

RENDERED: February 13, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 96-CA-00761-MR

TRACY D. WILSON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 87-CR-001182

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**  
**AFFIRMING**

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BEFORE: ABRAMSON, GARDNER and JOHNSON, Judges.

JOHNSON, JUDGE: Tracy Wilson (Wilson) appeals from an order entered by the Jefferson Circuit Court on February 20, 1996, that denied his motion to vacate or set aside his sentence and his motion for an evidentiary hearing made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Having found no error, we affirm.

During the months of March, April, May and June of 1987, Wilson and three co-defendants committed a series of robberies of convenience stores and fast-food restaurants in Jefferson County, Kentucky. On August 5, 1987, a grand jury returned a twenty-five (25) count indictment against Wilson and three co-defendants that listed the names of several of the robbery victims and also listed

other robbery victims merely as "an employee of Taco Bell", "an employee of Convenient Food Mart", and "a customer of Sav-A-Step". Wilson entered an Alford guilty plea<sup>1</sup> to nine counts of robbery in the first degree in violation of Kentucky Revised Statutes (KRS) 515.020 and one count of wanton endangerment in the first degree in violation of KRS 508.060. Judgment was entered on February 10, 1988, and the trial court sentenced Wilson to prison for fifteen (15) years based upon the Commonwealth's recommendation of fifteen (15) years on each robbery count, and one year on the wanton endangerment count, with all ten counts to run concurrently for a total of fifteen (15) years in prison.

On February 12, 1996, Wilson, pro se, filed motions for post-conviction relief pursuant to RCr 11.42. Wilson alleged that the indictment was deficient because it failed to specifically name the employees and customers who were robbed and because it was based upon uncorroborated statements from his co-defendants. Wilson also alleged that his trial counsel was ineffective for failing to discover these alleged insufficiencies. On February 16, 1996, the trial court granted the motion to proceed in forma pauperis by writing "Granted" on the motion. However, the trial court denied the motion to vacate or set aside the sentence and the motion for a full evidentiary hearing by writing "Denied" on those motions. This appeal followed.

Wilson makes four arguments on appeal: (1) that the indictment charged no offense because it failed to name a robbery

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 167 (1970).

victim by name; (2) that the indictment was improperly based upon uncorroborated statements of his co-defendants; (3) that trial counsel rendered ineffective assistance in failing to properly investigate the case and raise the alleged indictment errors; and (4) that the trial court erred in denying the motion for a full evidentiary hearing.

Wilson's first argument is that six of twenty-five counts of the indictment failed to charge an offense because they did not refer to the robbery victim by name. Wilson contends that since counts three, four, nine, ten, thirteen, fourteen and fifteen of the indictment mention the victims as "an employee . . ." or as "a customer . . .", he is entitled to relief pursuant to Stark v. Commonwealth, Ky., 828 S.W. 2d 603 (1992). In Stark, the indictment stated that the offense was committed "upon Moby Dick Restaurant" and, in other counts, upon 4-Star Video, Hardees Restaurant and Spalding Cleaners. The Supreme Court of Kentucky held that only a person can be the victim of a robbery and that the reference to a business as a victim was not sufficient. Id. at 606. The Commonwealth argues that Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996), which overruled Stark, is dispositive of Wilson's claim of error. In Thomas, the Supreme Court stated that "if the defense needs details to adequately prepare, the defense 'should be supplied them through a requested bill of particulars, rather than that a requirement be made that every indictment set forth all details of the charge.'" Id. at 450, quoting Finch v. Commonwealth, Ky., 419 S.W.2d 146, 147 (1967).

Our review of the indictment herein leads us to conclude that the indictment did not fail to name a person who was robbed. Simply because the indictment failed to designate a specific person as the victim by providing his or her name does not mean that it failed to designate a person. "An employee" or "a customer" is necessarily a person. Wilson was not entitled to relief.

The second issue that Wilson raises is whether the uncorroborated testimony of his co-defendants was sufficient to support the grand jury indictment. However, "[t]he legality and sufficiency of evidence heard by a grand jury is not subject to review in this Court." Harrell v. Commonwealth, Ky., 328 S.W.2d 531, 532 (1959), citing Rice v. Commonwealth, Ky., 288 S.W.2d 635 (1956). As explained in the United States Supreme Court case of Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956), and quoted in Rice,

Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict.

Rice, 288 S.W.2d at 638. Thus, Wilson's argument regarding the alleged insufficiency of the evidence before the grand jury is without merit.

Next, we address Wilson's claim that he received ineffective assistance of counsel. Wilson alleges that his trial counsel rendered ineffective assistance by not recognizing and acting upon the alleged deficiency in the indictment. To show that counsel's assistance was ineffective, Wilson must prove that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). "In the absence of a showing that some alternative action by counsel would have compelled a mistrial or a dismissal . . . ineffective assistance will rarely be shown." Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986). Since there was no error in the indictment for counsel to discover, obviously trial counsel's assistance could not be deemed to be ineffective.

As his final argument, Wilson claims that the trial court erred by denying him an evidentiary hearing. Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727 (1986), states as follows:

Where, as here, 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 is required. Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).

The arguments Wilson made in his motion are refuted on the face of the record; and therefore, no evidentiary hearing was required.

The order of the Jefferson Circuit Court denying Wilson RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tracy D. Wilson, Pro Se  
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BRIEF FOR APPELLEE:

Hon. A.B. Chandler, III  
Attorney General

Hon. Karen Quinn  
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