

RENDERED: APRIL 1, 2011; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001391-MR

PAUL AMBURGEY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 05-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Paul Amburgey appeals *pro se* from an order of the Pike Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42.

For the following reasons, we affirm.

Amburgey was convicted of first-degree rape (two counts) and was sentenced to a total of twenty-years' imprisonment. His conviction and sentence

¹ Kentucky Rules of Criminal Procedure.

were upheld by the Kentucky Supreme Court on direct appeal.² Amburgey then moved *pro se* for post-conviction relief pursuant to RCr 11.42, alleging ineffective assistance of trial counsel. The trial court denied his motion. This appeal followed.

On appeal, Amburgey claims the trial court erred by denying his motion without first conducting an evidentiary hearing. The provisions of RCr 11.42 pertinent to this appeal provide:

(2) The motion shall be signed and verified by the movant and 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.

....

(5) . . . If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

The Kentucky Supreme Court has interpreted these provisions to establish the following procedural steps with respect to the necessity of an evidentiary hearing prior to granting or denying an RCr 11.42 motion:

1) The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed.

² *Amburgey v. Commonwealth*, 2005-SC-000722-MR (Ky. Aug. 24, 2006).

- 2) After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. 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) (internal citations omitted).

In order to prove ineffective assistance of counsel, a defendant must show:

- (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and
- (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986).

In his RCr 11.42 motion, Amburgey first claimed that his trial counsel was ineffective by failing to conduct a pre-trial investigation. Specifically, he argued that his counsel failed to interview "witnesses listed herein." However, Amburgey did not list the witnesses, make any other specific allegations with respect to this argument, or show that he was prejudiced by his counsel's actions in this regard. Additionally, Amburgey maintained that his counsel failed to investigate the victim's testimony, which he asserts was unreliable and a product of coercion. Yet, the different versions of the victim's testimony were presented to the jury, whose task is "to evaluate the credibility of witnesses and lend to that evaluation

the relative weight they deem fit.” *Hatfield v. Commonwealth*, 250 S.W.3d 590, 596 (Ky. 2008) (citation omitted). The fact that the jury gave greater weight to the victim’s testimony does not prove that counsel for Amburgey was ineffective. Thus, the trial court did not err by summarily dismissing these claims. RCr 11.42(2).

Next, Amburgey argued that his counsel failed to object to testimony; but he neither identified the alleged objectionable testimony, nor did he show how counsel’s failure to object prejudiced him. In a similar vein, Amburgey claimed that his counsel failed to challenge the Commonwealth’s experts; again, he did not identify the experts or show that he was prejudiced by his counsel’s alleged failure. As a result, the trial court properly dismissed both of these claims.

Next, Amburgey asserted that his counsel was ineffective by failing to obtain medical doctors to testify as expert witnesses at trial. However, Amburgey failed to show how any medical testimony could have benefitted his case or how he was prejudiced by the failure to present such testimony. As the trial court noted, no dispute existed regarding the injuries sustained by the victim. Amburgey failed to demonstrate, and we fail to appreciate, how presentation of another medical doctor’s opinion could have challenged these undisputed facts. Accordingly, dismissal of this claim was not erroneous.

At the conclusion of his motion, Amburgey provided a list of alleged errors committed by his counsel and averred that the cumulative effect of these errors justified relief under RCr 11.42. However, again, he did not adequately show how

his counsel's representation was deficient or that he was prejudiced by such representation. The trial court, therefore, did not err by dismissing this claim.

In summary, our review of the record discloses that Amburgey's allegations are clearly refuted by the record and are inadequate to support post-conviction relief; thus, an evidentiary hearing was not necessary. While Amburgey alleges on appeal a number of other violations supposedly committed by his trial counsel, his failure to raise these claims before the trial court in his RCr 11.42 motion precludes us from reviewing them. *See Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007) (holding that failure to raise an issue in the trial court precludes appellate review, absent manifest injustice); *McBrearty v. Kentucky Cnty. & Technical Coll. Sys.*, 262 S.W.3d 205 (Ky.App. 2008) (holding that failure to raise an issue to the trial court precludes consideration of such issue on appeal). With respect to all allegations raised, Amburgey is not entitled to post-conviction relief pursuant to RCr 11.42.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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