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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000652-MR

BRANDON PAUL SMITH

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CR-00003

COMMONWELATH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TAYLOR, JUDGE: Brandon Paul Smith brings this *pro se* appeal from a March 26, 2016, order of the Livingston Circuit Court denying Smith's Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for relief without an evidentiary hearing.

We affirm.

The underlying facts were summarized in a previous Opinion of this

Court as follows:¹

At approximately 9:36 PM on January 6, 2012, Courtney Quertermous was working as a cashier at the Ledbetter Minit Mart when a robber entered the store, pointed a pistol at her and stated: “Give me all of your f***ing money or I’m going to blow your brains out.” Quertermous later described the robber as a tall man with facial hair wearing a gray sweatshirt, a dark toboggan emblazoned with a colorful emblem, and a blue bandanna tied across his face. Although Quertermous could not identify the make and model of the robber’s gun, she knew the gun was real based on her lifelong experience with firearms. Fearing for her life, she surrendered the money and called the police after the robber fled.

Kentucky State Police Trooper Eric Fields and Detective Kyle Nall arrived at the Minit Mart and began their investigation at approximately 9:45 PM. Detective Nall interviewed Quertermous and watched the video surveillance tape from the Minit Mart’s security camera. The tape corroborated Quertermous’s description of the events and also showed that the robber wore white tennis shoes and jeans with holes in them. Having no suspects in the case, Detective Nall provided other officers with a photograph of the robber taken from the surveillance tape.

Deputy Cory Golightly of the McCracken County Sheriff’s Department saw the photograph and identified Smith as a suspect in the robbery. One day prior to the robbery, Deputy Golightly was dispatched to investigate a possible suicide attempt by Smith. When Deputy Golightly encountered Smith, he was dressed exactly like the man depicted in the Minit Mart’s surveillance video. Specifically, Smith wore a gray sweatshirt, blue jeans with holes in them, a black toboggan emblazoned with a white emblem and he carried a blue bandanna in his pocket. Smith told Golightly that he was “down on his

¹ The Opinion was rendered by the Court of Appeals in a direct appeal of Brandon Paul Smith’s conviction in *Smith v. Commonwealth*, Appeal No. 2012-CA-002108-MR.

luck” and agreed to be transported to nearby Lourdes Hospital for observation. After learning of the robbery, Golightly obtained the video from a security camera at Lourdes Hospital showing that Smith closely matched the robber’s description. Golightly provided the video to Detective Nall to make further inquiry.

Detective Nall’s inquiry yielded more evidence that Smith was a suspect in the robbery. Tina Overturf, a friend of Smith’s who lives within a mile of the Minit Mart, testified that Smith ate dinner at her home on the night of the robbery at approximately 6:30 PM. After dinner, Overturf invited Smith to stay the night in her living room because she knew he was “down on his luck” and in need of shelter. Overturf went to check on him sometime between 8:30 and 9:00 PM, and found he left Overturf’s home. At trial, Overturf testified her home was only a “twenty-minute walk” from the Ledbetter Minit Mart and that Smith was wearing a gray sweatshirt and blue jeans on the night of the robbery. Detective Nall interviewed Smith regarding the robbery.

Smith v. Commonwealth, Appeal No. 2012-CA-002108-MR (Ky. App. 2012).

Smith was eventually indicted by the Livingston County Grand Jury upon the offense of first-degree robbery. A jury trial was held, and the jury found Smith guilty of the charged offense. Subsequently, the circuit court sentenced Smith to fifteen-years’ imprisonment. Smith then filed a direct appeal of his conviction to the Court of Appeals. In Appeal No. 2012-CA-002108-MR, the Court of Appeals affirmed Smith’s conviction and sentence of imprisonment.

On November 5, 2014, Smith filed the instant RCr 11.42 motion to vacate his sentence of imprisonment alleging ineffective assistance of trial counsel. By order entered March 26, 2015, the circuit court summarily denied Smith’s RCr 11.42 motion without an evidentiary hearing. This *pro se* appeal follows.

Smith claims that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Smith contends that his trial counsel rendered ineffective assistance of counsel, thus entitling him to RCr 11.42 relief.

To prevail, Smith must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *See 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 result. *Norton v. Com.*, 63 S.W.3d 175 (Ky. 2012). And, an evidentiary hearing is only required if Smith's allegations cannot be resolved upon the face of the record. *See Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). It is incumbent upon Smith to set forth specific factual allegations that if true would demonstrate entitlement to RCr 11.42 relief. *See Bowling v. Com.*, 981 S.W.2d, 545 (Ky. 1998); *Stoker v. Com.*, 289 S.W.3d 592 (Ky. App. 2009).

In his *pro se* brief, Smith raises several allegations concerning trial counsel's alleged ineffective assistance. Most of these allegations lack specificity and are merely general or conclusory allegations. We will, nonetheless, address each allegation separately.

Smith initially contends that trial counsel rendered ineffective assistance because he failed to interview an alibi witness, Jamie Ward, before trial. Smith claims that “[h]aving more in-depth and credible testimony from an alibi

witness would have undoubtedly put doubt of . . . [his] guilt in the mind of at least one juror changing the outcome of the trial.” Smith’s Brief at 10.

The record discloses that Ward was called as a witness at trial and was questioned by Smith’s trial counsel. While Smith believes that trial counsel should have interviewed Ward prior to trial and questioned Ward more thoroughly at trial, Smith fails to set forth any additional testimony that Ward might have offered at trial. Instead, Smith has merely advanced general allegations without specific factual support. It is well-established that general or “conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing” under RCr 11.42. *Haight v. Com.*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Com.*, 297 S.W.3d 151 (Ky. 2009). Thus, we conclude that Smith failed to demonstrate that trial counsel was ineffective for failing to interview Ward.

Smith next asserts that trial counsel was ineffective for failing to adequately investigate and prepare his case for trial. Smith particularly argues that trial counsel did not sufficiently confer with Smith prior to trial. More specifically, Smith argues:

Had Counsel pursued its case properly, Defense Counsel would have provided additional exculpatory evidence to support Detective Nall’s search of all [Smith’s] property, everything he owned in the world, that supported the fact that Detective Nall found no matching clothing or stolen property, as a consequence, of that search.

Additionally, had Counsel investigated and researched [Smith's] case, he would have challenged Detective Golightly's alleged identification of [Smith] from the night before the robbery.

Smith's Brief at 12.

During trial, counsel for Smith did cross-examine Detective Cory Golightly concerning his identification of Smith, and Detective Kyle Nall did admit that the search of Smith's bags did not produce clothing resembling the robber's clothing. Additionally, Smith has failed to set forth with any specificity the "additional exculpatory evidence" that trial counsel could have discovered by properly investigating Smith's case. Simply put, Smith has not set forth specific facts justifying relief under RCr 11.42. *See Stoker*, 289 S.W.3d 592.

Consequently, we are of the opinion that Smith failed to demonstrate that trial counsel was ineffective for failing to adequately investigate Smith's case prior to trial.

Smith also argues that trial counsel rendered ineffective assistance for failing to move for a continuance during trial. Smith, however, fails to specify when a continuance was warranted, and the reason trial counsel should have requested a continuance. Smith's bare assertion without any supporting facts is insufficient to demonstrate that trial counsel's performance was deficient. *See Stoker*, 289 S.W.3d 592.

Smith further maintains that trial counsel was ineffective due to his failure to retain a psychiatrist to perform a mental health evaluation. Smith claims

that he was depressed at the time of his arrest and that such depression would have constituted “mitigating evidence.” Smith’s Brief at 14. Even if a psychiatrist testified that Smith suffered from depression, we cannot say there exists a reasonable probability that this testimony alone would have affected the jury’s verdict. *See Norton*, 63 S.W.3d 175. Thus, no prejudice resulted.

Finally, Smith contends that trial counsel rendered ineffective assistance by failing to move for a mistrial during the course of the trial. Smith asserts that trial counsel should have moved for a mistrial when a juror admitted to being “friends” with the robbery victim’s grandmother during the trial. Upon this issue, the circuit court stated:

The record shows that one juror, Ms. Roberts, asked to approach the bench after the testimony of Ms. Quertermous. She stated that while she had not known her name when asked during voir dire, she did recognize Ms. Quertermous as the grandchild of people she knew. The juror stated that she would not give this witness anymore credibility than any other witness that she did not know. The juror did not state that she was “best friends” with the grandparents, as [Mr. Smith] has suggested, only that she knew the witness’s grandparents.

While Mr. Smith correctly states the law as far as a juror’s lack of candor during voir dire, there was no reason for the Court or counsel to believe that Ms. Roberts was deceitful in the initial questioning.

It is clear that the juror did not have a relationship with the victim but only knew the robbery victim’s grandparents. The mere fact that the juror was acquainted with the victim’s grandparents is not a “close relationship” that would warrant a finding of implied bias or the exclusion of the juror. *See Marsch v.*

Com., 743 S.W.2d 830 (Ky. 1988); *Rankin v. Com.*, 327 S.W.3d 492 (Ky. 2010).

And, when directly questioned by the circuit court, the juror stated she could be unbiased. Therefore, we conclude that trial counsel was not ineffective for failing to move for mistrial.

We view any remaining contentions of error as moot.

In summary, we conclude that Smith's allegations of ineffective assistance of counsel were refuted upon the face of the record and that the circuit court properly denied Smith's RCr 11.42 motion without an evidentiary hearing.

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

ALL CONCUR.

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