

RENDERED: DECEMBER 2, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002564-MR

REGINALD MACK

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

TAYLOR, JUDGE: Reginald Mack brings this *pro se* appeal from a November 9, 2004, order of the Bell Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate the twenty-year sentence upon a jury verdict finding him guilty of robbery in the first degree. We affirm.

Appellant was indicted for and found guilty by a jury of first-degree robbery. He was sentenced to twenty years' imprisonment. Being unsatisfied with the jury verdict,

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

appellant pursued a direct appeal to the Kentucky Supreme Court. Appellant's sentence was affirmed in Mack v. Commonwealth, 136 S.W.3d 434 (Ky. 2004). Thereafter, appellant filed the instant RCr 11.42 motion to vacate sentence. On November 9, 2004, the circuit court denied appellant's motion, thus precipitating this appeal.

Appellant contends the circuit court committed reversible error by denying his RCr 11.42 motion without an evidentiary hearing. Appellant has raised numerous allegations of error. We observe that he has filed a *pro se* brief which is handwritten. As a result, the arguments are difficult to discern, but we have made every effort to do so.

Appellant initially contends the trial court erred by failing to instruct the jury upon theft by unlawful taking and assault in the fourth degree. This issue was raised in his direct appeal and decided by the Supreme Court in Mack. It is well-established that appellant cannot raise an issue in an RCr 11.42 motion that could have or was raised on direct appeal. Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001). As such, we summarily reject the above contention.

Appellant has also raised a plethora of allegations relating to the alleged ineffective assistance of his trial counsel. To prevail, appellant must demonstrate that trial counsel's performance was deficient and that such deficient

performance was prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). It is firmly established that an RCr 11.42 motion must state specific grounds for relief and also must state facts in support of these grounds. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). An evidentiary hearing is only mandated if the motion raises grounds that could not be conclusively refuted upon the face of the record. Lewis v. Commonwealth, 411 S.W.2d 321 (Ky. 1967). Conclusory allegations of error are insufficient to require an evidentiary hearing. Wedding v. Commonwealth, 468 S.W.2d 273 (Ky. 1971).

Appellant has failed to demonstrate entitlement to relief. His allegations of ineffective assistance of trial counsel are either conclusory or lack any basis in fact. Furthermore, appellant failed to prove prejudice resulting from counsel's alleged ineffective assistance. Throughout his brief, appellant has stated facts without any evidentiary basis and has advanced incredulous arguments. Simply put, we conclude that appellant's claims of ineffective assistance of trial counsel are refuted upon the face of the record and the circuit court did not err by summarily denying his RCr 11.42 motion.

For the foregoing reasons, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Reginald Mack, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General of
Kentucky
Frankfort, Kentucky