

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

NO. 2012-CA-000427-MR

ANDREW TRAVIS HOSACK

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 09-CR-00297

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Andrew Travis Hosack appeals from the February 3, 2012, order of the Pulaski Circuit Court which denied his motion for post-conviction relief under RCr<sup>1</sup> 11.42. Because we hold the trial court did not abuse its discretion in denying Hosack's motion, we affirm.

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

In 2009, Hosack was indicted on one count of burglary in the first degree<sup>2</sup> and one count of robbery in the first degree.<sup>3</sup> On December 17, 2009, Hosack appeared and entered a plea of guilty to both charges. A final judgment was entered on February 10, 2010, sentencing Hosack to ten years on each count to be served consecutively, for a total sentence of twenty years. In addition, Hosack was found to be in contempt of court as a result of being disruptive in the courtroom, and was sentenced to an additional 180 days on each of the two counts of contempt. No direct appeal was filed.

On July 19, 2011, Hosack filed a post-conviction motion to vacate his sentence pursuant to RCr 11.42. However, he then moved to withdraw the motion and was granted that relief. On November 23, 2011, Hosack filed a new RCr 11.42 motion, alleging his trial counsel had provided ineffective assistance. The motion was denied in an order entered on February 3, 2012. This appeal followed.

This Court reviews a trial court's denial of RCr 11.42 relief for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion occurs when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

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<sup>2</sup> Kentucky Revised Statutes (KRS) 511.020, a Class B felony.

<sup>3</sup> KRS 515.020, a Class B felony.

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and followed in *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

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.

*Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Thus, the relevant inquiry of the trial court is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 SW3d 380, 386 (Ky. 2002).

On appeal, Hosack alleges he was suffering from a mental illness at the time of trial that resulted in his inability to understand the proceedings against him and an inability to enter an informed plea. He argues his trial counsel was

ineffective by failing to investigate evidence of this mental illness and by failing to employ an expert to conduct a mental evaluation. We have reviewed Hosack's contentions and find them to be without merit.

Despite Hosack's argument to the contrary, his poor courtroom conduct, which led to him being charged with contempt, does not prove he suffered from a mental illness at the time of his plea. He has failed to provide, or even identify, any specific evidence supporting his claim that he was mentally unstable. Although he makes general references to hospitalization, medical staff, and prescription treatment, he fails to name a single hospital, treating physician, or pharmaceutical. In fact, he fails to even identify the mental illness from which he allegedly suffers. In short, Hosack's argument is composed entirely of whimsy and speculation. At the time of Hosack's plea, the trial court found he understood the charges against him and entered his plea knowingly and voluntarily. Hosack's speculative arguments to the contrary are insufficient to support his claim of ineffective assistance. Accordingly, the trial court did not abuse its discretion in denying his RCr 11.42 motion for relief.

For the foregoing reasons, the February 3, 2012, order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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