

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2007-CA-002441-MR

JOEY HOWARD GRAY

APPELLANT

APPEAL FROM MUHLENBERG CIRCUIT COURT  
v. HONORABLE C. DAVID JERNIGAN, JUDGE  
ACTION NO. 04-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, MOORE AND STUMBO, JUDGES.

NICKELL, JUDGE: Joey Howard Gray (“Gray”), *pro se*, has appealed from an order entered by the Muhlenberg Circuit Court on November 14, 2007, which, without holding an evidentiary hearing, denied his *pro se* motions for appointment of counsel and to vacate, set aside, or correct the trial court’s final judgment and sentence of imprisonment pursuant to RCr<sup>1</sup> 11.42. Having concluded the trial

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

court did not err in denying Gray's claims of ineffective assistance of counsel without holding an evidentiary hearing, we affirm.

Gray directly appealed his twenty-year sentence for possession of drug paraphernalia<sup>2</sup> and first-degree possession of a controlled substance<sup>3</sup> enhanced by his conviction of being a persistent felony offender<sup>4</sup> to the Supreme Court of Kentucky.<sup>5</sup> We quote the pertinent facts of this case from that opinion as follows:

Appellant was in his home on the morning of July 17, 2004, when Cameron Laycock, Appellant's parole officer, accompanied by two police officers, arrived at 7:00 a.m. Also in Appellant's home were four other people, a white man, two black men, and a white woman. The white man was lying on the couch, one of the black men was in the master bedroom, and the other black man and the white woman were in the smaller bedroom. One of the men was later identified as Dennis Barnes and one of the black men as "Big Pond."

Appellant gave the officers permission to search his home. The search turned up multiple syringes, a crack pipe with cocaine residue, an unlabeled prescription bottle, and plastic bags with controlled substance (cocaine) residue. Appellant appeared to Laycock, the parole officer, to be under the influence of drugs or intoxicants, and his arms showed signs of needle tracks. Appellant was arrested, taken into custody, indicted and convicted.

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<sup>2</sup> Kentucky Revised Statutes (KRS) 218A.500, a Class A misdemeanor.

<sup>3</sup> KRS 218A.1415, a Class D felony.

<sup>4</sup> KRS 532.080.

<sup>5</sup> *Gray v. Commonwealth*, 2006-SC-000072-MR, (rendered April 20, 2006) (not-to-be-published)

A judgment and final sentence was entered on December 29, 2004, fixing Gray's punishment at the sentences recommended by the jury. The Supreme Court's opinion affirming Gray's conviction became final on May 11, 2007. On November 2, 2007, Gray filed a *pro se* "motion to vacate judgment pursuant to RCr 11.42" along with a memorandum in support thereof, "motion for a full blown evidentiary hearing," motion to proceed *in forma pauperis*, and motion for appointment of counsel. Gray raised twelve separate allegations of prosecutorial misconduct, ineffectiveness of his trial counsel, and other prejudicial errors in the RCr 11.42 motion. On November 14, 2007, without holding a hearing, the circuit court entered an order overruling all of Gray's motions. This appeal followed.

On appeal, Gray contends the trial court erred in failing to set aside his conviction "due to Ineffective Assistance of Counsel was more than flagrantly established;" abused its discretion in failing to vacate the conviction based upon his allegation of prosecutorial misconduct; and showed bias and abused its discretion "since the record does not support the findings of fact and conclusion of law adduced by the Circuit Court."

In addition to challenging the trial court's rejection of his various claims, Gray contends that the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion; there must be an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). "Where the movant's allegations are refuted on the face

of the record as a whole, no evidentiary hearing is required.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985)). Our review indicates all of Gray’s allegations are clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

Gray additionally contends the trial court erred in failing to appoint counsel to represent him on his RCr 11.42 motion. “There is no constitutional right to a post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001) (citing *Murray v. Giarratano*, 492 U.S. 1, 8, 109 S.Ct. 2765, 2769, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987)). If an evidentiary hearing is required, counsel must be appointed for the indigent movant if so requested, but if no hearing is necessitated, then counsel need not be appointed. *Id.* at 453. As we have determined no hearing was required, Gray was not entitled to the appointment of counsel as he contends.

It appears Gray has abandoned the remaining issues raised in his RCr 11.42 motion before the trial court as they are not included in his brief to this Court. Therefore, we will not discuss these other allegations of error as they are not properly before us for review.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish ineffective assistance of counsel, a

person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000).

The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland, supra*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 912 (Ky. 1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Sanborn*, 975 S.W.2d at 991 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). To establish actual prejudice, a movant must show reasonable probability the outcome of the proceeding would

have been different or was rendered fundamentally unfair and unreliable.

*Strickland, supra*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). Where the movant is convicted at trial, a reasonable probability is one that undermines confidence in the outcome of the proceeding upon consideration of the totality of the evidence before the jury. *Strickland, supra*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884. Finally, we review a trial court's findings of fact under the clearly erroneous standard of review. CR<sup>6</sup> 52.01.

Gray argues he received ineffective assistance of counsel, raising five allegations of counsel's deficient performance. Specifically, Gray supports his claim by stating his counsel: "A. Had problems due to pregnant. B. Failed to request for expert funding; thus created a one sided trial. C. The defendant had numerous mental problems yet counsel failed to have the defendant evaluated before trial. D. Failed to impeach the Commonwealth Witnesses even though they were convicted felons. E. Allowed a tainted jury member to remain on the jury panel." However, Gray fails to point to any specific reference in the record supporting any of his contentions. We are convinced no such support exists.

The record indicates Gray's counsel was, in fact, pregnant, but we are unable to ascertain what medical problems Gray contends adversely affected her performance. The only issue we have been able to locate is a single pre-trial hearing at which counsel was not present due to unspecified medical reasons. That

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<sup>6</sup> Kentucky Rules of Civil Procedure.

hearing was rescheduled to a later date and counsel appeared at that later hearing.

Gray suffered no prejudice from this continuance as he remained free on bail.

Gray specifies nothing in the record indicating how counsel's pregnancy hindered her representation of Gray and we will not infer a constitutional violation from a silent record. *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003).

Similarly, Gray has failed to specify any support in the record for his contention counsel was ineffective for failing to request funding for an expert witness. Gray does not indicate what expert he needed or how such expert would have aided in his defense. He does not indicate how he was prejudiced by this alleged failure nor how counsel's actions were objectively unreasonable. *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005). Thus, this contention is without merit.

Gray has also failed to provide factual support for his allegation trial counsel should have moved the court to order him to undergo a mental competency examination prior to trial. He provides no indication he suffered from any mental defects at the time of trial nor that he informed his counsel of the possible existence of any such alleged issues. Failure to provide factual support for this allegation is fatal to his claim. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002); RCr 11.42(2).

Gray's contention his trial counsel was ineffective for failing to impeach the Commonwealth's witnesses as convicted felons is also devoid of support from the record and is wholly without merit. Without naming names, Gray

merely claims some of the witnesses were convicted felons. The sole person he mentions by name was not called as a witness for the Commonwealth or the defense. The Commonwealth called a probation officer, three police officers, and the state police crime laboratory examiner who tested the substances recovered from Gray's apartment. Nothing in the record indicates any of these witnesses had been convicted of a felony. As the trial court succinctly noted in its order denying relief, “[c]learly, Gray is conjuring up claims of ineffective assistance of counsel.”

Gray's final allegation of ineffective assistance relates to a jury member he claims was tainted. Although Gray specifies a member of his jury panel, he does not indicate how this juror was tainted or biased, how he knew such to be true, or how his counsel was made aware of the taint or bias. Once again, bare assertions of error without a supporting factual basis warrant summary dismissal of such claims. *Sanders, supra.*

It is abundantly clear to this Court that all of Gray's allegations regarding the ineffectiveness of his trial counsel are refuted on the face of the record. The trial court's findings of fact are clearly supported by substantial evidence and we will not disturb them on appeal. CR 52.01. Therefore, no evidentiary hearing was warranted, no appointment of counsel was required, and the trial court correctly denied Gray the relief he requested.

Finally, Gray contends the trial court erred in failing to vacate his conviction based upon alleged prosecutorial misconduct. This argument is a pure fabrication. Gray again provides us with no references to the record. Further, after

a careful review of the record, we hold this issue has not been preserved for our review as Gray did not argue this issue in his direct appeal. “It is an established principle that this Court will not address as issue which has been raised in a direct appeal or which should have been raised in a direct appeal.” *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990). *See also, Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000). Additionally, RCr 11.42 motions are “limited to the issues that were not and could not be raised on direct appeal.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003). As Gray could have, but did not, raise the issue of prosecutorial misconduct on direct appeal, he is now prohibited from attempting to litigate that issue in this post-conviction proceeding.

Therefore, for the foregoing reasons, the judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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