commit constitutional error by permitting him to plead guilty. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007) (when reviewing an RCr 11.42 appeal, an appellate court must defer to the trial court's findings of fact and determinations of witness credibility).

We finally note that Overbay made a third argument in his brief, which is essentially identical to his first argument. The only difference is that he alleges that the shooting victim told several people that he was going to kill Overbay. While this marks Overbay's first attempt at specificity, he fails to state

the names of the witnesses who heard the victim or, if he did not know their names, how and when he became aware of this evidence. Without these necessary details, in light of Overbay's in-court declarations, the trial court properly found that he was not denied effective assistance of counsel due to his counsel's failure to investigate. *Edmonds*, 189 S.W.3d at 569.

For the foregoing reasons, the order of the Laurel Circuit Court denying Overbay post-conviction relief is affirmed.

ALL CONCUR.

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