

RENDERED: AUGUST 10, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000056-MR

COREY D. TOOGOOD, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NOS. 10-CR-003585 AND 11-CR-003548

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

KRAMER, JUDGE: Corey D. Toogood, Jr. appeals the Jefferson Circuit Court's order denying his RCr<sup>1</sup> 11.42 motion to vacate his sentence. After a careful review of the record, we affirm because Toogood's motion was insufficiently pled.

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

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

In case number 10-CR-003585, Toogood was indicted on charges of: first-degree robbery; tampering with physical evidence; possession of a firearm by a convicted felon; third-degree terroristic threatening; and illegal possession of a controlled substance, schedule I hallucinogen marijuana. In case number 11-CR-003548, he was indicted on one count of being a first-degree persistent felony offender (PFO-1st).

The two cases were tried together. Following a jury trial, Toogood was convicted of: first-degree robbery; third-degree terroristic threatening; illegal possession of a controlled substance (marijuana); possession of a firearm by a convicted felon; and PFO-1st. He was sentenced as follows: first-degree robbery—ten years of imprisonment; third-degree terroristic threatening—five years of imprisonment; illegal possession of a controlled substance (marijuana)—five years of imprisonment; possession of a firearm by a convicted felon—one year of imprisonment; and PFO-1st—twenty years of imprisonment. The circuit court sentenced him to a total sentence of twenty years of imprisonment. He was also ordered to pay \$130.00 in court costs.

Toogood appealed, and the Kentucky Supreme Court vacated the circuit court's imposition of court costs, but affirmed the remainder of the circuit

court's judgment. *See Toogood v. Commonwealth*, No. 2012-SC-000214-MR, 2013 WL 1188056 \*1, \*5 (Ky. 2013).

Toogood moved to vacate his sentence in both cases pursuant to RCr 11.42. He subsequently moved to strike his original RCr 11.42 motion, and he filed a timely substitute RCr 11.42 motion.<sup>2</sup> Toogood also moved for an evidentiary hearing. The circuit court denied Toogood's RCr 11.42 motion without holding an evidentiary hearing.

Toogood now appeals, contending that the circuit court erred when it: (a) denied his RCr 11.42 motion as insufficiently pled; and (b) denied his RCr 11.42 motion without holding an evidentiary hearing.

## **II. STANDARD OF REVIEW**

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v.*

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<sup>2</sup> Although Toogood's motion to strike his original RCr 11.42 motion and his timely-filed substitute RCr 11.42 motion were filed both in case 10-CR-003585 and in case 11-CR-003548, the circuit court record in case number 11-CR-003548 erroneously does not include these two documents. However, they were included in the record for case number 10-CR-003585, and the documents clearly indicate that they pertained to both cases. Therefore, we address them as they pertain to both cases.

*Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009) (citations omitted). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

### III. ANALYSIS

#### A. INSUFFICIENCY OF PLEADINGS

In his substitute RCr 11.42 motion filed in the circuit court, Toogood alleged three claims of ineffective assistance of counsel. The circuit court denied all three claims as insufficiently pled. However, on appeal, Toogood only challenges the circuit court’s decision concerning one of those claims. Therefore, the other two claims that he does not raise on appeal are waived. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

The one remaining ineffective assistance of counsel claim that Toogood raises on appeal is his allegation that trial counsel rendered ineffective assistance by failing to investigate and prepare a complete defense. Specifically, Toogood asserted in the circuit court that counsel rendered ineffective assistance of counsel in that counsel

failed to investigate and interview the listed eyewitness of the incident. Movant requested that counsel speak or reach out to the listed eyewitness in support of movant’s innocence to the “physical force” factor [of the charge] of first[-]degree robbery. Movant urges that, had counsel pursued a statement or subpoenaed the eyewitness account on the incident[,], movant would have been most likely guaranteed a lesser[-included] offense . . . which

[would have] resulted in movant receiving a lesser sentence.

Regarding this claim, the circuit court held that Toogood failed “to specifically identify the eyewitness or allege with particularity how interviewing the eyewitness would have assisted his defense. RCr 11.42(2) explicitly requires specificity, factual support, and prejudice. The Defendant has not offered any facts in support [of] his allegations. The failure to do so is fatal to this allegation.”

We agree with the circuit court. RCr 11.42(2) requires the following of motions filed pursuant to RCr 11.42:

The 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. Failure to comply with this section shall warrant a summary dismissal of the motion.

Toogood failed to allege in the circuit court who the eyewitness was that counsel should have interviewed and failed to specify what testimony the eyewitness would have provided to assist in his defense. Thus, his motion did not satisfy the requirements of RCr 11.42(2). “Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule’s specificity standard and so warrant a summary dismissal of the motion.” *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (internal

quotation marks and citation omitted). Consequently, the circuit court properly denied relief based upon this insufficiently pled claim.

Further, although Toogood attached an affidavit from the eyewitness to his opening brief on appeal, we will not consider it. *See Morris v. Commonwealth*, 488 S.W.2d 680, 680-81 (Ky. 1972) (noting that “evidentiary matter not offered for consideration by the trial court [will] not be considered at the appellate level as ‘This is not a court of original jurisdiction.’”). Therefore, this claim fails on appeal.

#### **B. FAILURE TO HOLD EVIDENTIARY HEARING**

Toogood also contends that the circuit court erred in failing to hold an evidentiary hearing in this case. However, because his motion pertaining to the claim discussed *supra* failed to meet the specificity standard of RCr 11.42(2), it was subject to summary dismissal and, accordingly, it did not warrant an evidentiary hearing. Consequently, this claim lacks merit.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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