

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-001865-MR

JOSEPH CAVE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NOS. 01-CR-000581 & 01-CR-001996

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Joseph Cave brings this *pro se* appeal from a May 5, 2005, order of the Jefferson Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. We affirm.

Between 1997 and 1999, a series of seven sexual offenses were committed in the Louisville area. The incidents

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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 Kentucky Revised Statutes 21.580.

were known as the "Flashlight Rapes" because the assailant used a flashlight to blind his victims. In November 2002, Cave was arrested for forty-two burglaries committed in the Louisville area. A Louisville Police Detective suspected Cave might also be the flashlight rapist. Subsequently, DNA evidence conclusively linked Cave to all seven sexual offenses. As a result, Cave was indicted and ultimately pleaded guilty to eight counts of burglary, five counts of first-degree rape, four counts of first-degree sodomy, three counts of first-degree sexual abuse, one count of attempted rape, and to being a persistent felony offender in the second-degree. The circuit court sentenced Cave in July 2002, as follows:

BURGLARY I - COUNTS 1 THRU 8 - 20 YEARS  
EACH COUNT ENHANCED TO LIFE BY PFO II

RAPE I - COUNTS 9 THRU 11 - 20 YEARS  
EACH COUNT ENHANCED TO LIFE BY PFO II

RAPE I - COUNTS 12 AND 13 - 20 YEARS  
EACH COUNT ENHANCED TO 24 YEARS BY PFO II

SODOMY I - COUNTS 14 THRU 17 - 20 YEARS  
EACH COUNT ENHANCED TO LIFE BY PFO II

SEXUAL ABUSE I - COUNTS 18 THRU 20 - 5  
YEARS ENHANCED TO 10 YEARS BY PFO II

CRIMINAL ATTEMPT RAPE I - COUNT 21 [-]  
10 YEARS ENHANCED TO 20 YEARS BY PFO II

**PERSISTANT FELON IN THE II - ENHANCED  
ALL CHARGES SEE ABOVE**

Cave's conviction was affirmed on direct appeal by the Supreme Court of Kentucky on February 12, 2004, in Appeal No. 2002-SC-000710-MR.

Cave subsequently filed a *pro se* RCr 11.42 motion to vacate sentence on February 3, 2005. The circuit court summarily denied appellant's motion without an evidentiary hearing by an opinion and order entered May 5, 2005. This appeal follows.

Cave contends the circuit court committed error by denying his RCr 11.42 motion to vacate sentence without conducting an evidentiary hearing. Additionally, Cave contends his guilty plea was not voluntarily and intelligently entered and that he received ineffective assistance of counsel.

When reviewing a circuit court's denial of an RCr 11.42 motion without an evidentiary hearing, we must determine whether movant's allegations are refuted upon the face of the record. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). If material issues of fact exist that cannot be conclusively proved or disproved upon the face of the record, the court is required to conduct an evidentiary hearing. Id. However, conclusory allegations unsupported by specific facts do not justify the court conducting an evidentiary hearing. Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003). Based upon our review of the record

before the circuit court, we find no error in denying Cave an evidentiary hearing.

Having concluded that Cave was not entitled to an evidentiary hearing, we will next address Cave's contention that his guilty plea was not voluntarily and intelligently entered. Cave alleges he "was under the Influence of mental duress and impaired on medication that was prescribed from the Psychiatrist at KCPC" when he entered the guilty plea. Cave maintains that these medications impaired his ability to voluntarily and intelligently enter the guilty plea.

To constitute a valid guilty plea, the plea must have been a "voluntary and intelligent choice among the alternative course[s] of action open to the defendant." Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). In reviewing a guilty plea, the totality of the circumstances surrounding entry of the plea must be considered. Kotas v. Commonwealth, 565 S.W.2d 445 (Ky. 1978).

In this case, the circuit court pointed out that the record conclusively demonstrated the court engaged in an extensive guilty plea colloquy with Cave upon the voluntariness of his plea and waiver of his constitutional rights. The circuit court stated that Cave expressed he was satisfied with the advice of his counsel, had never been treated for a mental illness and was not currently under the influence of alcohol,

drugs, or narcotics. The court further stated Cave agreed he had been evaluated and found competent to stand trial. Thus, the circuit court concluded that Cave's contention regarding the voluntary and intelligent nature of his guilty plea was refuted upon the face of the record. We agree with the circuit court's reasoning on this issue and can find no error.

We now turn to Cave's contentions that he received ineffective assistance of trial counsel. The proper standard for reviewing claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985); Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998). The Strickland standard requires a showing that (1) trial counsel's performance was deficient as it fell outside the range of professionally competent assistance and (2) such deficiency was prejudicial as there existed a reasonable probability that the outcome would have been different if not for counsel's performance. Strickland, 466 U.S. 668. Furthermore, the burden is upon the moving party to overcome the strong presumption that trial counsel's performance was sufficient or may be considered trial strategy. Id.

Cave specifically contends his trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence during the sentencing phase of the trial.

Cave asserts that trial counsel failed to present any evidence to demonstrate that Cave "was a lifelong resident of Louisville, he was raised in a Catholic Family and attended Catholic School . . . ." Cave's Brief at 10. Cave further complains that trial counsel failed to interview any members of his family, review any of his school records, or compile any information regarding his work history.

The record reflects that at the time of the sentencing hearing, Cave was serving a thirty-year sentence in a separate case for forty-four counts of burglary. At the hearing, six of Cave's victims testified regarding the devastating impact of the sexual crimes he committed against them. Given the heinous nature of the crimes committed and the amount of evidence amassed against Cave, we cannot say that there was a reasonable probability that presentation of mitigating evidence would have affected the outcome of the proceedings. Thus, we cannot conclude that trial counsel was ineffective for failing to produce the evidence at the hearing.

Cave's final contention is that he received ineffective assistance of counsel "when counsel failed to advise him of a viable defense pertaining to the DNA Evidence that linked Cave to the Flashlight rapes." Cave merely makes this conclusory allegation without supplying any supporting facts.

Absent specific facts to support Cave's conclusory allegations, the circuit court correctly denied Cave's RCr 11.42 motion.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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