

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000086-MR

THOMAS BURKHEAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CR-002504

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Thomas Burkhead brings this *pro se* appeal from a December 16, 2004, order of the Jefferson Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion without an evidentiary hearing. We affirm.

In October 2001, appellant was operating a motor vehicle and struck a pedestrian. As a result thereof, appellant was indicted and eventually found guilty of wanton first-degree assault. He was sentenced to fifteen years' imprisonment.

Appellant pursued a direct appeal to the Kentucky Court of Appeals. This Court affirmed appellant's conviction in Appeal No. 2002-CA-001394-MR by an opinion rendered January 16, 2004. On December 16, 2004, appellant filed a *pro se* RCr 11.42 motion to vacate sentence. Therein, appellant claimed various reasons why his trial counsel was ineffective and his sentence should be vacated. Without an evidentiary hearing and without appointment of counsel, the circuit court denied the motion.¹ This appeal follows.

Appellant contends the circuit court committed error by denying his RCr 11.42 motion without an evidentiary hearing and without appointment of counsel. An evidentiary hearing and appointment of counsel is only required where defendant's allegations of error cannot be refuted upon the face of the record. See Lewis v. Commonwealth, 411 S.W.2d 321 (Ky. 1967). Appellant specifically raises four allegations of error. We shall consider them *seriatim*.

First, appellant argues that trial counsel was ineffective for failing to consult with him regarding his defenses and for failing to investigate. Appellant also alleges trial counsel was ineffective for failing to secure an accident reconstructionist. To prevail upon a claim of ineffective assistance of counsel, a defendant must demonstrate that trial

¹ The record reflects that the trial court denied the motion on the same day it was filed, December 16, 2004.

counsel's performance was deficient and that such deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). As to appellant's specific allegations, he fails to cite this Court to what specific investigation he is referring to, what specific defenses were not raised or how an accident reconstructionist would have been helpful. Instead, appellant asserts conclusory statements without any supporting allegations of prejudice. It is well-established that a mere allegation of ineffective assistance of trial counsel is insufficient without a claim of prejudicial effect. Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998). As such, we do not believe appellant demonstrated that trial counsel was ineffective for failing to investigate, failing to raise defenses, or failing to secure an accident reconstructionist.

Second, appellant argues that trial counsel was ineffective for having spoken to a juror before the sentencing phase of trial. The record demonstrates that trial counsel approached a juror and asked the juror what the jury was arguing about for so long. The juror refused to answer and immediately informed the trial judge. The trial judge then questioned the juror and specifically asked the juror if the juror was uncomfortable or if the juror had any negative feelings towards trial counsel. The juror responded in the negative. From the record, it is clear that appellant suffered no prejudice from

counsel's behavior. Thus, we reject appellant's claim that trial counsel was ineffective in this respect.

Third, appellant contends that trial counsel was ineffective for failing to introduce into evidence a videotape of the accident scene. In appellant's direct appeal, this Court was faced with the issue of whether the trial court committed reversible error by not allowing into evidence a videotape of the accident scene. This Court responded in the negative. The Court held that there were other photographs and descriptions of the scene admitted into evidence. Considering this Court's decision in Appeal No. 2002-CA-001394-MR, we cannot say that trial counsel's performance was ineffective as to the videotape.

Fourth, appellant contends that trial counsel was ineffective for failing to timely object to the jury upon "Batson grounds." Batson v. Kentucky, 476 U.S. 79 (1986). In this regard, appellant argues:

Tr. courts abused its disc. and denied movant due process of law, as guaranteed under the 5th, 6th and 14th amendments of the United States Constitution and sections 2, 7 and 11 of the Kentucky Constitution when I.A.C. did not make a timely objection on Batson grounds prior to the swearing of the jury. This issue can not be determined on the face of the record

We observe the above quoted material constitutes the whole of appellant's argument. Appellant has failed to even allege that any African-Americans were struck by the Commonwealth for

improper motive or to specify which of the potential jurors were allegedly struck for improper motive. Simply stated, appellant has made conclusory allegations without supporting facts. See Sanborn, 975 S.W.2d 905. Hence, we reject appellant's contention that trial counsel was ineffective for failing to make a Batson objection to the jury.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Burkhead, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General of
Kentucky
Frankfort, Kentucky