

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

NO. 2013-CA-001038-MR

BRIAN BENTON

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NOS. 04-CR-00110, 04-CR-00110-001 & 04-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Brian Benton, appeals from an order of the Johnson Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42.

Finding no error, we affirm.

In April 2006, Appellant was convicted in the Johnson Circuit Court of first-degree complicity to robbery, complicity to receiving stolen property over

\$300.00, and for being a second-degree persistent felony offender. The charges stemmed from the 2004 robbery of the Citizens National City Bank in Paintsville, Kentucky. Appellant was sentenced to ten years on the robbery charge and five years on the receiving stolen property charge, enhanced to a total sentence of twenty years' imprisonment by virtue of his persistent felony offender conviction. Appellant's convictions and sentence were subsequently affirmed on appeal to the Kentucky Supreme Court. *Benton v. Commonwealth*, 2006–SC–000372–MR (Oct. 23, 2008).

On October 14, 2010, Appellant filed a *pro se* RCr 11.42 motion in the trial court alleging that trial counsel was ineffective for failing to present the testimony of Jimmy Craft and Joey Dickerson Rife, as well as for failing to advise him of his Sixth Amendment right to testify at trial. Counsel was thereafter appointed and requested an evidentiary hearing on Appellant's claims. By order entered September 19, 2011, the trial court denied Appellant's RCr 11.42 motion without an evidentiary hearing. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v.*

*Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional

assistance. *Strickland*; see also *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Appellant first argues that trial counsel was ineffective for failing to secure the appearance at trial of Jimmy Craft. Trial counsel did subpoena Craft for trial and, in fact, Appellant stated in his initial RCr 11.42 motion that trial counsel made a good faith effort to secure Craft's attendance. Nevertheless, Craft failed to appear and was later arrested and brought before the court after the trial had concluded. Appellant now claims that Craft's testimony was crucial because it would have completed his alibi defense and would have provided a complete timeline of his whereabouts on the day in question.

The record establishes that Appellant called two other alibi witnesses, Greg Arnett and Steve Gibson, who both testified that Appellant was fixing brakes on a truck on the day and time of the robbery. Although Appellant claims that Craft would have completed his alibi, he offers no specifics as to what Craft would have testified to. Further, he fails to explain how Craft's testimony would have possibly changed the outcome of the trial.

Appellant argues that he was entitled to an evidentiary hearing on this issue because nothing in the record refutes his claim. Appellant fails to recognize, however, that he bears the burden of establishing that an issue of fact exists so as to warrant a hearing. As previously noted, “[c]onclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.”

*Sanders*, 89 S.W.3d at 385. Merely stating that Craft would have completed his alibi, without providing any factual basis to support the claim, is self-serving and insufficient grounds to justify a hearing. “[T]he purpose of RCr 11.42 is to provide a forum for known grievances, not to provide the opportunity to research for grievances. *Gillam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983).

Similarly, Appellant alleges that trial counsel was ineffective for failing to call Joey Dickerson Rife as a witness to challenge the credibility of the Commonwealth’s witness, Claudetta Bailey. Bailey testified as to Appellant’s involvement in the robbery and refuted his alibi claim. As such, Appellant claims that it was critical for Rife, Bailey’s ex-husband, to testify to impeach Bailey’s credibility, demonstrate her inability to recall facts, and show that she was biased against Appellant. Again, Appellant’s argument must fail.

First, we find nothing in the record to indicate Appellant requested Rife’s presence at trial or that trial counsel was even aware of Rife’s existence. The existence of a potential witness that trial counsel either chose not to have testify, or was not aware of, is not grounds for an ineffective assistance claim.

*Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (Citing *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995) (en banc) (“The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.”)).

Second, a claim of ineffective assistance of counsel based on a failure to call witnesses requires that the movant state who would have testified, what they would have testified to, and how their testimony would have changed the reliability of the verdict. *Foley v. Commonwealth*, 17 S.W.3d 878, 888 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). As he did with Craft, Appellant has failed to provide any specifics as to what Rife would have testified to. As such, we cannot conclude that the trial court erred in denying an evidentiary hearing.

Finally, Appellant asserts that his trial counsel was ineffective and violated his Sixth Amendment by failing to advise him of his right to testify at trial. Appellant argues that had he been permitted to testify, he could have filled in the timeline of the day in question to demonstrate that he was not involved in the robbery and could have refuted Bailey’s testimony. Further, Appellant believes that the jury would have determined that he was more credible than the Commonwealth’s witnesses.

At the outset, we must agree with the Commonwealth that because Appellant is claiming a violation of his Sixth Amendment rights, this issue could have and should have been asserted on direct appeal. *McQueen v. Commonwealth*, 948 SW.2d 415 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997); *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). RCr 11.42 is not the proper vehicle to raise the instant claim.

Notwithstanding the procedural deficiency, however, Appellant's claim has no merit. In his brief, Appellant makes nothing more than vague references about what he would have testified to had he been given the opportunity. "[V]ague claims fail to satisfy the specificity requirements of RCr 11.42(2)." *Hodge*, 116 S.W.3d at 470. Moreover, there is absolutely nothing in the record to indicate that Appellant was unaware of his right to testify on his own behalf or that trial counsel prevented him from doing so. Given Appellant's lengthy criminal history, we find it disingenuous for him to now claim that he failed to comprehend he had the right to testify. There was more than sufficient evidence in the record for the trial court to conclude that Appellant was aware of his right to testify. Simply making unsubstantiated allegations of ineffective assistance after an unfavorable result at trial does not warrant an evidentiary hearing.

The burden is on the movant to establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings. *Dorton v. Commonwealth*, 433

S.W.2d 117 (Ky. 1968). Herein, the trial court was able to resolve the issues from the record and correctly determined that the allegations were not sufficient to invalidate the convictions on the grounds of ineffective assistance. *See Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998), *cert. denied*, 526 U.S. 1023 (1999).

The order of the Johnson Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCR 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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