

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

NO. 2004-CA-002473-MR

MARK WORTHINGTON

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 00-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel without an evidentiary hearing. Since appellant's allegations were refuted by the record, the trial court was not required to hold a hearing on the motion pursuant to RCr 11.42(5). Hence, we affirm.

On January 12, 2000, appellant, Mark Worthington, was indicted on one count of attempted murder, one count of assault in the first degree, one count of theft by unlawful taking, and

two counts of wanton endangerment in the first degree. The charges stemmed from an incident on November 29, 1999, wherein Worthington shot his ex-father-in-law, Herman Hay, five times and shot at his ex-wife, Phyllis Hay, in the presence of his six-year-old and eight-year-old sons, and then fled with Herman Hay's gun. Pursuant to a plea agreement, Worthington entered an Alford plea on May 9, 2001, to attempted murder, theft by unlawful taking of a firearm, assault in the first degree, and two counts of wanton endangerment in the first degree. In exchange for the plea, the Commonwealth agreed to recommend that Worthington be sentenced to ten (10) years' imprisonment on the attempted murder charge and ten (10) years on the assault charge, to run concurrently with each other, and five (5) years on the remaining three charges, to run concurrently with each other, for a total of fifteen (15) years.

After the guilty plea, Worthington fired his counsel on the plea and retained another attorney. On June 28, 2001, through his new attorney, Worthington filed an RCr 8.10 motion to withdraw his guilty plea. As grounds for the motion, Worthington claimed that his counsel on the guilty plea had a conflict of interest in representing him because he had represented his ex-wife in a perjury case related to another alleged assault by Worthington on Phyllis Hay. The trial court denied the motion, and Worthington was sentenced according to

the Commonwealth's recommendations on July 19, 2001.

Worthington filed a direct appeal to this Court, alleging that the trial court erred in failing to grant his motion to withdraw his plea. This Court affirmed the judgment on November 1, 2002, ruling that Worthington failed to show how the alleged conflict of interest would have impaired his defense.

On September 8, 2004, Worthington filed an RCr 11.42 motion to vacate, set aside or correct his sentence, alleging ineffective assistance of his counsel on the guilty plea. Specifically, Worthington argued that his counsel on the plea encouraged him to plead guilty without adequately investigating a potential claim of self-defense and interviewing potential witnesses in the case. The trial court denied the motion without an evidentiary hearing on November 1, 2004. This appeal followed.

Worthington argues that the trial court erred in denying his RCr 11.42 motion without benefit of an evidentiary hearing. RCr 11.42(5) states in pertinent part, "Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing . . . ."

"In a petition filed under RCr 11.42 the movant must show that there has been a violation of a constitutional right, a lack

of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack." Lay v. Commonwealth, Ky., 506 S.W.2d 507, 507 (1974). If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises "an issue of fact that cannot be determined on the face of the record." Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993), judgment affirmed, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Hodge v. Commonwealth, 68 S.W.3d 338, 342 (Ky. 2001), as modified on denial of rehearing (2002). To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for the deficient performance, the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), accord, Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

In the instant case, Worthington alleged in his RCr 11.42 motion that his counsel on the guilty plea was ineffective because he coerced Worthington into pleading guilty and not going to trial without conducting an adequate investigation of the case. In particular, Worthington maintains that his attorney failed to investigate a viable claim of self-defense. Upon review of the record, we believe that Worthington's allegation was refuted by the record.

First, Worthington does not make an affirmative claim that he was entitled to a defense of self-defense in his brief. Worthington states only, "If the Appellant was acting in self-defense by an attack initiated by his father-in-law Herman Hay, then he could not possibly be attempting to murder his ex-wife. The potential for this defense was never explored." (Emphasis added). Secondly, the record refutes any claim that Worthington was entitled to a defense of self-defense. While the record does indicate that Herman Hay had a gun during the incident and fired the gun, the statements contained in the uniform offense report relayed that Worthington shot at Phyllis Hay and Herman Hay before Herman Hay ever fired his weapon. The account of the incident contained in Detective Rob Shivel's report states that Worthington fired his gun first at Phyllis Hay, stating "I've had enough, I'm going to kill you whore" or "You damn bitch, I'll kill you." Herman Hay then came out of his bedroom and Worthington fired several shots at him. At that point, Herman fell down and began firing his gun at Worthington. There is nothing in the record indicating that Herman Hay threatened Worthington or starting shooting at him first.

The record also establishes that Worthington's plea was entered freely, knowingly and voluntarily, and his counsel on the plea negotiated a very favorable deal for him. Worthington was facing a maximum of thirty-five (35) years'

imprisonment for convictions on all five counts in the indictment in this case, but got only fifteen (15) years pursuant to the plea agreement. The transcript of the plea proceeding established that Worthington was satisfied with his attorney's services and that his attorney had done everything he had asked him to do in representing him. The certificate of counsel in the motion to enter guilty plea also confirmed that Worthington's counsel discussed the charges and all possible defenses with his client. Contrary to his claim on appeal that he was coerced into pleading guilty, Worthington stated during the plea proceeding that he was pleading guilty willingly, without any threats or force, promises or pressures from any person or persons. Advising a client to plead guilty in order to obtain a lesser sentence is not ineffective assistance of counsel. Commonwealth v. Campbell, 415 S.W.2d 614 (Ky. 1967). Accordingly, the record refutes Worthington's claim that his counsel on the guilty plea was ineffective for advising Worthington to accept the plea deal and not further investigating a self-defense claim.

For the reasons stated above, the judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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