

RENDERED: NOVEMBER 23, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000314-MR

CHRISTOPHER A. BAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 05-CR-001086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

TAYLOR, CHIEF JUDGE: Christopher A. Baker brings this appeal from a

November 10, 2009, order of the Jefferson Circuit Court denying Baker's

Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary

hearing. We affirm.

In March 2005, Baker was indicted upon the offenses of first-degree assault arising from a fight with two men who he alleged attacked him. Baker was indicted for being a first-degree persistent felony offender (PFO I). A jury trial ensued; Baker's defense was that he acted in self-defense. Ultimately, the jury found Baker guilty of first-degree assault. Before the sentencing phase of trial, Baker and the Commonwealth reached a plea agreement. In accordance therewith, Baker entered a guilty plea to being a PFO I, and the Commonwealth recommended the minimum possible sentence of twenty-years' imprisonment. In its final judgment entered on October 2, 2006, the court sentenced Baker to twenty-years' imprisonment.

Subsequently, in September 2009, Baker filed an RCr 11.42 motion seeking to vacate his judgment and sentence of imprisonment. Without conducting an evidentiary hearing, the circuit court denied the RCr 11.42 motion, thus precipitating this appeal.

Baker contends that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Specifically, Baker argues material facts exist entitling him to a hearing. Baker argues that trial counsel failed to investigate and subpoena witnesses and failed to obtain exculpatory evidence.

To prevail, Baker must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And, Baker is only entitled to an evidentiary hearing if there are allegations that cannot be

conclusively resolved upon the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). Our review proceeds accordingly.

To begin, Baker asserts that trial counsel was ineffective for failing to call three witnesses to testify at trial. One of these witnesses, Frederick German, could not be located, as was evidenced by an affidavit of an investigator of the public defender's office. This affidavit is contained in the record.

As to the other two witnesses, Duane Visel and Willie Todd, Baker merely alleges that they likely witnessed the alleged assault but were never interviewed by trial counsel. Baker, likewise, claims that a videotape of the assault may have existed and that trial counsel should have obtained this tape.

Baker, however, fails to allege that Visel and Todd's testimony would have been exculpatory. Both Visel and Todd were employees at a liquor store where the assault allegedly originated. However, it was unclear whether either witnessed the actual assault as it took place outside the store. And, there is only speculation as to the existence of a video recording of the assault. Simply stated, we do not believe that Baker's allegations were sufficient to entitle him to an evidentiary hearing. *See Ringo v. Commonwealth*, 391 S.W.2d 392 (Ky. 1965).

In sum, we conclude that Baker's allegations of ineffective assistance of trial counsel were adequately refuted upon the face of the record. Thus, the circuit court properly denied Baker's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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