

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

NO. 2003-CA-002334-MR

JIMMY THACKER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 94-CR-00258

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: On September 1, 1994 Jimmy Thacker stopped Toby Thacker as he was driving to his home, shot him twice, forced him into the car trunk, and drove him to a side road. When Toby attempted to escape, Thacker attacked him with a rock and fled. Thacker was indicted on the charges of kidnapping, robbery first degree, assault first degree, possession of a handgun by a convicted felon, and first degree Persistent Felony Offender.

On August 28, 1996 Thacker entered a plea of guilty to First Degree Robbery and Persistent Felony Offender First

Degree.<sup>1</sup> Subsequently Thacker's motion to withdraw his guilty plea was denied and a final judgment and sentence was entered on October 30, 1996. On December 6, 1999, Thacker filed a pro se RCr 11.42 motion alleging that counsel failed to conduct an adequate pretrial investigation and file various pretrial motions. He further alleged counsel was ineffective when his motion to withdraw his plea failed. Thacker's appointed counsel filed a supplement to Thacker's pro se motion alleging that counsel was ineffective for failing to investigate the case and failing to inform Thacker that intoxication was a defense to the charges. Without conducting an evidentiary hearing, the circuit court denied the motion.

The Commonwealth asserts that Thacker's motion is time-barred because it was filed more than three years after the entry of the judgment and sentence.<sup>2</sup> On September 24, 1999 Thacker, pro se, filed a motion for extension of time to file his RCr 11.42 motion. No ruling was made on the motion but Thacker filed his motion on December 6, 1999 and the circuit court considered the motion on the merits without reference to the timeliness issue. A consideration of the motion on the

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<sup>1</sup> Thacker entered a previous guilty plea but was permitted to withdraw the plea after it was discovered that there was some confusion as to the length of the sentence.

<sup>2</sup> Kentucky Rules of Criminal Procedure 11.42(10) requires that the motion be filed within three years after the judgment became final, unless there are facts previously unknown to the movant or a fundamental constitutional right asserted was not established within the period provided and has been held to apply retroactively.

merits implies that the circuit court granted Thacker's motion for extension of time.<sup>3</sup> Because we affirm the circuit court's reasoning, we are not compelled to discuss whether the extension was proper.

To succeed, a movant requesting RCr 11.42 relief must show that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance and that the deficient performance so prejudiced the defense that the movant would not have pled guilty, but would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thacker contends that had his counsel informed him that intoxication was defense to the crimes charged, he would have insisted on going to trial. The circuit court found that there was no evidence in the record that Thacker could have relied on such a defense at trial and we can find none. Although he alleged in his motion to suppress a statement given the day following the crime that he was intoxicated when he gave the statement, there is nothing in the record to indicate that he was intoxicated at the time of the offense. Thacker contends that it is the lack of such evidence in the record that requires an evidentiary hearing. We disagree.

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<sup>3</sup> See e.g., Eiland v. Ferrell, 937 S.W.2d 713, 716-717(Ky. 1997) holding that the circuit court's failure to rule on the timeliness of objections to a commissioner's report were held timely by implication when the court considered the merits of the objections.

Thacker entered a guilty plea and waived all defenses, including that of intoxication, except that the indictment did not charge an offense. Bush v. Commonwealth, 702 S.W.2d 46 (Ky. 1986). In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), the Court explained that an RCr 11.42 hearing is required only when there is a material issue of fact that cannot be conclusively resolved by the record. Where the record demonstrates that the guilty plea was voluntary, no evidentiary hearing is required. Ford v. Commonwealth, 453 S.W.2d 551 (Ky. 1970). Thacker was asked prior to entering his plea whether he informed counsel of the facts surrounding the offense and replied affirmatively. There is no suggestion that he was coerced into making the pleas or that he did not understand the consequences. He has offered no specific facts to support his allegation that he was intoxicated when he committed the offenses charged or how, three years after the offense, he could prove that he was intoxicated. Conclusory allegations that are not supported by specific facts do not require that the court hold a hearing to determine if such facts exist. Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

The summary denial of Thacker's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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