

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001555-MR

ROGER D. CRAWLEY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE BRIAN WIGGINS, JUDGE  
ACTION NO. 09-CR-00138

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: Roger D. Crawley, *pro se*, has appealed from the Muhlenberg Circuit Court's denial of his RCr<sup>1</sup> 11.42 motion for post-conviction relief without first convening an evidentiary hearing. We affirm.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

Crawley was convicted of trafficking in a controlled substance in the first degree<sup>2</sup> and being a persistent felony offender in the first degree (PFO I).<sup>3</sup> He received a sentence of twenty years' imprisonment. His convictions were affirmed on direct appeal to the Supreme Court of Kentucky in an unpublished opinion.<sup>4</sup> Crawley filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42 on June 30, 2011, accompanied by a motion for an evidentiary hearing and to appoint counsel. All of the motions were denied by order entered on August 5, 2011, and Crawley's subsequent motion to alter, amend or vacate that order was likewise denied. This appeal followed.

Crawley contends the trial court erred in denying his motion without first convening an evidentiary hearing and denying his motion for appointment of counsel. He alleges his motion for RCr 11.42 relief raised issues of fact that could not be conclusively determined from the face of the record, thus requiring the trial court to convene a hearing. He further contends he received ineffective assistance from his appellate counsel. The Commonwealth argues Crawley's claims are all disputed by the record, not pled with specificity as required by RCr 11.42(2), or are not properly before this Court because he failed to raise them below.

Prior to reviewing the arguments of the parties, we note first that we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion.

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<sup>2</sup> Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

<sup>3</sup> KRS 532.080.

<sup>4</sup> *Crawley v. Commonwealth*, 2009-SC-00673-MR, 2010 WL 3722783 (September 23, 2010).

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test. First, a movant must show that counsel's performance was deficient. Second, a movant must show that any such deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As established in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: 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 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. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

*Bowling*, at 411–12. Additionally, we note that the burden is on the movant to overcome a strong presumption that counsel’s assistance was constitutionally sufficient or that under the circumstances, counsel’s action “might have been considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

On the issue of whether an evidentiary hearing is necessary, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, Crawley is only entitled to an evidentiary hearing if there are allegations that cannot be conclusively resolved on the face of the record. Further, we note that in determining whether the allegations in a post-trial motion to vacate, set aside or correct sentence can be resolved on the face of the record, the trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Id.* at 452–53. We review the arguments of the parties with these standards in mind.

On appeal, Crawley initially argues that the trial court erred in denying his request for an evidentiary hearing. He asserts the allegations made in his motion were not clearly refuted by the record and, accordingly, the court's refusal to grant an evidentiary hearing was erroneous. Crawley lists four separate issues in support of his argument. We disagree with his assertions.

First, Crawley contends that the failure of his counsel to raise an entrapment defense could not be determined from the face of the record. However, a careful review reveals Crawley did not raise this issue in the RCr 11.42 motion

he filed in the trial court. Therefore, this allegation of error is not properly before us and no further discussion is warranted. *Bowling*, 80 S.W.3d at 419.

Second, Crawley asserts his allegation of counsel's failure to interview witnesses to show he merely set up a meeting between a buyer and seller could not be resolved absent an evidentiary hearing. Crawley fails to appreciate that his admitted involvement in the transaction constitutes trafficking under accomplice liability. Thus, even if we were to believe counsel acted deficiently in this regard, Crawley's contention fails to reveal any prejudice or probability of different result. *Strickland*. Further, the properly admitted recorded interactions (both audio and video) between Crawley and the confidential informant contained sufficient proof that Crawley was actively involved in the trafficking and were more than sufficient basis for the jury's guilty verdict.

Third, Crawley alleges counsel's failure to interview witnesses to attack the confidential informant's credibility entitled him to an evidentiary hearing. Crawley argues his counsel should have interviewed a number of unnamed witnesses who would ostensibly have testified that the confidential informant was a drug user, had sold drugs in the past, and had a reputation in the community for such.<sup>5</sup> He claims this failure prejudiced him and affected the outcome of the trial. We disagree.

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<sup>5</sup> Intertwined with his argument are more allegations of trial counsel's failure to prepare an entrapment defense which we have already determined is not properly before us.

Even a cursory review of the record reveals that any such testimony from Crawley's alleged "exculpatory witnesses" would have been cumulative at best. The confidential informant was thoroughly examined at trial. His past convictions were put before the jury as was his drug habit. The confidential informant admitted he contacted the police to become an informant to help get himself off drugs. Crawley does not indicate what further testimony could have been developed to impeach this witness apart from the admissions made on the stand, nor does he indicate that he ever informed his counsel that any such witnesses existed. We discern no prejudice from any alleged failure to interview these unnamed witnesses. *Strickland*.

Fourth and finally relating to his initial argument that the trial court erred in denying his request for an evidentiary hearing, Crawley argues counsel failed to obtain an expert to conduct independent drug analysis. Crawley offers little to no support for this vague and general allegation, in contravention of the specificity requirements of RCr 11.42(2) and *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "[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 v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (footnote omitted). We will not search the record to construct Crawley'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). Thus, no further discussion of this purported error is required.

For his next argument on appeal, Crawley contends that the trial court erred in failing to appoint counsel to represent him in the RCr 11.42 proceedings. The law of the Commonwealth is clear. An appellant has no right to appointed post-conviction counsel under either the United States or the Kentucky Constitution. *Fraser*, 59 S.W.3d at 451. Pursuant to RCr 11.42(5), appointed counsel is only required if the allegations are not refuted by the record and an evidentiary hearing is necessary. *Id.* at 453. As we have previously discussed, Crawley’s preserved allegations were refuted by the record. Accordingly, the trial court had no obligation to appoint counsel to represent him with respect to his RCr 11.42 motion.

Crawley’s final argument on appeal is that he received ineffective assistance of appellate counsel. He alleges appellate counsel was ineffective in failing to: 1) raise an issue regarding suppression of evidence; 2) provide evidence in his direct appeal of his arrest for selling valium; and 3) show one of the convictions used during the PFO portion of sentencing had been vacated.

Of these three foregoing issues, only the latter is pled with the specificity required under RCr 11.42(2). As we previously stated, reviewing courts

will not search the record to glean support for vague and underdeveloped arguments. Further, our review of the record reveals Crawley did not raise the third issue in his RCr 11.42 motion in the trial court and the issue is thus not properly before us. *Bowling*. Even so, we believe this issue requires a brief discussion.

Crawley argues appellate counsel was ineffective in failing to show that a robbery conviction used in the PFO phase had previously been vacated by a federal court. He levels a similar argument against trial counsel. He contends these failures resulted in an improper conviction for PFO I. This contention is without merit.

Apart from his own unsupported assertion, Crawley has presented no evidence that his robbery conviction has, in fact, been vacated. Even had he done so, we would still be compelled to conclude no prejudice or wrongful conviction occurred as a result of counsel's alleged failures.

During the PFO phase of the trial, the jury was presented with testimony regarding Crawley's criminal history. This included *three* previous felony convictions, including the robbery conviction which he claims was vacated. KRS 532.080(3), in pertinent part, states a person is a persistent felony offender in the first degree if he "stands convicted of a felony after having been convicted of *two (2) or more* felonies . . . and now stands convicted of any one (1) or more felonies." (Emphasis added). Thus, had Crawley proved that the robbery conviction had been vacated and the jury was not instructed on it, the other two



prior felony convictions were statutorily sufficient for the jury to conclude he was guilty of being a PFO I. Crawley has failed to show any errors of counsel resulted in prejudice or a wrongful conviction. Neither has he shown a reasonable probability of a different outcome absent the alleged error. *Strickland*.

After examination of the record, the trial court correctly concluded that RCr 11.42 relief in this case was unwarranted. For the reasons stated herein, the judgment of the Muhlenberg Circuit Court denying post-conviction relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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