

RENDERED: NOVEMBER 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001924-MR

TREMAINE WASHINGTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CR-00874

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tremaine Washington brings this appeal from an October 21, 2013, Opinion and Order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

In 2004, appellant was found guilty of murder by a jury and was sentenced to twenty-years' imprisonment in the stabbing death of his cousin. Appellant pursued a direct appeal, and the Supreme Court of Kentucky affirmed his conviction in Appeal No. 2005-SC-0037-MR.

In 2009, appellant filed an RCr 11.42 motion alleging ineffective assistance of trial counsel. By Opinion and Order entered October 21, 2013, the circuit court summarily denied the RCr 11.42 motion. This appeal follows.

To prove ineffective assistance of trial counsel, movant must demonstrate that trial counsel's performance was deficient and that such deficient performance resulted in prejudicial error. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An evidentiary hearing is required if movant's allegations of error cannot be refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001).

Appellant argues that the circuit court erroneously denied his RCr 11.42 motion without an evidentiary hearing. Specifically, appellant asserts that trial counsel was ineffective for failing "to investigate and present evidence as to [appellant's] character and emotional state at the time of the incident." Appellant's Brief at 5. Appellant believes that if trial "counsel investigated and presented these witnesses the jury would have seen [appellant] for what he truly was, a young man just barely old enough to drink, who made an impulsive choice the consequence of which he never imagined or intended." Appellant's Brief at 8.

Appellant fails to identify any specific witnesses that trial counsel should have called to testify at trial. Instead, appellant merely makes bare allegations without factual support. The circuit court noted that appellant failed to demonstrate “what the additional witnesses would have said or what effect, if any, those additional witnesses would have on the outcome of this case.” The court further observed:

It must be remembered that the several witnesses who testified were all family members of both [appellant] and the victim. They saw what happened, testified about [appellant] being the instigator and the provocateur in starting this fight, in going back and getting the two knives in question and returning to the scene and again instigating the altercation. Trial counsel had the benefit of statements from these witnesses given to the police for review and impeachment at trial.

Without more specific detail, we agree with the circuit court that appellant failed to demonstrate that trial counsel’s performance was deficient. Upon the whole, we hold that appellant’s allegations of ineffective assistance of trial counsel were refuted upon the face of the record and that the circuit court properly denied the RCr 11.42 motion.

For the foregoing reasons, the Opinion and Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Dixon Bullock
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky