

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

NO. 2010-CA-002184-MR

LARRY MORRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERIC COWAN, JUDGE  
ACTION NO. 06-CR-002475

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

KELLER, JUDGE: The Appellant, Larry Morris (Morris), appeals a decision of the Jefferson Circuit Court denying him relief under Kentucky Rule of Criminal Procedure (RCr) 11.42 for ineffective assistance of counsel. Morris did not establish the requisite elements for a claim of ineffective assistance. Therefore, the decision of the circuit court is affirmed.

On direct appeal this court summarized the facts of the underlying case as follows:

On June 6, 2006, Larry Morris entered Thorton's Food Mart (Thorton's) on Seventh Street Road in Louisville. He placed luncheon meat, chips and cupcakes in a bag and left without paying for the items. Jason Taylor, a Thorton's employee, followed Morris out of the store. Morris turned toward Taylor and raised his shirt, exposing a gun tucked inside his pants. Taylor went back into the store and later reported the crime to Thorton's corporate office and the Louisville Metro Police Department (LMPD).

*Morris v. Commonwealth*, No. 2008-CA-001213-MR, 2008 WL 2696889, at \*1 (Ky. App. July 11, 2008).

This court affirmed Morris's conviction, and on July 16, 2009, he filed a *pro se* RCr 11.42 motion claiming ineffective assistance of trial counsel. Shortly thereafter, Morris filed a motion for leave to supplement offering additional grounds for relief, and requested that counsel be appointed for him. On October 19, 2009, the circuit court granted both requests and allowed 90 days to supplement the original motion. On September 7, 2010, appointed counsel filed a motion to submit the case on the pleadings stating that he had examined the pleadings, had not discovered any additional claims requiring supplement, and had asked the court to evaluate the claims as they stood. The Commonwealth did not respond. On September 15, 2010, the circuit court granted the motion to submit the case on the pleadings. Without holding an evidentiary hearing, the circuit court denied the request for relief under RCr 11.42 for failure to establish prejudice, and

dismissed the claims for failure to provide a factual basis for any claim of ineffective assistance of counsel.

On appeal, Morris makes the following arguments: 1) the trial court abused its discretion by not allowing him to supplement his original motion and declining to hold an evidentiary hearing; 2) the violent offender statute was incorrectly applied to his case; and 3) counsel was ineffective for failing to adequately prepare for trial, request an instruction on the presumption of innocence, and request a competency hearing.

When determining if an evidentiary hearing is necessary, “[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). A claim of ineffective assistance of counsel will invalidate a conviction when the defendant shows that counsel’s performance was deficient and “that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Deficient performance “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* The defense is prejudiced when “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

First, we turn to Morris’s allegation that the circuit court improperly denied his request to supplement his original motion. This argument has no merit.

Morris was granted leave to supplement his motion and was appointed counsel in an order entered October 19, 2009. Appointed counsel made a motion to submit the case on the pleadings and did not raise any additional grounds for relief. While Morris included additional grounds for relief in his motion to supplement, he did not resubmit them after leave was granted, nor did he raise any of the supplemented arguments on appeal.

Morris also argues that he was improperly denied an evidentiary hearing. The Commonwealth asserts that appointed counsel's motion to submit the case on the pleadings constituted a waiver of Morris's right to an evidentiary hearing. However, regardless of whether the issue was waived, Morris is only entitled to a hearing if the issues presented cannot be determined from the record. *See* RCr 11.42(5). Further, even if the motion alleges facts not included in the record, the allegations must be such that, if true, they would invalidate the conviction. *Lewis*, 411 S.W.2d at 322. As discussed in greater detail below, Morris fails to set forth additional facts that, if true, would invalidate his conviction.

Before turning to the evidence, we consider Morris's assertion that the violent offender statute was improperly applied to his case. Morris essentially avers that the evidence was insufficient to convict him of first-degree robbery and, therefore, Kentucky Revised Statute (KRS) 439.3401(1)(l) is inapplicable. However, in order to prevail, Morris must show that a deficiency on the part of his counsel led to the improper application of the violent offender statute. Morris does

not make this argument in relation to the application of KRS 439.3401(1)(l). Even if the argument was properly presented, there is no indication that counsel's deficient performance led to an improper application of KRS 439.3401(1)(l).

Finally, Morris asserts that his counsel's failure to adequately prepare for trial, failure to request an instruction on the presumption of innocence, and failure to request a competency hearing amounted to ineffective assistance of counsel. To support this argument, it is critical that Morris not only establish a deficiency in his attorney's actions, but also establish actual prejudice. In other words, an appellant must show that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064)).

Morris's argument regarding counsel's preparation for trial—which included his alleged failure to consult with Morris, interview witnesses, and conduct a pretrial investigation—are not sufficient to warrant reversal. Morris's assertion that his counsel failed to present an instruction on innocence is also without merit because our review of the record indicates that an innocence instruction was requested. Likewise, Morris's argument that his attorney should have sought a competency hearing is unsupported.

On direct appeal, this Court noted there was "ample evidence" presented against Morris. *Morris*, 2008 WL 26968889, at \*3. At trial, the store clerk testified that Morris stole items from the store and, when followed outside,

showed a weapon. Morris does not point to any specific witnesses that would testify to the contrary and instead simply claims he did not have a gun. Morris also presents no evidence to establish incompetency, other than the fact that he allegedly receives social security, and there is no indication that he was unable to understand the proceedings.

In light of the evidence presented at trial, and the lack of support offered by Morris, the Jefferson Circuit Court correctly determined that Morris failed to provide an adequate factual basis for his claims and failed to establish actual prejudice. As a result, Morris did not meet the requisite elements for ineffective assistance of counsel, and we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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