

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000174-MR

EDRIC CALDWELL

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, JUDGE  
ACTION NO. 06-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

THOMPSON, JUDGE: Edric Caldwell appeals from an order of the Fulton Circuit  
Court denying his motion for RCr 11.42 relief. Because we hold that the trial court  
erred when it failed to hold an evidentiary hearing, we reverse and remand.

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<sup>1</sup> 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 KRS 21.580.

We adopt the following relevant facts of the underlying action as conveyed by the Kentucky Supreme Court.

Around midnight on August 19, 2006, Coy Robinson was attacked upon arriving at his home in Hickman, Kentucky. Robinson owned a liquor store and had just left the store, bringing with him a paper sack containing six “bank bags.” Robinson was walking toward the door of his home, bag in hand, when he was robbed and brutally beaten. One of the attackers absconded with one of the bank bags, which contained customers’ checks. Robinson could not describe his attacker, but thought that there were two people present during the attack. Officer Ray Smith of the Hickman Police Department responded to the scene and called an ambulance to transport Robinson to the hospital. Officer Smith investigated the area and found a magazine clip for a .357 Springfield magnum lying on the ground.

Subsequently, Caldwell apparently communicated with Dwayne Winfield and offered to sell Winfield two guns, including a .357 Springfield magnum for which he had lost the magazine clip. After this communication, Winfield made contact with Officer Chris Cummings of the Union City (Tennessee) Police Department. Officer Cummings knew Winfield from prior associations stemming from Winfield’s own encounters with law enforcement officers. Officer Cummings listened in on a subsequent telephone conversation between Winfield and Caldwell. According to Officer Cummings, Caldwell offered to sell two handguns, one of which was a .357 Springfield magnum without the clip. Officer Cummings then reported these events to the police chief of Hickman, Caldwell’s city of residence. Police Chief Tony Grogan informed Officer Cummings that Caldwell was a possible suspect in another matter and that a .357 magazine clip had been dropped at the scene in that case.

Officer Cummings proceeded to have Winfield set up a gun buy that was to take place outside of Wal-Mart in Union City. Officer Cummings parked and waited for Caldwell to enter Tennessee on Highway 5 at which

point Caldwell and his female passenger were pulled over and Caldwell was arrested. A prior records check had revealed that Caldwell's license was suspended. Incident to his arrest for driving on a suspended license, a search of Caldwell's vehicle led to discovery of a .38 caliber pistol. Prior to towing the vehicle, an inventory search was executed. A .357 Springfield magnum without a magazine clip was discovered inside a box in the trunk of the vehicle.

Consequently, Caldwell was indicted by a Fulton County Grand Jury for first-degree robbery, first-degree assault, possession of a handgun by a convicted felon, and being a first-degree PFO. The handgun possession charge was severed[.]

*Caldwell v. Commonwealth*, 2010 WL 2025124, 1-2 (Ky. 2010). Also relevant to this appeal is the fact that Winfield testified that Caldwell contacted Winfield, told him he needed money to pay a Rent-A-Center bill and solicited his assistance in a robbery. Caldwell was found guilty of robbery in the first degree, assault in the first degree, and persistent felony offender in the first degree. The Supreme Court affirmed Caldwell's conviction.

Thereafter, Caldwell filed an RCr 11.42 motion to vacate, set aside or correct his sentence. He made multiple allegations, including ineffective assistance of counsel due to his trial counsel's alleged failure to secure records to rebut the testimony of Winfield regarding Caldwell's need for money to pay a bill; failure to call an alibi witness; and failure to object to the admission of testimony regarding uncharged criminal conduct, namely Winfield's testimony that he had been solicited by Caldwell to commit a robbery. The trial court denied Caldwell's motion, and this appeal followed.

We review a trial court's denial of an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). The trial court has abused its discretion when its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

To succeed on a claim of ineffective assistance of counsel under RCr 11.42, a movant must meet both requirements of the two-prong test as outlined in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The trial court's relevant inquiry was whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Caldwell argues that the trial court erred when it failed to hold an evidentiary hearing on the allegations regarding trial counsel's failure to secure

various records to rebut the testimony of Winfield, failure to call a potential alibi witness, and failure to object to the admission of testimony regarding uncharged criminal conduct. Additionally, Caldwell argues that these errors resulted in cumulative error. We agree.

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); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). An evidentiary hearing is unnecessary when the record refutes the claims of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Id.*; *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky.App. 1986).

None of Caldwell’s allegations of trial counsel error is directly refuted by the record. In support of its denial of Caldwell’s RCr 11.42 motion, the trial court attributed trial counsel’s failure to call an alibi witness to trial strategy. However, such an assertion without actual testimony of the trial counsel is unsupported conjecture. The trial court further opined that Caldwell’s argument that his trial counsel failed to secure various records to rebut the testimony of Winfield was unsupported by proof that such documents existed. However, because an evidentiary hearing was not held, Caldwell was not provided an opportunity to present such evidence. Lastly, the trial court noted that Winfield’s testimony regarding uncharged criminal conduct was permissible under KRE 404(b) to show proof of motive, preparation, and plan of the crime committed. Although that may be true, such evidence is only admissible after “reasonable

pretrial notice” is given to the defendant of such evidence. KRE 404(c). It is possible that an evidentiary hearing may reveal that trial counsel’s failure to object to the testimony resulted in a lost opportunity to enforce the notice requirement and suppress the evidence. Because Caldwell’s allegations of trial counsel’s errors are not directly refuted by the record and, if proven, might collectively serve to invalidate his conviction, we hold that the trial court erred when it failed to hold an evidentiary hearing. It is important to note that our holding in no way addresses the merit of Caldwell’s RCr 11.42 arguments.

For the foregoing reasons, the order of the Fulton Circuit Court is reversed, and the case remanded with instructions to hold an evidentiary hearing.

LAMBERT, SENIOR JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I cannot agree that the alleged errors of counsel rise to the level of defective performance on their face. Additionally, even if they arguably did constitute defective performance, they cannot be said to have had prejudicial impact so as to change the outcome of this case based on the totality of the circumstances.

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