

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

NO. 2014-CA-001727-MR

JOHN C. COLEMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 06-CR-00238

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, NICKELL, AND VANMETER, JUDGES.

MAZE, JUDGE: In 2006, a Kenton County grand jury returned an indictment charging John C. Coleman with Possession of a Handgun by a Convicted Felon. Subsequently, the grand jury returned an additional indictment charging Coleman with first-degree Wanton Endangerment and being a Persistent Felony Offender in the second degree (PFO II). The Wanton Endangerment count was dismissed prior

to trial. Following a trial in October 2007, the jury convicted Coleman on both remaining counts. The jury fixed his sentence at seven years' imprisonment, enhanced to twenty years by virtue of his status as a PFO II.

On direct appeal, the Kentucky Supreme Court reversed the conviction and remanded for a new trial. *Coleman v. Commonwealth*, No. 2008-SC-000072-MR, 2009 WL 3526657 (Ky. 2009). Upon remand, the Commonwealth sought to amend the indictment and charge Coleman as a Persistent Felony Offender in the first degree (PFO I) based upon evidence of an additional prior conviction in Ohio. The trial court allowed the amendment. Ultimately, the jury found Coleman guilty of the possession and PFO 1 charges. The jury fixed his sentence at 5 years on the handgun-possession charge, enhanced to 17½ years by virtue of his status as a PFO I. This Court affirmed the convictions on appeal. *Coleman v. Commonwealth*, No. 2010-CA-001015-MR, 2012 WL 3055210 (Ky. App. 2012).

Therafter, on November 14, 2013, Coleman filed a *pro se* motion to vacate his conviction pursuant to RCr<sup>1</sup> 11.42, alleging several counts of ineffective assistance of counsel. On June 18, 2014, the trial court denied the motion without an evidentiary hearing. This appeal followed.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome of the trial would have been different. *Strickland v.*

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

*Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688–89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

The trial court must conduct a hearing on an RCr 11.42 motion where the allegations raise material issues which cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). “The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Id.* at 452-53. Where the trial court has denied an RCr 11.42 motion without a hearing, this Court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000).

Coleman first argues that his trial counsel failed to adequately investigate the facts, circumstances and defenses to the handgun-possession charge. He maintains that his trial counsel should have pursued evidence of possible alternative perpetrators and should have raised defenses claiming

contaminated or missing evidence regarding his alleged possession of the handgun.

The trial court found no evidence that Coleman's counsel at the second trial was ineffective in any of these matters. The court stated in its order:

It is clear from a review of the trial that counsel was aware that defendant's fingerprints were not on the gun and that fact was made known to the jury. Defendant states that counsel should have sought information concerning the incident which could give rise to any charges of any improper police investigative practice, an apparent reference to the fact that when the gun was retrieved it was handled by the officers with their bare hands. There is absolutely no evidence in the record that there was any bad faith or attempt to destroy evidence on the part of the officers. Rather, they discovered a loaded weapon, right where it appeared that defendant had dropped or put something down, while in the initial phases of securing the scene and their handling of the gun was a proper safety check to ensure that the weapon posed no hazard to anyone there. Furthermore the police fingerprint technician who testified that it is generally difficult to obtain usable prints from a gun, and stated unequivocally that no prints were obtained from the gun in this case, not even the two officers who handled the gun with their bare hands had left any prints thereon. ... This also negates defendant's argument that the fingerprints of an alternative perpetrator were found on the gun but were withheld from the defense. There was no "missing evidence" as the evidence defendant wishes he could have relied upon was not missing but was non-existent. Therefore counsel was not ineffective for not attempting to show that the police intentionally destroyed exculpatory evidence or for not requesting a missing evidence instruction. Defendant also asserts that counsel failed to properly present an alternative perpetrator defense by introducing evidence that the gun belonged to someone else. First of all, ownership of the gun is irrelevant to a possession charge, but beyond that defense counsel showed the jury that there was no proof of ownership of the gun and presented circumstantial evidence that the gun had not been in the possession of

defendant and thoroughly cross-examined the witnesses who testified that the defendant had been brandishing the gun. There is nothing in the record to indicate any ineffectiveness in the assistance counsel provided defendant as to the issue of fingerprints on or ownership of the gun.

RCr 11.42 (2) requires that “[t]he motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” As the trial court found, Coleman did not specifically identify any facts upon which he challenged the effectiveness of his counsel’s representation or any potential prejudice arising from counsel’s decisions. In the absence of such evidence, the trial court properly found that Coleman was not entitled to an evidentiary hearing on this matter.

Coleman next argues that his trial counsel failed to raise a jurisdictional challenge to the amendment of the PFO charge from second degree to first degree. He maintains that the additional indictments issued in 2007 and 2010 were improperly returned under the original 2006 case number, rendering them void. Coleman presents no evidence and cites to no authority for his suggestion that the grand jury lacked jurisdiction to return the amended indictment, or that the indictments were otherwise defective.

Even if the form for adding the additional charges was improper, the validity of an indictment shall not be affected by reason of a defect or imperfection that does not tend to prejudice the substantial rights of the defendant on the merits.

RCr 6.12. In the most recent appeal, this Court found that the PFO charge was properly amended to first degree. In the absence of any showing of prejudice, Coleman was not entitled to an evidentiary hearing on this issue.

Finally, Coleman argues that his appellate counsel was ineffective for failing to preserve and raise on appeal the issues relating to the PFO indictments on appeal. *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010). As noted above, we agree with the trial court that Coleman has not identified any non-frivolous jurisdictional defect that his trial counsel should have raised. Consequently, his appellate counsel cannot have been ineffective for failing to raise the issue.

Accordingly, the June 18, 2014 order of the Kenton Circuit Court denying Coleman's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Coleman, *pro se*  
Kentucky State Penitentiary  
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Courtney J. Hightower  
Assistant Attorney General  
Frankfort, Kentucky