

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

NO. 2009-CA-000249-MR

CHARLES DAVIS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 01-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

ACREE, JUDGE: Charles Andrew Davis, Jr. appeals the Franklin Circuit Court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his conviction. Finding no manifest injustice, we affirm.

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<sup>1</sup> 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 KRS 21.580.

On June 18, 2001, Davis was indicted on two counts of trafficking in a controlled substance in the first degree and one count of attempt to commit trafficking. Following a jury trial, Davis was found guilty and sentenced to fifteen years imprisonment and a \$500 fine.

On direct appeal, this Court affirmed Davis's convictions on the trafficking counts, but reversed the conviction of attempt to commit trafficking, finding there was insufficient evidence to support the charge.

Davis filed a collateral attack to his conviction in a motion pursuant to RCr 11.42, alleging ineffective assistance of counsel. The circuit court denied his motion without conducting a hearing. This appeal followed.

Davis argues the trial court improperly ruled upon his motion without conducting an evidentiary hearing. Further, he asserts his trial counsel was deficient in the following respects: 1) failing to object to the testimony of the Commonwealth's key witness, a confidential informant, and generally to question the witness's credibility; 2) failing to contest the admissibility of certain evidence because the Commonwealth did not establish the chain of custody; 3) failing to adequately investigate the circumstances surrounding the events which led to Davis's arrest; 4) failing to move for a directed verdict; and 5) failing to raise the defense of entrapment.

At the outset, we must address the Commonwealth's observation that Davis's appellate brief does not conform to the requirements of Rule of Civil

Procedure (CR) 76.12; it is not in the proper format and contains no citations to the record. Pursuant to CR 76.12 (8)(a), “[a] brief may be stricken for failure to comply with any substantial requirement of this Rule[.]” However, we will review Davis’s arguments for manifest injustice. *Elwell v. Stone*, 779 S.W.2d 46 (Ky. App. 1990).

RCr 11.42 permits a person convicted of a crime to collaterally attack his sentence if he believes he received ineffective legal assistance from his trial attorney. The Rule requires a defendant to “state specifically the grounds on which the sentence is being challenged and the facts on which [he] relies in support of such grounds.” RCr 11.42(2).

A circuit court must conduct an evidentiary hearing on the allegations raised in an RCr 11.42 motion when a defendant “raises a material issue of fact that cannot be determined on the face of the record[.]” RCr 11.42(5). However, when there is nothing outside the record which is material to the determination, a hearing is not necessary. *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990).

Davis’s claims that an evidentiary hearing was necessary are vague and unsupported by specific facts. He had not identified what testimony, or even whose testimony, was required to supplement the record. Likewise, he has not identified portions of the record which are insufficient to resolve his motion. Instead, he claims, “if granted an Evidentiary Hearing, [he] would have raised issues on the Record that would have reflected towards errors made that were

obviously on the record and could not have been refuted.” Davis himself, then, agrees these errors were “obviously on the record.” Without a more specific statement that he needed to present information which was not already part of the record, we cannot say the circuit court’s refusal to conduct a hearing constituted manifest injustice.

To prevail on a claim of ineffective assistance, Davis must show both that his attorney’s performance was deficient and that, but for counsel’s deficient performance, there is a reasonable probability that the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The burden of showing prejudice is on the defendant. *Stanford v. Commonwealth*, 854 S.W.2d 742, 747 (Ky. 1993). Prejudice cannot be established by mere speculation. *Kinser v. Commonwealth*, 741 S.W.2d 648, 653 (Ky. 1987).

The two elements of a claim of ineffective assistance of counsel, deficient performance and prejudice, can be addressed in any order. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

Accordingly, we first address the prejudice element. Davis has not met his burden with respect to this portion of the *Strickland* test because he has not argued that the outcome of his trial would have been different but for trial

counsel's supposed errors. Absent such an allegation and accompanying factual support, we presume any error was harmless.

Because there is no allegation of prejudice to examine, we need not assess counsel's performance. Davis has raised insufficient arguments to support a finding of palpable error.

We are unable to find manifest injustice in the circuit court's denial of Davis's RCr 11.42 motion. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles Davis, *Pro se*  
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BRIEF FOR APPELLEE:

Jack Conway  
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