

RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000992-MR

LEWALT JACKSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 07-CR-002431

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: FORMTEXT COMBS, CHIEF JUDGE; NICKELL AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: LeWalt Jackson brings this *pro se* appeal from an April 10, 2008, order of the Jefferson Circuit Court denying Jackson's Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

On June 13, 2007, Jackson was arrested and charged with two counts of robbery in the first degree. The court conducted a hearing on July 30, 2007,

wherein Jackson waived formal reading of the information and entered a plea of guilty pursuant to a plea agreement with the Commonwealth. On August 1, 2007, an Order of Arraignment and Acceptance of Plea of Guilty Judgment of Sentence was entered in the circuit court. Therein, Jackson pleaded guilty to two counts of robbery in the second degree and was sentenced to ten-years' imprisonment upon each count. The sentences were ordered to run consecutively for a total of twenty-years' imprisonment.

Jackson subsequently filed a *pro se* RCr 11.42 motion to vacate his sentence of imprisonment. By order entered April 10, 2008, the circuit court denied Jackson's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Upon review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing, we must determine whether movant's allegations of error are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001). If there exists a material issue of fact that cannot be conclusively proved or disproved upon the face of the record, the trial court erred by denying movant's RCr 11.42 motion without an evidentiary hearing. *Id.* In order to prevail upon an RCr 11.42 motion, movant must demonstrate that counsel's performance was deficient and absent such deficiency there exists a reasonable probability the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If movant pleaded guilty, he must also demonstrate a reasonable probability that he would have insisted upon going to

trial but for trial counsel's ineffectiveness. *Kiser v. Com.*, 829 S.W.2d 432 (Ky.App. 1992).

Jackson contends that trial counsel was ineffective for failing "to investigate and obtain . . . discovery prior to advising" Jackson to enter the guilty plea. The only statement Jackson offers in support of this assertion is that he:

[I]nformed his counsel of the discrepancies pertaining to the statements, evidence and speculations by the detectives, but his counsel failed to investigate, interview the accusers, review the security video's [sic] from the crime scenes, and obtain a discovery prior to advising the avoidance of going to trial.

Jackson's Brief at 4. Jackson neither identifies the alleged "discrepancies" nor elaborates upon the information these discrepancies would reveal. Jackson also fails to specify the information an interview of "the accusers" or a review of the security tape would reveal. Jackson merely jumps to the conclusion that absent trial counsel's deficiencies, he would not have pleaded guilty but rather would have insisted upon going to trial.

It is well-settled that a movant seeking relief under RCr 11.42 "must aver facts with sufficient specificity to generate a basis for relief." *Lucas v. Com.*, 465 S.W.2d 267, 268 (Ky. 1971). In the case *sub judice*, Jackson has only made vague allegations as to trial counsel's alleged failure to investigate or obtain discovery. These bare unsupported allegations are simply insufficient to justify relief pursuant to RCr 11.42. *See id.* Thus, we reject Jackson's contention of error.

Jackson next argues that trial counsel was ineffective for advising him to plead guilty to two counts of second-degree robbery when the facts did not support the elements of the offense. Particularly, Jackson asserts that there “was never evidence presented to support that physical force or a threat of physical force was utilized” as required by KRS 515.030.¹

This assertion is directly refuted by the record. A police uniform citation was issued against Jackson. In the uniform citation, the complaint read that Jackson entered two different Circle K stores in Louisville, Kentucky, on April 16, 2007, and May 6, 2007, respectively. The uniform citation further stated that appellant demanded cash from an employee in each store and “indicated he was armed with a handgun.” As such, the record clearly refuted Jackson’s assertion that there was no evidence that he threatened use of a firearm.

Jackson lastly asserts that trial counsel was ineffective for advising him to plead guilty “without being familiar with the circumstances” of his case. Jackson was originally charged with two counts of first-degree robbery. Under the plea agreement with the Commonwealth, Jackson pleaded guilty to two counts of second-degree robbery and was sentenced to two ten-year terms of imprisonment to run consecutively for a total sentence of twenty years.

¹ Kentucky Revised Statutes 515.030(1) provides:

A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

We believe Jackson was adequately and competently represented by trial counsel. Before entering the guilty plea, the record clearly demonstrates that Jackson was advised of his rights and of the consequences of a guilty plea. Moreover, it is clear that Jackson was given ample time to consider the guilty plea. By pleading guilty, Jackson avoided a trial, a possible conviction upon two counts of first-degree robbery, and a harsher sentence of imprisonment. Even Jackson acknowledges in his brief that had he been convicted on two counts of first-degree robbery he would have served at least fifty-years' imprisonment. As such, we do not believe that trial counsel was ineffective for advising Jackson to plead guilty.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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