

RENDERED: MAY 13, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000178-MR

MICHAEL PEAK

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 97-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: Michael Peak was found guilty of cultivating marijuana over five plants, second offense; and possession of drug paraphernalia; and was sentenced to seven years in the penitentiary. After his direct appeal to this court was unsuccessful, Peak filed an RCr<sup>2</sup> 11.42 motion that was summarily denied. We affirm.

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

A movant in an RCr 11.42 proceeding is not entitled to an evidentiary hearing if the allegation raised is refuted by the record.<sup>3</sup> It is within the broad discretion of the trial court to determine if an allegation can be resolved by the record.<sup>4</sup> And if the allegation was, or should have been, raised in a direct appeal, the movant can not raise it in an RCr 11.42 proceeding.<sup>5</sup>

Peak's initial allegation is that trial counsel rendered ineffective assistance. He argues that the evidence presented was insufficient to warrant a jury instruction on the defense of medical necessity. To establish ineffective assistance of counsel the movant must demonstrate that counsel's performance fell below an objective standard of reasonableness and the errors were so prejudicial that the movant was deprived of a fair trial and a reasonable result.<sup>6</sup> In his direct appeal Peak alleged that the trial court erred when it refused to instruct the jury on the medical necessity defense. This court held that the medical necessity defense is not recognized in Kentucky; counsel could not have, therefore, rendered

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<sup>3</sup> Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986).

<sup>4</sup> Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

<sup>5</sup> Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990).

<sup>6</sup> Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001).

ineffective assistance of counsel when evidence was not submitted on a non-existent defense.

Peak asserts that counsel's filing the notice of appeal prior to the final judgment somehow "frustrated" his right to a "speedy trial of his conviction." There is no right in our Constitution or the United States Constitution to a speedy appeal. This court gave due consideration to all issues raised in Peak's appeal and there is no basis for his assertion that he did not receive an effective appellate review.

The final issue raised concerns the failure of appellate counsel to notify Peak of this court's opinion until after the time had elapsed for filing a petition for rehearing or discretionary review. RCr 11.42 is limited in purpose and is designed to:

permit a trial court an opportunity after entry of judgment to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself. It is not an appropriate remedy for a frustrated appeal.<sup>7</sup>

The remedy for one who lost the right of appeal due to ineffective assistance of counsel is to seek relief from the court that has jurisdiction to hear the appeal.<sup>8</sup>

The order of the Butler Circuit Court is affirmed.

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<sup>7</sup> Commonwealth v. Wine, 694 S.W.2d 689, 694 (Ky. 1985).

<sup>8</sup> Id.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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