RENDERED: DECEMBER 7, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000641-MR

KELVIN W. REED — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 1999-CR-001385

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Kelvin Reed appeals from the denial by the Jefferson Circuit Court of his RCr 11.42 motion, following his conviction of burglary in the third degree, possession of burglar's tools and persistent felony offender in the second degree (PFO II). For the reasons stated below, we affirm.

The factual background of this case is as follows. Reed was indicted by the Jefferson County Grand Jury on June 7, 1999 for burglary in the second degree,

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

possession of burglary tools, theft of motor vehicle registration plate, all charges which stem from allegations that on March 6, 1999, Reed burglarized a gas station in Jefferson County.[2] A second indictment was returned on July 20, 1999 charging Reed with being a PFO II. On December 19, 2001, Reed was convicted by a jury in Jefferson Circuit Court on charges of burglary in the third degree and possession of burglary tools. Reed waived jury sentencing and entered a plea of guilty to being a PFO II. He was sentenced to six years' imprisonment. On March 28, 2003, this Court affirmed Reed's conviction in an unpublished opinion,[3] and on December 11, 2003, the Kentucky Supreme Court denied discretionary review.[4] On April 6, 2004, Reed filed a *pro se* motion pursuant to RCr 11.42 alleging ineffective assistance of counsel at his trial. That motion was denied by an order entered February 23, 2006, which also denied his request for an evidentiary hearing. This appeal followed.

Reed raises several issues on appeal: that his attorney failed to pursue a motion to suppress statements made by him while sitting in a police cruiser; that counsel failed to call exculpatory witnesses; and that counsel failed to properly impeach testimony by a lay witness.

We note first that issues which either were or could have been raised on Reed's direct appeal are not proper grounds for a RCr 11.42 motion. *Hodge v.*

[2] Reed was also indicted for five other offenses which occurred on March 24, 1999, and did not relate to the burglary in question.

[3] 2002-CA-000457.

[4] 2003-SC-0325.

Commonwealth, 116 S.W.3d 463 (Ky. 2003); *Sanders v. Commonwealth,* 89 S.W.3d 380 (Ky. 2000) and *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990). Therefore, Reed's argument concerning his counsel's failure to pursue a motion to suppress statements he made while in police custody is not properly raised on this appeal. *See Collier v. Commonwealth*, 387 S.W.2d 858 (Ky. 1965). We will consider only those issues specifically concerning the sufficiency of the legal representation provided to Reed by his attorney.

The legal standard which must be met to show ineffective assistance of counsel under RCr 11.42 was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001):

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so ineffective that defeat was snatched from the hands of probable victory. *Haight*, 41 S.W.3d at 441.

A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if the issues raised in that motion reasonably require such a hearing for a determination. On the other hand, a defendant is not entitled to such a hearing if the motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations

are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965). If an evidentiary hearing is required, the court should appoint counsel to represent him at that hearing if he is indigent and requests such appointment in writing. RCr 11.42(5). If no evidentiary hearing is required, it is not necessary to appoint counsel. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). Applying these principles to the facts of this case, we find no error in the circuit court's ruling.

Reed next claims that his attorney failed to call any exculpatory witnesses on his behalf at trial. In Reed's brief, a vague reference was made about the possibility of his girlfriend being able to testify about his actions before the burglary. But, Reed concedes that she would not have been able to testify to his actions or whereabouts during the burglary. A vague allegation that counsel failed to investigate or call additional witnesses, without offering specifics as to what such witnesses would have said, is insufficient to support a RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002).

Finally, Reed complains that his trial counsel failed to object to opinion testimony given during trial. Reed argues that his counsel was rendered ineffective for failure to object to Carla Murphy's testimony regarding a window pane that had been removed at the gas station, which appeared to be how the burglar entered the premises. Murphy, the owner of the gas station, testified that the window was "removed nicely" and placed outside by a soda machine. Murphy's testimony was rationally based on her own perception of what she personally observed and was helpful in determining a fact in

issue; *i.e*., how the defendant entered the building. The lay testimony clearly falls within the allowable limits of KRE 701, which states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
> (a) Rationally based on the perception of the witness,
> (b)Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
> (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Murphy's testimony was just as admissible as that of the witness in *Howard v. Kentucky Alcoholic Beverage Control Board*, 172 S.W.2d 46 (Ky. 1943), who testified that another person was intoxicated; or that of the witness in *King v. Ohio Valley Fire & Marine Insurance Co.*, 280 S.W. 127 (Ky. 1926), who testified that when he arrived at the scene of a fire, he "smell [ed] gasoline." In fact, the defense counsel at trial questioned Murphy as to her opinion on how the window could have been removed without using tools. Clearly, Murphy's testimony about the window was relevant lay testimony and admissible.

Our review of the record indicates that all of the issues raised by Reed, which go to the question of the effectiveness of his counsel, are either refuted by the record or have no merit on their face. Therefore, he was not entitled to an evidentiary hearing. *Maggard v. Commonwealth, supra; Fraser v. Commonwealth, supra*.

For the reasons set forth above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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