

RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002097-MR

PAUL DWAYNE YORK

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 05-CR-00562

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

TAYLOR, JUDGE: Paul Dwayne York brings this *pro se* appeal from an October
9, 2008, Order of the Boone Circuit Court summarily denying his Kentucky Rules

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

of Criminal Procedure (RCr) 11.42 motion to vacate judgment and sentence of imprisonment. We affirm.

York was indicted by the Boone County Grand Jury upon the charge of first-degree robbery and with being a second-degree persistent felony offender. Pursuant to a plea agreement with the Commonwealth, York pleaded guilty to second-degree burglary and was sentenced to ten-years' imprisonment.

Eventually, York filed an RCr 11.42 motion to vacate his judgment of imprisonment. York claimed that trial counsel was ineffective for advising York to plead guilty when the indictment was not properly amended to charge him with second-degree burglary, instead of first-degree burglary. By order entered October 9, 2008, the circuit court denied York's motion without an evidentiary hearing. This appeal follows.

York contends the circuit court erred by summarily denying his RCr 11.42 motion to vacate his sentence of imprisonment.

To prevail, York must demonstrate that trial counsel's assistance was deficient and that such deficiency was prejudicial; i.e., that York would not have pleaded guilty but would have insisted upon a jury trial. *See Sparks v. Com.*, 721 S.W.2d 726 (Ky. App. 1986). And, to be entitled to an evidentiary hearing, York must raise claims for relief that cannot be refuted upon the face of the record. *See Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). For the reasons hereafter stated, we believe the circuit court properly denied York's RCr 11.42 motion without an evidentiary hearing.

York argues that trial counsel was ineffective when counsel:

- (a) permitted, without objection, the attorney for the [C]ommonwealth to amend the charge to a different offense;
- (b) allowed prosecution by an invalid information, i.e., the AOC 491.1 form;
- (c) failed to insure that the proper procedures were followed for a valid waiver of an indictment;
- (d) failed to insure that the record preceding the acceptance of waiver to an indictment affirmatively set out facts which would permit an independent determination of its validity; [and]
- (e) failed to protect [sic] the appellant's rights to be rearranged on the amended and different charge.

York's Brief at 16.

Essentially, York believes that the indictment should have been amended to charge him with second-degree burglary before he entered the guilty plea under the plea bargain. We are not convinced that failure to so amend the indictment was error; nevertheless, we are convinced that any alleged error was non-prejudicial. Stated simply, York has failed to demonstrate that he would not have entered a guilty plea but would have insisted upon a jury trial.

In his brief, York claims that "prejudice is apparent" and somewhat curiously argues:

By changing the charge to burglary second degree the Commonwealth knew that it would be in a better position to obtain a conviction. However, if the appellant had went [sic] to trial on the charge of robbery he most certainly would have been acquitted, or, at most, he

would have been only convicted of the lesser included offense of “Theft by Unlawful Taking.”

York’s Brief at 17. York completely fails to demonstrate prejudice – how the amendment of the indictment to second-degree burglary per the plea agreement would have affected his decision to plead guilty. Consequently, we conclude that York’s allegation of ineffective assistance of trial counsel was refuted upon the face of the record.

York also asserts that his post-conviction counsel rendered ineffective assistance in preparing his RCr 11.42 motion filed in the circuit court. We disagree.

York filed a *pro se* RCr 11.42 motion. He alleges that Rebecca Murrell, an attorney employed by the Department of Public Advocacy, volunteered to draft the RCr 11.42 motion. For obvious reasons, York did not bring this issue before the circuit court. However, we are a court of review and ordinarily will only review issues initially decided by the lower court. *See Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006); *Swatzell v. Com.*, 962 S.W.2d 866 (Ky. 1998), *overruled on other grounds by Rapier v. Philpert*, 130 S.W.3d 560 (Ky. 2004). However, we do not believe York has demonstrated entitlement to relief upon the events.

York claims that post-conviction counsel failed to investigate the facts and law and failed to set forth all claims of relief in the RCr 11.42 motion. In particular, York claims that post-conviction counsel failed to claim “prejudice” in the RCr 11.42 motion.

As to failure to investigate the facts, York does not point to any particular facts or evidence but merely makes general arguments. Such generalized arguments are insufficient to afford York relief under RCr 11.42. And, as to failure to set forth all claims of relief in the RCr 11.42 motion, the RCr 11.42 motion stated that “[t]he potential adverse impact to Defendant of allowing this invalid conviction to stand is significant.” It appears that post-conviction counsel raised appropriate claims considering the facts of this case. Upon the whole, we do not think post-conviction counsel was ineffective in preparing the RCr 11.42 motion.

York also claims that errors were committed during the trial proceedings. RCr 11.42 is not a substitute for a direct appeal or for a Kentucky Rules of Criminal Procedure (CR) 60.02 motion. *Cinnamon v. Com.*, 455 S.W.2d 583 (Ky. 1970). These errors are not cognizable in an RCr 11.42 motion. We, thus, will not address same.

In sum, we conclude that the circuit court properly denied York’s RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the Order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul Dwayne York, *Pro Se*
St. Mary, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky