

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001346-MR

HARRELL T. MERCER

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE BRUCE T. BUTLER, JUDGE  
ACTION NO. 06-CR-00118

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Harrell T. Mercer, *pro se*, appeals from the Grayson Circuit Court's denial of his motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42 following an evidentiary hearing. For the following reasons, we affirm.

On September 12, 2006, Tommy Lindsey was found dead on the road in front of his parents' house in Grayson County, Kentucky. Forensic evidence

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

indicated he had died from blunt force trauma consistent with being struck by an automobile. During the course of investigating the death, police officers interviewed Mercer, Chris Coates, Andrea Belcher, and Trista Hall, the last people known to have seen Lindsey alive. Their stories were mostly consistent.

On the night Lindsey was killed, he and the four others were drinking alcohol at the body shop where Mercer worked. Lindsey, intoxicated and injured from a slip and fall at the body shop, decided to go home for the evening. When no one would drive him, Lindsey took Belcher's minivan without permission, backed into a tree, and proceeded toward his home. A short time later, Mercer and the others got into a green Chevrolet Camaro belonging to the body shop owner and went after Lindsey to retrieve the minivan. All of the witnesses, including Mercer, indicated Mercer was the driver of the Camaro.

After locating the minivan in a ditch near Lindsey's home, Belcher and Coates drove it back to the body shop. Mercer and Hall continued toward Lindsey's residence in the Camaro, saw lights on, assumed Lindsey had arrived home safely, and decided to turn around to rejoin the others at the body shop. Shortly after turning around in Lindsey's driveway, the Camaro ran over something. When Hall asked what they had hit, Mercer indicated his belief it was "just a dog." The pair did not stop to investigate, and instead returned to the body shop. Lindsey's dead body was located a short time later by a newspaper carrier. DNA testing confirmed blood located on the Camaro belonged to Lindsey.

Mercer was charged with multiple offenses in connection with Lindsey's death, including murder<sup>2</sup> and being a persistent felony offender in the first degree.<sup>3</sup> On August 20, 2007, Mercer entered a guilty plea to amended charges of manslaughter in the second degree<sup>4</sup> and being a persistent felony offender in the second degree.<sup>5</sup> Pursuant to the Commonwealth's offer on a plea of guilty, Mercer was sentenced to an enhanced term of eighteen-years' imprisonment. His subsequent motion for shock probation was denied. Mercer did not appeal his convictions.

On June 30, 2009, Mercer filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42. He also filed motions seeking an evidentiary hearing, authority to proceed *in forma pauperis*, and appointment of counsel. The trial court granted him pauper status, appointed counsel and set the matter for a hearing. Prior to convening the evidentiary hearing, appointed counsel informed the trial court that no supplemental filings would be tendered. The hearing was convened on July 11, 2011, with Mercer and trial counsel being the sole witnesses to testify. Following the hearing, both sides submitted written arguments supportive of their positions. After considering the written and oral arguments in conjunction with the

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<sup>2</sup> Kentucky Revised Statutes (KRS) 507.020, a Capital offense.

<sup>3</sup> KRS 532.080(3).

<sup>4</sup> KRS 507.040, a Class C felony.

<sup>5</sup> KRS 532.080(2).

evidence adduced at the hearing, the trial court denied Mercer's motion for post-conviction relief in a written order entered on June 8, 2012. This appeal followed.

Mercer advances five allegations of error before this Court. He contends counsel failed to investigate and develop an alternate perpetrator defense, did not explain the elements of the crime to him, failed to investigate the facts, and failed to investigate for exculpatory evidence. He further argues the cumulative effect of these errors marred the plea process to the extent that reversal is required. However, Mercer's brief contains little more than bare assertions, conclusory allegations and unsupported statements of his beliefs. In fact, in contravention of the mandates of CR<sup>6</sup> 76.12, Mercer fails to make a single citation to the record or any authority supportive of his position.

As a general rule we will not consider bare allegations of error which are unsupported by evidence or argument on appeal. *Stewart v. Jackson*, 351 S.W.2d 53, 54 (Ky. 1961) (citations omitted). Although the rule of lenity applies to *pro se* litigants, this basic rule is still applicable. While we would be within our discretion to strike Mercer's brief or dismiss the action for noncompliance, we will not impose such draconian sanctions at this time. However, we shall address the issues presented based solely on the facts appearing on the face of the record.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must generally prove two prongs: 1) counsel's performance

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<sup>6</sup> Kentucky Rules of Civil Procedure.

was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard of attorney performance is reasonable, effective assistance. The movant bears the burden of proof in showing his counsel's representation fell below an objective standard of reasonableness and must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

In the context of a guilty plea, the movant must show that, but for the alleged errors and deficiencies of counsel, a reasonable probability exists the movant would not have entered a plea but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

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.

The main crux of Mercer's argument appears to be based on his belief that counsel failed to conduct a thorough pretrial investigation relative to several matters. Our review of the record indicates that none of Mercer's allegations are sufficient to overcome the high bar set for showing his counsel was constitutionally ineffective. Even a cursory review bears out this determination.

At the evidentiary hearing, the trial court received testimony from Mercer and his former counsel regarding the events precipitating entry of his guilty plea which it set forth in great detail in its order denying relief. Mercer testified that trial counsel had prepared absolutely no defense for him and basically forced him to enter a guilty plea based on her lack of preparation. He stated counsel had never discussed the law, facts, potential witnesses or possible defenses with him. He stated he informed counsel he was so intoxicated on the night of Lindsey's death that he had no independent recollection of what happened and his statements to police were based only on what Coates had told him occurred. Mercer said he believed Coates was actually driving the car when Lindsey was struck and that he had told counsel to investigate that possibility but she refused. He indicated that but for counsel's unprofessional approach to his case, he would have insisted on going to trial.

Contrary to Mercer's assertions, counsel indicated she had thoroughly reviewed the witness statements made to police, all of which—including his own admission—indicated Mercer was piloting the car that struck and killed Lindsey. She testified Mercer never mentioned an alternate perpetrator to her prior to entering his guilty plea. Counsel further testified she had spoken with Mercer at length regarding the statements and physical evidence to be used against him, the elements of the offenses for which he stood charged, what defenses would and would not be applicable, sentencing ranges and enhancements, and the elements of the Commonwealth's plea offer. Counsel indicated she had actively prepared for

trial but believed that based on the facts, Mercer had no viable defenses and would be convicted if he proceeded to trial. She stated her belief that obtaining a favorable plea agreement was in Mercer's best interests and her pretrial strategy was dominated by this effort.

After evaluating the testimony and arguments, the trial court, citing *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. App. 1967), concluded Mercer had failed to meet the burden of establishing "convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." It further concluded Mercer had failed to meet the deficiency prong of the *Strickland* test for ineffectiveness. Based on our review of the record, the trial court's determinations were correct. The actions of trial counsel were clearly matters related to trial strategy, all of which appear from the record to be appropriate in light of the overwhelming evidence of Mercer's guilt.

Mercer has failed to show counsel's actions were deficient. He has likewise failed to prove a reasonable probability he would have insisted on going to trial but for counsel's alleged deficiencies, especially considering the favorable plea agreement he would have had to reject in exchange for the risk of receiving a substantially longer sentence at trial in the very likely event of a conviction. Mercer's failure to carry his burden was fatal to his request for extraordinary relief as the trial court correctly concluded. There being no individual errors, there can be no cumulative error. *See Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky.

1998) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

For the foregoing reasons, the judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harrell T. Mercer  
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BRIEF FOR APPELLEE:

Jack Conway  
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