

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002175-MR

LARRY WHITE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00291

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Larry White, proceeding *pro se*, appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The issue is whether the circuit court properly denied Appellant's motion without conducting

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.

an evidentiary hearing. After reviewing the parties' briefs and the record, we agree that an evidentiary hearing was unnecessary. Thus, we affirm.

In February 2004, Appellant was tried and convicted of first-degree assault and sentenced to fifteen years' imprisonment. He filed a direct appeal on the grounds that he should have been granted a mistrial, but this Court affirmed his conviction. *White v. Commonwealth*, No. 2004-CA-000342-MR (Ky. App. Feb. 11, 2005). In February 2008, Appellant filed an RCr 11.42 motion for post-conviction relief in which he alleged, among other things, that his attorney had rendered ineffective assistance of counsel by failing to present testimony from several exculpatory witnesses.² On November 3, 2008, the Fayette Circuit Court denied Appellant's RCr 11.42 motion without an evidentiary hearing largely because Appellant had failed to provide the names or predicted testimony of any alleged exculpatory witnesses or to explain how their testimony would have affected the reliability of his conviction. 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. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-pronged analysis to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction.

² Appellant's motion was filed *pro se*. Counsel was subsequently appointed to assist Appellant, but no supplement to the original motion was filed.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064.

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 v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). "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).

Appellant's brief focuses on the fact that the circuit court's denial of his RCr 11.42 motion hinged on his failure to provide the names or predicted testimony of any alleged exculpatory witnesses. Appellant contends that the

circuit court's decision erroneously placed the burden on him – and not his counsel – to investigate his case and to ascertain who could testify in his defense. In support of this contention, Appellant notes that he “wrote counsel several letters informing him of all possible witnesses who would be at the trial and possible witnesses to the crime.” However, in both his RCr 11.42 motion and in his brief, Appellant fails to provide any specific supportive details such as the names of any alleged exculpatory witnesses or the anticipated substance of their testimony. In addition, Appellant fails to indicate how the witnesses' testimony would have resulted in a different outcome at trial. Appellant further argues that “[h]ad counsel conducted an independent investigation he would have uncovered additional witnesses [that were] not named by” Appellant. However, Appellant fails to elaborate on who these witnesses might be or how their testimony would have benefitted him.

These failures are ultimately fatal to Appellant's motion. RCr 11.42(2) specifically requires that any motion brought under that rule “be signed and verified by the movant and [that the motion] *shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds*. Failure to comply with this section shall warrant a summary dismissal of the motion.” (Emphasis added). Thus, 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 v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Accordingly, “[t]he RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation.” *Hodge*, 116 S.W.3d at 468; *see also Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990).

As noted, Appellant failed to provide any specific grounds or facts in his RCr 11.42 motion that would warrant an evidentiary hearing on the basis that Appellant’s trial counsel failed to adequately investigate potential witnesses. Therefore, the circuit court did not err in summarily denying Appellant’s motion. Appellant also makes vague assertions that his trial counsel: (1) failed to investigate the full facts of the case; (2) failed to advise him of the law applicable to his case and allowed him to unintelligently enter into a plea bargain; and (3) failed to move for or to otherwise protect his right to a mistrial. Again, however, Appellant fails to elaborate on these claims and provides nothing that would suggest a need for an evidentiary hearing.

Thus, for the foregoing reasons, the order of the Fayette Circuit Court denying Appellant’s RCr 11.42 motion without an evidentiary hearing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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