

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001640-MR

HENRY F. CLAYTON

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NOS. 97-CR-00115 & 98-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DYCHE, and JOHNSON, Judges.

COMBS, JUDGE. Henry F. Clayton appeals from the denial of a motion filed pursuant to RCr<sup>1</sup> 11.42 to vacate his 1998 convictions for first-degree stalking, kidnapping, and second-degree assault. He argues that the trial court erred in failing to conduct an evidentiary hearing on his claims of ineffective assistance of counsel. After reviewing the record, we agree with the Commonwealth's argument that Clayton's motion failed to

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

set forth facts with sufficient specificity to warrant an evidentiary hearing. Thus, we affirm.

Clayton separated from his wife, Susan, in August 1997. In the weeks following the separation, he began stalking Susan and harassing members of her family. In October 1997, he was indicted for the offenses of stalking and violating a protective order. On January 15, 1998, while those charges were pending, Clayton committed the acts which resulted in his convictions for assault and kidnapping and was jailed. He was released on bond on the condition that he enter a rehabilitation facility for treatment of alcohol and methamphetamine abuse. Instead of undertaking rehabilitation, he went looking for his estranged wife. He found her at her brother's home.

Armed with a knife, a loaded pistol, and duct tape, Clayton entered the house and tied Susan up along with her sister-in-law, Sherry McWhorter. In a protracted ordeal that lasted more than eight hours, Clayton subjected the women to physical assaults, repeatedly threatening to kill them. He eventually surrendered to police. Susan had suffered minor injuries while she was held hostage; McWhorter was unharmed physically.

Following a jury trial, Clayton was sentenced on September 23, 1998 to serve forty-two years in prison. That

conviction was affirmed by the Kentucky Supreme Court.<sup>2</sup> The sole issue raised in his direct appeal concerned the refusal of the trial court to allow his court-appointed counsel to withdraw on the morning of trial (a situation which would have necessitated a continuance) in order that he might be represented by counsel employed by him. In its opinion affirming Clayton's conviction, the Supreme Court held that the lower court did not abuse its discretion in requiring Clayton to proceed to trial with his appointed counsel.

On September 21, 2001, Clayton filed a motion to vacate his sentence pursuant to RCr 11.42. He alleged that the performance of his appointed counsel at trial had been deficient and therefore violative of his constitutional rights.

Clayton filed a notice for a hearing on October 10, 2001. On the same day, the Commonwealth appeared and filed a response to the motion, but Clayton's attorney did not appear. There was no activity in the record during the next eight months. On June 4, 2002, the trial court entered the order from which Clayton has now appealed. In denying the motion, the trial court stated as follows:

This matter was brought before the Court on October 10, 2001. At that time, counsel for [Clayton] requested time to supplement his original Motion in response to the Commonwealth's Response. The Court

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<sup>2</sup> Clayton v. Commonwealth, 98-SC-0854-MR, memorandum opinion of the court, August 26, 1999.

granted [Clayton's] request, but has yet to receive a supplement from [Clayton]. Following this lengthy delay, the Court, based on the record before it, makes a finding that [Clayton's] allegations are determined on the face of the record, and an evidentiary hearing on this matter is unnecessary.

IT IS HEREBY ORDERED AND ADJUDGED that [Clayton's] Motion for RCR 11.42 relief is hereby denied.

In this appeal, Clayton maintains that the trial court was required to grant him an evidentiary hearing on his RCr 11.42 motion. He argues that many of the allegations of ineffective assistance of counsel were not susceptible of resolution by an examination of the record alone. The Commonwealth contends that Clayton waived any right to an evidentiary hearing. In the alternative, it argues that his motion lacked sufficient specificity to entitle him to a hearing. While we do not find a waiver, we agree with the Commonwealth that the motion was defective for lack of specificity.

In order to prevail under RCr 11.42, the movant must allege the existence of **specific** facts that -- if true -- would entitle him to relief, stating "specifically the grounds on which his sentence is being challenged and the facts on which [he] relies." RCr 11.42(2). The facts must demonstrate that counsel's performance was deficient and that the deficiency

resulted in prejudice affecting the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). If such facts are alleged, a motion may not be denied without a hearing unless the record on its face conclusively refutes the movant's allegations. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). However, the trial court may summarily dismiss the motion without a hearing if the movant fails to offer a "minimum of factual basis" or to make a substantial showing of entitlement to relief. Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 748 (1993).

An examination of Clayton's RCr 11.42 motion reveals that it is wholly lacking in any specificity. We have examined the record and the transcript of the trial. Clayton has alleged seven separate grounds of ineffective assistance, all of which we believe were appropriately resolved by the trial court without a hearing. We shall review each allegation.

First Allegation: Counsel rendered ineffective assistance when he failed and/or refused to prepare adequately for trial despite ample opportunity.

In support of this allegation, Clayton contends that his trial counsel, Michael Triplett, spoke with him only twice prior to trial and for no more than five minutes on each occasion. However, this issue had been raised in his direct

appeal, in which the sole issue focused on Clayton's request to replace Triplett, who had been appointed, with counsel whom he sought to employ. The issue of adequacy of Triplett's preparation was discussed by the Supreme Court in its opinion affirming Clayton's conviction, holding that the trial court did not abuse its discretion in refusing to allow Clayton's attorney to withdraw on the morning of trial. The court observed that Triplett was "prepared to proceed to trial and did, in fact, do so." Because the Supreme Court has already ruled on this issue, Clayton may not re-litigate it here. Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 468 (2002).

Even if this issue were available for our review, Clayton's motion does not contain any facts to support his contention that a different result might have been obtained by a different attorney. He has not alleged the existence of any exculpatory evidence or pertinent information that he could have provided to his attorney if he had been able to spend more time with him. There is no basis to surmise that the outcome of the trial would have been different.

Second Allegation: Counsel rendered ineffective assistance when he failed and/or refused to consult with the Movant to develop a viable defense theory.

The record refutes this contention and instead reveals that trial counsel did develop a defense theory, concentrating

on Clayton's depression and deteriorated emotional state (including his suicidal thoughts) following his separation from Susan. His attorney presented evidence portraying Clayton as angry, depressed, and hopeless as a result of the dissolution of his marriage. That evidence centered on his perception that his divorce attorneys were not working in his best interest. It also included his wife's refusal to allow him visitation with their child and his belief that his wife had either dissipated or was concealing assets -- many of which he considered to be his own non-marital property. In addition, the jury heard evidence that Clayton had not gone looking for Susan with the intention of harming her. His defense evidence argued that he confronted his wife in order to locate his assets to provide for his children after his suicide.

Although this defense theory did not result in Clayton's acquittal, it was a strategy cleverly designed to elicit sympathy from the jury and to provide an alibi or justification for Clayton's criminal behavior. In his post-judgment motion, Clayton criticized his attorney for failing to consult with him to arrive at a viable defense theory. He did not, however, suggest what (if any) other theory might have been available to his counsel nor did he allege the existence of facts to support any other theory. Thus, this allegation fails

to serve as a predicate either for a hearing or for the vacating of his sentence.

Third Allegation: Counsel rendered ineffective assistance when he failed and/or refused to contact or to subpoena important defense witnesses provided to him by Movant.

Clayton's motion does not contain the names of those individuals whom he alleges that his attorney failed to call as witnesses at trial. He acknowledges that he can now no longer remember the names of those individuals whom he claimed to be essential to his defense. Without the identity of the missing witnesses or at least a summary of their putative testimony, Clayton's motion fails to raise any issue necessitating a hearing on this ground.

Fourth Allegation: Counsel rendered ineffective assistance when he failed and/or refused to petition the court for funding or to seek other assistance in obtaining expert witnesses to aid in Clayton's defense.

Clayton has stated no specific factual basis for this claim of ineffectiveness. Neither the RCr 11.42 motion nor the affidavit supporting the motion refers to the identity or the category of an expert witness whom defense counsel allegedly should have employed. The motion also fails to specify how the alleged failure to present expert testimony would have produced

or contributed to a different outcome in the case. This allegation has no merit as presented.

Fifth Allegation: Counsel rendered ineffective assistance when he failed and/or refused to obtain a full and adequate pre-trial mental health examination of the Movant.

Clayton acknowledges in his brief that his trial counsel did obtain a psychological evaluation of him prior to trial and concedes that the record disposes of this claim.

(Appellant's brief, p. 9).

Sixth Allegation: Counsel rendered ineffective assistance when he failed and/or refused to present or to prepare any mitigating evidence for the sentencing phase of trial.

The record demonstrates that trial counsel did prepare and present mitigating evidence to the jury. However, Clayton has failed to identify any additional mitigating evidence that might have been available to his attorney at trial. Nor does he indicate the nature of mitigating evidence that he could have presented at the hearing which he sought but failed to receive.

Seventh Allegation: Counsel rendered ineffective assistance when he failed and/or refused to instruct the Movant as to the law and facts pertaining to Movant's request to substitute counsel, seek a continuance, and then proceed to trial with the attorney of his choice.

In his affidavit, Clayton stated that counsel Triplett failed to advise him of the justification he would be required to offer on the morning of trial in order to obtain a continuance to hire private counsel. Acknowledging that his case had already been continued twice, he stated he was nonetheless unaware that the continuances had been requested by his own attorney. In general terms, Clayton recited:

If I had known about all the things that Mr. Triplett should have done, but did not do, then I would have informed the trial court about all of them on the morning that trial was supposed to begin, when I was trying to get the Judge to allow me to have Mr. Hellings represent me. I honestly believe that if I would have had an attorney who wanted to work on my case, and would have done the things that could have been done, and should have been done, the results of my trial would have been different.

The record does not set forth the discussion between Clayton and Triplett regarding substitution of counsel. However, as with the other allegations of deficient performance, Clayton had failed to specify exactly how he was prejudiced by his attorney's representation. It is evident from the record that the court's denial of this request was very likely attributable to its timing. Clayton has not explained why he waited until the day of trial to request a different lawyer or how (or if) his attorney was responsible for this delay. Clayton's belief that a different attorney would have obtained a

different result cannot suffice to compel a hearing on his motion absent some objective factual basis.

Clayton last argues that he was prejudiced by the introduction into evidence of the psychological report prepared by Dr. Ed Connor. The Commonwealth correctly observes that this is not the same argument presented in the RCr 11.42 motion. Clayton argued before the trial court that his counsel had not made sufficient use of the report -- not that he erred in allowing the jury to see the report in the first instance. As this argument has not been preserved for our review, we cannot review it. We note, however, despite the preservation problem with this allegation of error, that counsel's use of the report was a matter of trial strategy. Counsel skillfully utilized the report to bolster Clayton's testimony of depression, hopelessness, and thoughts of suicide. Matters of strategy do not meet the criteria for ineffective assistance of counsel. Strickland, supra, 466 U.S. at 689. Thus, even if it had been properly preserved, this argument would have failed on the merits.

The judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

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