

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002767-MR

ANTHONY WAYNE MARSHALL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 02-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Anthony Wayne Marshall appeals the order of the McCracken Circuit Court denying his motion pursuant to RCr 11.42 to vacate his conviction and sentence. He argues on appeal that the court should have appointed counsel for him and conducted an evidentiary hearing on his motion.

In April 2002, Marshall was indicted by a McCracken County Grand Jury for two counts of assault in the first degree and with driving a motor vehicle under the influence of alcohol/drugs (DUI). The charges followed Marshall's January

19, 2002 collision with a vehicle driven by William McManus and in which Laura Cope was a passenger. According to the bill of particulars, McManus and Cope suffered "severe whiplash" and both required "extensive physical therapy."

Marshall was appointed counsel. On July 31, 2002, Marshall signed an agreement with the Commonwealth to enter a guilty plea to the DUI count and two amended counts of assault in the second degree. In return for the guilty plea, the Commonwealth recommended sentences of 30 days to serve on the DUI charge and ten years for each assault count, to run concurrently for a total of ten years. On that same date, Marshall filed a motion to enter a guilty plea on those charges, and the court accepted the plea. The court subsequently sentenced Marshall to a total sentence of ten years in accordance with the plea agreement.

In October 2003, Marshall filed a pro se motion pursuant to RCr 11.42 alleging that his counsel was ineffective and his guilty plea was involuntary. Marshall argued that his counsel failed to fully and properly investigate the facts of the charged offenses, and as a result erroneously advised Marshall to plead guilty. He claimed in particular that his counsel failed to investigate whether the victims suffered serious physical injury. Assault in the second degree, as it applies in this case, is established by showing that a person

wantonly caused serious physical injury to another person by means of a deadly weapon or dangerous instrument. KRS 508.020(1)(c). Marshall moved for appointment of counsel and for a full evidentiary hearing.

The Commonwealth's response stated that it was without sufficient knowledge whether counsel fully investigated the extent of injury of the victims. But the Commonwealth noted that Marshall alleged when he was entering his plea it was knowing, willing and voluntary, and he received a lesser sentence since his counsel negotiated a plea to reduced charges. The Commonwealth asserted that the motion should be denied without hearing or the appointment of counsel because the record showed that the claim was without merit. Without conducting an evidentiary hearing, the trial court entered an order denying the motion without setting forth the reasons therefor. Marshall appeals that order.

Marshall argues that there is an issue not refuted by the record as to whether counsel investigated the facts of his case before advising him to plead guilty. Marshall states that his trial attorney told him that simply being hurt was enough to establish the "serious physical injury" element of assault in the second degree. Marshall asserts that only after he pled guilty was he given access to the victims' medical records, and he discovered that the victims were not seriously injured in the

accident. Thus, he believes ineffectiveness was shown because he believes he could not have been found guilty of the charges to which he pled guilty. Marshall maintains, moreover, that due to counsel's failure his plea was not entered knowingly, intelligently, and voluntarily.

The Commonwealth asserts that appellant waived his argument as to attorney ineffectiveness by pleading guilty freely and voluntarily. The Commonwealth adds that if instead we consider Marshall's claim of ineffective assistance of counsel, it was proper to advise Marshall to plead guilty because he was facing more prison time if he had gone to trial. The Commonwealth argues that neither an evidentiary hearing nor appointment of counsel was warranted.

First, the Commonwealth errs in asserting that Marshall cannot raise the issue of attorney effectiveness in a post-conviction motion. It is well settled that a defendant may challenge the effectiveness of counsel despite entering a guilty plea. Centers v Commonwealth, 799 S.W.2d 51 (Ky.App. 1990). In order to prove ineffective assistance of counsel, the defendant must show (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously

affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different. Id. at 55, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, we review Marshall's claim that he was improperly advised to plead guilty to the charge of second degree assault.

The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which if true would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000); Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). We believe Marshall's claim that the victims did not suffer serious physical injury and he was wrongly advised to plead guilty is refuted by the record. Thus, we conclude a hearing was not necessary in this case.

The record contains no proof as to the victims' injuries, but the bill of particulars reports that the victims suffered severe whiplash and required extensive physical therapy. "Serious physical injury" is defined in KRS 500.080(15) as follows:

[P]hysical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged

loss or impairment of the function of any  
bodily organ.

The record thus suggests there was prolonged impairment since the injuries required *extensive* physical therapy. In addition, we have no information whether those injuries have completely resolved or whether they persisted after therapy.

The only evidence to the contrary is Marshall's assertion that the medical records showed no serious physical injury. Marshall did not detail what those records said that led him to conclude that there was no serious physical injury. He did not attach medical records to the RCr 11.42 motion. Moreover, Marshall provides no substantiation of his allegations that his counsel never read the victims' medical records or interviewed any witnesses, expert or otherwise.

RCr 11.42 motions must state specifically the grounds on which the conviction is being challenged as well as state the facts relied on in support of such grounds. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). Without a minimum of factual basis in the verified RCr 11.42 motion, the motion should be summarily overruled. Id. at 748. Conclusory and meager allegations are insufficient to require an evidentiary hearing. Wedding v. Commonwealth, 468 S.W.2d 273 (Ky. 1971).

We conclude that the record in this case adequately refutes Marshall's merely speculative assertions. Where the

movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing or appointment of counsel is required. Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985). For the foregoing reasons, we affirm the order of the McCracken Circuit Court denying the RCr 11.42 motion without a hearing or the appointment of counsel.

ALL CONCUR.

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