

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001821-MR

FREDERICK JOE WADE

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 08-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; AND LAMBERT,¹
SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Frederick Joe Wade, proceeding *pro se*, appeals from an order of the Fleming Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The

¹ Senior Judge Joseph E. Lambert 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.

issue is whether the circuit court properly denied Appellant's motion without conducting an evidentiary hearing. After reviewing the parties' briefs and the record, we agree that an evidentiary hearing was unnecessary. Thus, we affirm.

Appellant was charged with first-degree assault and with being a first-degree persistent felony offender (PFO). The charges arose from an allegation that Appellant had shot his wife through her hand and into the left side of her head with a .38 revolver. Appellant eventually pled guilty to the assault charge in exchange for the Commonwealth's agreement to dismiss the PFO charge and to recommend a 13-year sentence of imprisonment. The Commonwealth also agreed to recommend that this sentence run concurrently with Appellant's sentence on another conviction. The circuit court accepted Appellant's guilty plea, and Appellant was convicted and sentenced in accordance with the parties' guilty-plea agreement and the Commonwealth's recommendations.

A few months later, Appellant filed a motion to vacate or set aside his conviction pursuant to RCr 11.42 on the grounds that he had received ineffective assistance of trial counsel in reaching his decision to plead guilty. Appellant specifically alleged that his plea was not entered knowingly, voluntarily and intelligently because his wife had not sustained "serious physical injury" as defined by KRS 500.080(15) – which is necessary for a conviction for first-degree assault.² KRS 500.080(15) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged

² A person is guilty of first-degree assault when he "intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.010(1)(a).

disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]” Appellant argued that his wife did not sustain a “serious physical injury” because she had not suffered any prolonged pain or impairment as a result of being shot in the hand and head. Appellant further argued that his counsel had failed to advise him that “serious physical injury” was an element of first-degree assault and that he would not have plead guilty had he known this because of his belief that his wife had not suffered such an injury. Appellant also raised a general claim that his counsel had failed to adequately investigate his case; however, he provided no specific facts or contentions to support this argument.

The circuit court considered Appellant’s motion and denied it without a hearing. In doing so, the court first noted that Appellant acknowledged during his guilty plea colloquy that he fully understood his rights, the allegations against him, and the actions on his part leading to those allegations. Thus, there was nothing inherently faulty about Appellant’s guilty plea. The court also rejected Appellant’s argument that his wife had not suffered “serious physical injury” under KRS 500.080(15), noting:

The victim personally appeared before the Court in connection with this matter, and the Court was able to observe the serious and prolonged disfiguring nature of the victim’s gunshot wounds. Even without the consideration of victim’s “prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ” (which are evident by the discovery in this case) the Court specifically finds that there is serious

and prolonged disfigurement of the victim caused by the defendant's actions.

The circuit court also rejected Appellant's claim that his counsel had failed to adequately investigate his case because the claim was void of any supporting facts and amounted to nothing more than a mere conclusory allegation. This appeal followed.

On appeal, Appellant argues that the circuit court erroneously denied his motion for RCr 11.42 post-conviction relief without a hearing. He first contends that a hearing was necessary because his trial counsel was ineffective for failing to timely respond to the Commonwealth's initial plea offer, which included an agreement to recommend a 12-year sentence instead of the 13-year sentence to which Appellant ultimately agreed. However, this specific contention was not presented to the trial court. Thus, it has not been preserved for our review and will not be considered by this Court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010); *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009).

Appellant next argues that his counsel was ineffective for failing to spend an adequate amount of time consulting with him about the case and for failing to interview witnesses who had information relevant to the case. He maintains that these specific arguments were made below, but the record reflects that Appellant only generally argued that counsel had failed to adequately investigate his case. Thus, their preservation is dubious. Moreover, Appellant provided no specific

grounds or facts below to support his argument or to otherwise show how his case was prejudiced. This failure is fatal to his claim. RCr 11.42(2); *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993); *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990). RCr 11.42(2) places an obligation on the party seeking post-conviction relief to produce specific facts supporting his motion. Mere conclusory allegations do not meet this burden and do not justify an evidentiary hearing. *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds by Leonard, supra*. Therefore, this argument must also be rejected.

Appellant finally argues that he was entitled to an evidentiary hearing because his counsel had failed to advise him that inflicting “serious physical injury” was an element of first-degree assault. According to Appellant, had his counsel informed him of this, he would not have pled guilty because of his belief that his wife had not suffered such injury as it is defined in KRS 500.080(15). In order for a defendant to prove ineffective assistance of counsel when a guilty plea has been entered, he must show:

(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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

Because an evidentiary hearing was not held, “[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). RCr 11.42 requires an evidentiary hearing “if the answer raises a material issue of fact that cannot be determined on the face of the record.” RCr 11.42(5); *see also Stanford*, 854 S.W.2d at 743. “The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). However, there is no need for an evidentiary hearing if the record refutes the claims of error or if the defendant’s allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

We agree with the circuit court that Appellant’s motion could be properly resolved on the record. The indictment alleged that Appellant had “[c]ommitted the offense of First Degree Assault when he intentionally or wantonly engaged in conduct which created a grave risk of death to another person *and thereby caused serious physical injury to that person*, to wit: The Defendant shot Debra Wade in the hand and face with a .38 revolver.” (Emphasis added). Appellant was provided with a copy of the indictment, which clearly sets forth that causing “serious physical injury” is an element of first-degree assault, at his arraignment. Moreover, Appellant acknowledged in his motion to enter guilty plea that he was

fully apprised of the charges against him and that he understood them and any possible defenses to them.

While these facts alone arguably might not be enough to eliminate the need for an evidentiary hearing, we further note that the record contains photographs of Appellant's wife that unquestionably demonstrate that she suffered "serious physical injury." Indeed, no reasonable person would argue to the contrary. Thus, the entire basis for Appellant's contention is untenable. Appellant's wife was shot in the hand and head, and her injuries were severe enough to require surgery that left her with rather extensive scarring. Gunshots, by their very nature, cause substantial, prolonged pain, and prolonged pain is considered a "serious physical injury." *Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004). Based on those photos – which were made available to Appellant in discovery prior to his guilty plea – the circuit court found Appellant's arguments in this regard to be unreasonable on their face.³ We find no error in this conclusion.

We also note that a conviction for first-degree assault is a Class B felony that carries with it a possible sentence of 20 years' imprisonment even before considering the persistent-felony-offender charge that could have considerably

³ As noted above, the circuit court's order also indicated that "[t]he victim personally appeared before the Court in connection with this matter, and the Court was able to observe the serious and prolonged disfiguring nature of the victim's gunshot wounds." According to the Commonwealth, this statement was made in reference to the victim's appearance before the circuit court in a related domestic violence matter. Appellant correctly points out that extra-judicial knowledge of a judge cannot be used as the basis for a ruling such as the one here. *See* Kentucky Rules of Evidence (KRE) 201; *Wells v. Wells*, 406 S.W.2d 157, 158 (Ky. 1966). However, because the record contains photographs of the victim displaying the obviously serious extent of her injuries and because the circuit court also relied upon those in its ruling, we believe any error in this respect was harmless. RCr 9.24.

enhanced any sentence that Appellant was facing. KRS 508.010; KRS 532.060(2)(b); KRS 532.080(3) & (6). Under these circumstances, and given that Appellant received only a 13-year sentence in comparison, we cannot say that there was a “reasonable probability” that he would have elected to go to trial even assuming his counsel had been deficient. *See Sparks*, 721 S.W.2d at 727-28.

Accordingly, for the foregoing reasons, the judgment of the Fleming Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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