

RENDERED: OCTOBER 14, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000926-MR

ZELNAR TRAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 07-CR-003360

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Zelnar Travis brings this appeal from a May 15, 2014, order of the Jefferson Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

The underlying facts of this appeal were set forth by the Kentucky Supreme Court in *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010), and we adopt same herein:

During the early morning hours of August 21, 2007, police received a call about a man who was possibly hurt in downtown Louisville. When police arrived on the scene, they realized that the individual, while not injured, had been robbed at gunpoint in a nearby housing project. The victim, Timothy Humphrey, was able to provide the officers with a detailed description of the two men who had robbed him. Within an hour, officers had located the Appellants near the robbery site. When the police found the two men, they noticed a loaded, semi-automatic handgun in the grass next to a porch on which they were sitting. The weapon was functional, but the serial number had been scratched off.

According to Humphrey, he was walking to a housing project when he noticed Travis and Dawson stalking him. The two men eventually caught up with him, put him on the ground, held a gun to his head, and searched him for valuables. Humphrey stated that the robbers took his wallet and cell phone. At the end of the confrontation, Travis and Dawson walked away and told Humphrey to leave the housing project. When Travis and Dawson were later apprehended by police, Humphrey identified them as the individuals who robbed him.

After a four-day trial, Travis was convicted of robbery in the first-degree, possession of a handgun by a convicted felon, possession of a defaced firearm, and being a first-degree persistent felony offender. Travis was sentenced to 20 years on the robbery charge and 8 years on the possession of a firearm charge, with those sentences to run concurrently for a total of 20 years, enhanced to 27 years by the PFO conviction. . . . The trial court additionally imposed court costs in the amount of \$130 and levied a “felony conviction fee” (or fine) of \$1000 apiece.

Id. at 458-59 (citations omitted). The Supreme Court affirmed Travis’s conviction but reversed the imposition of costs and fines. *Travis*, 327 S.W.3d 456.

In 2013, Travis filed the instant RCr 11.42 motion to vacate his sentence of imprisonment due to ineffective assistance of trial counsel. By order entered May 15, 2014, the circuit court denied the RCr 11.42 motion without an evidentiary hearing. In denying the RCr 11.42 motion, the circuit court reasoned:

The Court concludes that the defendant's motion is devoid of any specific facts to support the grounds upon which his sentence is being challenged. Therefore, the motion to vacate does not satisfy the requirements of RCr 11.42(2) and must be dismissed. Additionally, even if the defendant had provided adequate support, his legal argument does not satisfy the standard articulated in the *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] decision. Not only is the evidence insufficient to overcome the presumption of reasonableness afforded to the conduct of defense counsel, but there is no explanation at all regarding how the alleged errors actually prejudiced the outcome.

May 15, 2014, order at 4. This appeal follows.

To be entitled to RCr 11.42 relief, movant must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). Prejudice occurs when absent trial counsel's deficient performance, there exists a reasonable probability that the jury would have reached a different verdict. *Norton v. Com.*, 63 S.W.3d 175 (Ky. 2002). In the motion, it is incumbent that the movant set forth specific factual allegations, that if true, would demonstrate entitlement to RCr 11.42 relief. *Bowling v. Com.*, 981 S.W.2d 545 (Ky. 1998); *Stoker v. Com.*, 289 S.W.3d 592 (Ky. App. 2009). And, an evidentiary hearing is only required if movant's

allegations cannot be refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001). Our review proceeds accordingly.

Travis initially alleges that trial counsel was ineffective for failing to investigate and interview two alleged alibi witnesses. According to Travis, he:

[I]nformed his trial counsel that he did not commit the robbery; he was sitting on the porch of a vacant apartment with two (2) other individuals, one male and one female; he was on the porch with them from about 1:45 a.m. until 3:30 a.m.; the arresting officers interviewed both individuals and obtained their personal information; and Travis requested his trial counsel to interview the police officers involved and the alibi witnesses.

Travis's Brief at 6-7 (footnote omitted).

In this Commonwealth, it is incumbent upon trial counsel to adequately prepare a defense in a criminal trial, which necessarily involves consultation with the client, interviews with witnesses, and research of law and underlying facts. *Morgan v. Com.*, 399 S.W.2d 725 (Ky. 1966). In his allegation, Travis fails to provide the identity of the two alleged alibi witnesses or to provide any identifying information concerning the alibi witnesses. Moreover, the purported testimony of the two unnamed witnesses is purely speculative at best. Without more specificity, we conclude that Travis failed to allege facts that demonstrated trial counsel was deficient for not interviewing two alleged alibi witnesses. *See Bowling*, 981 S.W.2d 545.

Travis next asserts that trial counsel was ineffective for failing to present mitigating evidence during the penalty phase of trial. Travis particularly

claims that his parents and sister would have testified during the penalty phase but that trial counsel failed to call them as witnesses. Travis maintains that trial counsel never interviewed them or spoke to them concerning their potential testimony.

In his motion, it was necessary for Travis to set forth specific factual allegations, which if true, would entitle him to RCr 11.42 relief. *See Bowling*, 981 S.W.2d 545. Travis, however, failed to offer any specifics concerning the proposed testimony of his parents and sister. In fact, Travis merely states that the witnesses would have been willing to testify during the penalty phase of trial but does not reveal the substance of each parent or sister's testimony. Instead, Travis merely advances general and conclusory allegations unsupported by specific facts. Such is wholly insufficient under Kentucky law. *See Sanders v. Com.*, 89 S.W.3d 380 (Ky. 2002) *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009). Without specific allegations, we believe that Travis failed to demonstrate that trial counsel was ineffective in this regard.

Travis also maintains that trial counsel was ineffective for failing to inform him of his right to testify at trial. Travis alleges that trial counsel prevented him from testifying by citing trial strategy and that he was unaware that he possessed a "Fifth Amendment right to testify which cannot be waived by counsel or by the court." Travis's Brief at 14.

The record refutes Travis's claim. During trial, the trial court directly informed Travis that he had a right to testify at trial and that it was ultimately his

decision. Travis related that he understood and did not wish to testify at trial.

Consequently, it is manifestly clear that Travis knew of his right to testify at trial and trial counsel did not render ineffective assistance.

Travis lastly argues that trial counsel rendered ineffective assistance by failing to investigate the victim's motives. In support of this argument, Travis alleges:

[T]rial counsel asked during the initial client interview if he knew the alleged victim, Timothy Humphrey, in which he informed trial counsel that he did not know who Humphrey was. It was not until the Suppression Hearing when Humphrey took the stand that Travis recognized him. . . .

After the hearing, Travis informed his trial counsel that he first encountered Humphrey on August 14, 2007[,] when he was at Fisk Court in Louisville, Kentucky with the co-defendant. Travis witnessed a drug transaction between the alleged victim and James Allen. Humphrey approached them and asked if they had a "\$10 rock for sale." Allen proceeded to sell illegal drugs to Humphrey. Travis informed his attorney that on August 21, 2007, the day of the alleged robbery, that the co-defendant and Humphrey had a physical altercation two (2) hours before being arrested. The physical altercation was over an earlier drug deal.

Travis's Brief at 8-9 (citations omitted).

Travis is only entitled to RCr 11.42 relief if he demonstrates that trial counsel's performance was deficient and that such deficiency was prejudicial to the defense. See *Strickland*, 466 U.S. 668. Even if trial counsel were deficient for failing to investigate the victim's motives, Travis failed to establish that a reasonable probability existed that the jury's verdict would have been different. If

Travis or his co-defendant testified as to the alleged drug buy and physical altercation with the victim, Travis's own testimony would have placed him with the victim on the evening of the burglary and could have possibly provided the Commonwealth with a motive for the burglary. The evidence reasonably could have strengthened, rather than harmed, the Commonwealth's case. Considering the evidence as a whole, we simply do not believe that trial counsel was ineffective for failing to investigate the victim's motives.

In summary, we are of the opinion that the circuit court properly denied Travis's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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