

RENDERED: JULY 20, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2010-CA-000785-MR

DAVID A. CLARK

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 03-CR-00311

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: David A. Clark appeals the Hardin Circuit Court's denial of his motion filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, and the order denying relief upon the motion requesting counsel and an evidentiary hearing. Based upon the following, we affirm the decision of the trial court.

## Facts and Procedure

On October 13, 2005, Clark was convicted in the Hardin Circuit Court of multiple counts of sodomy; one count of rape; and one count of promoting a sexual performance by a minor, each involving his biological children and the son of his live-in girlfriend. For these crimes, Appellant was sentenced to life imprisonment. A series of direct appeals followed and in late 2008, the Kentucky Supreme Court affirmed all of Clark's convictions with the exception of one<sup>1</sup> and remanded for further proceedings. *Clark v. Commonwealth*, 267 S.W.3d 668, 674-678, 681. On remand, the trial judge sentenced Clark to life in prison. Clark undertook a collateral attack of his convictions, and in February of 2010, filed an RCr 11.42 motion, supporting memorandum, and motions requesting counsel and an evidentiary hearing. After evaluation of Clark's motions, the trial judge denied them.

In March 2011, the case was again appealed and the record was reviewed by the Department of Public Advocacy (DPA). The DPA determined that Clark was not entitled to representation for his appeal, and by permission of this Court the DPA was allowed to withdraw from Clark's case. Without assistance of counsel, Clark filed a brief challenging the original determination of the trial judge's order denying his RCr 11.42 motion. The instant appeal follows.

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<sup>1</sup> The Kentucky Supreme Court determined that the incident involved gave rise to two convictions, and as such, could result in only a single conviction. The Court vacated the conviction of promoting a sexual performance in favor of the conviction for use of a minor in a sexual performance.

The motion presented by Clark to the circuit court included: (1) failure by his counsel to seek a severance of the multiple charges against him; (2) a claim arising from double jeopardy implications (this violation was remedied on appeal); (3) a claim alleging that his various convictions were based upon jury instructions that did not distinguish one similar count from another (we note that this issue is a direct appeal error as the argument was not addressed in Clark's direct appeal; therefore, the assertion of the argument upon collateral attack was procedural error); and (4) a claim that his trial counsel did not perform an adequate pretrial investigation which equated to ineffective assistance of counsel. On appeal, Clark has raised only the issue of the lack of preparation of his trial attorney and asserts that the trial strategies used were inappropriate, further alleging prejudice as to the outcome of guilt in his case.

#### Standard of Review

The proper standard of review upon a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The *Strickland* standard requires a showing that (1) counsel's performance was deficient as it fell outside the range of professionally competent assistance, and (2) such deficiency was prejudicial as there exists a reasonable probability that the outcome would have been different but for counsel's deficient performance. *Gall*, 702 S.W.2d 37.

The standard of review in RCr.11.42 proceedings, when the trial court does conduct an evidentiary hearing, requires that the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996). A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion reasonably require such a hearing for determination. Conversely, a hearing is not required if the motion on its face does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965).

Clark has raised vague and unsupported contentions attempting to assert that the actions of his attorney were ineffective in the defense of his case. While Clark has failed to address with specificity errors in his brief; nevertheless, we have reviewed the sole argument at issue on appeal and we apply the applicable analysis relevant to our discussion.

#### Discussion

In his brief, Clark asserts that he was denied effective representation of defense counsel throughout his trial and sentencing. Further, Clark claims that “defense counsel failed to conduct proper pretrial investigations and prepare an adequate trial strategy on behalf of the movant.” (Appellant’s Brief at 1). As set forth above, under the *Strickland* standard, to prove ineffective assistance of counsel, the movant must show that (1) counsel’s performance was deficient as it

fell outside the “range of professionally competent assistance,” and (2) such deficiency was prejudicial as there exists a reasonable probability that the outcome would have been different but for counsel’s deficient performance. *Strickland*, 466 U.S. at 690, 104 S. Ct. 2066. See *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). “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. Unless a defendant makes both showings, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Gall*, 702 S.W.2d at 40-41 (citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2064).

In this case, Clark has failed to provide adequate facts to support his contentions. In fact, Clark has provided this Court with nothing more than conclusive language for arguments to support his contentions. “[W]ithout a minimum of factual basis, contained in a verified RCr 11.42 motion, the motion should be summarily overruled.’ In such instances, a movant clearly would not be entitled to an evidentiary hearing.” *Mills v. Commonwealth*, 170 S.W.3d 310, 327 (Ky. 2005) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (quoting *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993). Where an RCr 11.42 movant “has failed to allege sufficient facts to constitute a deprivation of a substantial right, then the trial court should dismiss the claim.” *Mills*, 170 S.W.3d at 326-27.

In this action, the trial judge found as follows:

Clark does not specify anything that his attorney . . . failed to do which might have led to any particular information of any use at Clark's trial. Clark's general allegation of a failure to investigate is insufficient for consideration under RCr 11.42. A vague allegation that counsel failed to investigate, without offering specific facts as to what such an investigation would have revealed, is insufficient to support an RCr 11.42 motion.

Findings of Fact, Conclusions of Law entered March 19, 2010, at 3.

Clark asserted the performance of his trial counsel was deficient; however, without asserting a factual basis for those claims, we find that Clark has set forth general allegations which are insufficient to meet the threshold of an RCr 11.42 claim.

“[V]ague allegations, including those of failure to investigate, do not warrant an evidentiary hearing and warrant summary dismissal of an RCr 11.42 motion.”

*Mills*, 170 S.W.3d at 330 (footnote omitted). We will not search the record to construct the Appellant's argument for him, nor will this Court undergo a fishing expedition to find support for underdeveloped arguments. “Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors.” *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Even if Clark had provided some factual basis for his argument alleging deficiency on the part of his trial attorney, he failed to follow basic procedural guidelines by not signing his filing for the RCr 11.42 motion. Despite this error, the trial judge chose to consider the motion prior to its dismissal though he was not required to do so.

A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

Kentucky Rules of Civil Procedure (CR) 11. See *Brey v. Commonwealth*, 917 S.W.2d 558 (Ky. 1996) (court directs clerk to strike from motion the signature of “inmate litigator”).

Finally, while Clark has asserted a number of allegations which ultimately prejudiced the outcome of his case, we decline to consider these allegations asserted due to his failure to develop these arguments in his brief. In sum, the denial of Clark’s RCr 11.42 motion is affirmed on all grounds.

Based upon the above, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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