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

NO. 2017-CA-000621-MR

DEREK L. FERGUSON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JAY A. WETHINGTON, JUDGE  
ACTION NO. 12-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, D. LAMBERT, AND SMALLWOOD, JUDGES.

DIXON, JUDGE: Appellant, Derek L. Ferguson, appeals *pro se* from an order of the Daviess Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

On January 3, 2012, Appellant was indicted by a Daviess County Grand Jury on one count of first-degree burglary, one count of first-degree felony assault, one count of possession of a handgun by a convicted felon, and for being a first-degree persistent felony offender. Following a jury trial in July 2013, Appellant was convicted of first-degree burglary, first-degree felony assault, and for being a first-degree persistent felony offender.<sup>1</sup> The jury recommended concurrent sentences of ten years for the burglary conviction, enhanced to twenty years by virtue of the PFO conviction, and fifteen years on the assault conviction, enhanced to twenty-five years by virtue of the PFO conviction. The trial court entered judgment accordingly, running the sentences concurrently for a total of twenty-five years' imprisonment. Appellant's convictions and sentence were affirmed on appeal to the Kentucky Supreme Court. *Ferguson v. Commonwealth*, 2013-SC-000694 (February 19, 2015).<sup>2</sup>

On January 24, 2017, Appellant filed an RCr 11.42 motion to alter, amend or vacate the judgment. Appellant's arguments in this motion all related to the victim's testimony that he had served time with Appellant in the Daviess County Detention Center ("DCDC"). Specifically, in his motion before the trial

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<sup>1</sup> The possession of a handgun by a convicted felon was severed from the other charges and eventually dismissed at the request of the Commonwealth.

<sup>2</sup> 2015 WL 737673.

court, Appellant claimed that trial counsel rendered ineffective assistance when she failed to: (1) investigate whether the victim was under the influence at the time he identified Appellant; (2) file a suppression motion challenging the identification with the evidence of Appellant's incarceration record; (3) call a witness from the Department of Probation and Parole to testify about that incarceration record; (4) adequately impeach a witness; (5) request a copy of the photo line-up used by police; and (6) use "exhibit A" in his defense. By order entered February 21, 2017, the trial court denied Appellant's motion, stating that all issues could be resolved from the face of the record and an evidentiary hearing was unnecessary. Appellant now appeals to this Court as a matter of right.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary

hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065;

*see also Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

In this Court, Appellant argues that the trial court erred in denying his motion for post-conviction relief because his trial counsel rendered ineffective assistance when she failed to either obtain his incarceration records or call a witness from probation and parole to contradict the victim's identification of him as the shooter. Specifically, the victim, who had initially identified Appellant as the shooter from a photo array, testified during trial that he recognized Appellant because the two had been in jail at the same time in the DCDC. Appellant contends, however, that he was being housed at the Eastern Kentucky Correctional Complex at the time the victim was in the DCDC. As such, Appellant argues that he was prejudiced by his counsel's refusal to introduce external movement records, which he has attached to his motion as "Exhibit A," or call a witness to impeach the victim's testimony. Had counsel done so, Appellant believes that he may have been acquitted or convicted of a lesser offense. We disagree.

As the trial court noted in its judgment, “Exhibit A is uncertified, incomplete, and recently generated.” In fact, Exhibit A shows only twenty external movements out of a possible thirty-one and was generated on January 18, 2017. While Appellant contends that counsel refused to offer Exhibit A at trial, such document clearly did not exist and would not have been admissible in its current form. Moreover, even had Exhibit A existed at the time of trial, it would not have been the proper basis of a suppression motion with respect to the victim’s identification of Appellant. Incarceration records contradicting the victim’s claim that he was in jail with Appellant would have gone to the weight of the victim’s testimony, but not the admissibility of his identification. *Burton v. Commonwealth*, 442 S.W.2d 583, 585 (Ky. 1969).

Notwithstanding the evidentiary flaws of Exhibit A, the record demonstrates that the victim’s claim he recognized Appellant from jail did not go unchallenged. During cross-examination, trial counsel questioned the victim about the inconsistencies in his testimony as to when and for long he was supposedly in jail with Appellant. In fact, counsel stated that she had subpoenaed jail records to show that the two had not served time together, but the trial court sustained the Commonwealth’s objection based upon lack of foundation, and the records were never introduced. The record also demonstrates that the lead detective on the case, Detective Malinger, testified that his investigation showed that Appellant and the

victim were not housed together at DCDC. Apparently, trial counsel had also subpoenaed a jail employee from DCDC to testify but did not call him to the stand, presumably because Detective Malinger confirmed the substance of what trial counsel was seeking from the jail employee.

Likewise, during closing arguments, trial counsel pointed out that despite the victim's adamant claim that he spent time in jail with Appellant, Detective Malinger testified that he could not confirm that fact. The Commonwealth similarly conceded in its closing argument that there was no record that the victim was in jail with Appellant. We agree with the trial court's conclusion that,

[w]hile [trial counsel] may not have challenged the victim's claim that he had been in jail with the Defendant in the way he would have liked, the record does not demonstrate that she was ineffective in attacking [the victim's] jail claim. Nor did the Defendant suffer any prejudice; the Commonwealth conceded that [the victim] must have been mistaken through Detective Malinger and in closing.

We conclude that trial counsel was not ineffective for failing to present incarceration records or calling a witness to impeach the victim. The record establishes that counsel investigated whether or not Appellant and the victim were housed together and the issue was sufficiently presented at trial.

Appellant next argues that the trial court erred in refusing to hold an evidentiary hearing prior to ruling on his RCr 11.42 motion. Appellant claims that

whether trial counsel was ineffective in her failure to adequately impeach the victim's testimony cannot be resolved from the face of the record. In a similar vein, Appellant contends that because the trial court did not hold a hearing, there are no factual findings for this Court to review. Again, we disagree.

RCr 11.42(5) sets forth the criteria by which the trial court must determine if the issues raised in the motion require an evidentiary hearing. In *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994), our Supreme Court noted,

Section (5) of RCr 11.42 requires a hearing on the motion only "if the answer raises a material issue of fact that cannot be determined on the face of the record." Section (6) requires findings only "at the conclusion of the hearing or hearings." It follows . . . that a hearing is required only if there is an issue of fact which cannot be determined on the face of the record. If there is no hearing, then no findings are required.

Furthermore, an evidentiary hearing is not required when the record refutes the claim of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

Appellant's complaint is that because of trial counsel's deficient performance, the jury was not aware that the victim was either mistaken or lying about having been in jail with Appellant. However, as previously noted, the record clearly shows that trial counsel cross-examined the victim about his claim,



Detective Malinge testified they were not housed together, and trial counsel had subpoenaed a jail employee from DCDC to testify to the same. There simply was no issue concerning Appellant's claims that could not be refuted from the face of the record. Accordingly, a hearing was not warranted.

For the reasons set forth herein, the order of the Daviess Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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