

RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002413-MR

KEVIN PAUL CRUM

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 03-CR-00077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

VANMETER, JUDGE: Kevin Paul Crum appeals *pro se* from the Mercer Circuit Court's order denying his motion for relief pursuant to RCr² 11.42 without an evidentiary hearing. On appeal, Crum argues two instances of ineffective

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

assistance of counsel, and that the circuit court erred by failing to suppress certain evidence. We affirm.

In this court's opinion on direct appeal, we set forth the facts giving rise to this matter as follows:

At approximately 2:00 a.m. on August 30, 2003, the Harrodsburg Police Department received a call from a security guard at Corning Glass Works in Harrodsburg. The security guard reported that a white car had been driven into the parking lot. A white male stepped out of the car and put on a "body armor" type vest. The security guard also reported that the white male put on what appeared to be a wig and a beard and retrieved something from the trunk that resembled a rifle or shotgun.

Sergeant James L. Thomas and Officer Granville Peyton were dispatched to the scene. Sergeant Thomas testified that when he pulled into the Corning parking lot he saw appellant standing next to a white car. He further testified that appellant appeared to place something in the trunk of the car and quickly slammed it shut. Sergeant Thomas approached appellant, and appellant identified himself as a police officer with the Illinois Police Department in Champaign, Illinois. Sergeant Thomas also testified that he noticed what appeared to be the outline of a strap holding body armor underneath appellant's shirt. When questioned about the armor, appellant stated that he wore it at all times.

Eventually, appellant was arrested for third-degree criminal trespass in violation of Kentucky Revised Statutes (KRS) 511.080 and for having an improper registration plate in violation of KRS 186.020. Appellant's car was searched. The search of the vehicle revealed firearms and a note which appeared to be a checklist for the murder of a child and other persons.

The Mercer County Grand Jury indicted appellant upon six counts of attempted murder, one count of

receiving stolen property, one count of carrying a concealed weapon, improper registration plate, and criminal trespass in the third-degree. The Commonwealth alleged that appellant wanted to avoid paying child support so he attempted to murder April Sullivan and her infant child allegedly fathered by appellant. It was also alleged that appellant intended to murder other members of Sullivan's family.

Crum v. Commonwealth, No. 2004-CA-2384-MR, slip op. at 1-3 (Ky.App. Nov. 10, 2005). After the circuit court denied Crum's motion to suppress evidence seized during the search of his automobile, Crum entered a conditional guilty plea to two counts of attempted murder, four counts of wanton endangerment, receiving stolen property, carrying a concealed weapon, improper registration, and criminal trespass. *Id.* at 3. He was sentenced to a total of eighteen years' imprisonment. *Id.* On direct appeal to this court, we affirmed despite Crum's argument that the circuit court erroneously denied his suppression motion.

Thereafter, Crum filed a motion for relief pursuant to RCr 11.42, which the circuit court denied without an evidentiary hearing. This appeal followed.

A circuit court is required to hold an evidentiary hearing regarding an RCr 11.42 motion when "there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). If the allegations can be conclusively resolved by examination of the record, counsel need not be appointed. *Id.* at 453. Since the circuit court did not hold an

evidentiary hearing below, our review is limited to determining whether the motion states, on its face, grounds which were not conclusively refuted by the record and which would invalidate the conviction if true. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

First, Crum argues two instances of ineffective assistance of counsel.

To prove ineffective assistance of counsel, he must establish:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001). When considering the issue of ineffective assistance, a reviewing court must focus on the totality of the evidence before the trial judge, and assess the overall performance of counsel throughout the case, in order to determine whether the identified omissions overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S.Ct. 2574, 2588-89, 91 L.Ed.2d 305 (1986).

Crum's first assertion of ineffective assistance of counsel is that his counsel erred by failing to pursue a competency hearing. In support of this point below, Crum stated that the "mental state of the movant 'clearly' demonstrates the movant was not of sound mind during the plea negotiations in this case[.]"

However, he did not explain in his motion why or how he was of an unsound mind,

or why his trial counsel would have been aware of this fact. Unfortunately for Crum, general and vague allegations regarding counsel's ineffective performance, without specific factual support, provide the basis for summary dismissal of an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002). Moreover, conclusory allegations unsupported by specific facts do not warrant a hearing under RCr 11.42. *Id.* at 385. Since Crum did not further clarify his argument, the circuit court did not err by failing to hold an evidentiary hearing in this regard.

Crum's second assertion of ineffective assistance of counsel is that his counsel improperly coerced and manipulated him to plead guilty. However, once again, Crum did not describe in his motion the actions his counsel allegedly took to coerce him into pleading guilty. Accordingly, the circuit court did not err by failing to hold an evidentiary hearing in this regard. *Id.*

Next, Crum argues that the evidence seized as a result of the search of his automobile was illegally obtained, and that the circuit court erred by failing to suppress it. Because this issue was raised and rejected on direct appeal, the circuit court did not err by failing to hold an evidentiary hearing when Crum again raised the issue in his post-conviction motion. *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000) (RCr 11.42 motions cannot be used to relitigate issues already decided on direct appeal).

The Mercer Circuit Court's order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin Paul Crum, *Pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky