

RENDERED: APRIL 21, 2006; 2:00 p.m.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-000385-MR

TROY DEWAYNE HUGHES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
INDICTMENT NO. 99-CR-00280

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: Troy Hughes appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion seeking post-conviction relief from a judgment sentencing him to forty years' imprisonment following his plea of guilty to the murder of his wife and to being a persistent felony offender (PFO). When he entered guilty pleas to the charges in the indictment, Hughes reserved issues relating to the suppression

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

of evidence for direct appeal, but the judgment was affirmed by the Supreme Court.<sup>2</sup>

Presently, Hughes appeals the denial of RCr 11.42 relief based on alleged ineffective assistance of counsel. Initially, Hughes claims that the circuit court erred in denying his motion without conducting an evidentiary hearing. Then Hughes contends that he was denied effective assistance because his attorneys failed to advise him of the availability of an extreme emotional disturbance defense and because they failed to challenge the PFO charge. Finally, for the first time on appeal, Hughes asserts that counsel erred by not retaining a medical expert to evaluate his mental condition. Alternatively, Hughes argues cumulative error.

As to Hughes's claim that Fayette Circuit Court erred when it failed to conduct an evidentiary hearing prior to ruling on his RCr 11.42 motion, on review, we consider "whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction."<sup>3</sup> An evidentiary hearing is unnecessary where the movant's claims are refuted by the record.<sup>4</sup>

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<sup>2</sup> *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002).

<sup>3</sup> *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

<sup>4</sup> *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

The record in this case reflects that Hughes appeared before the circuit court and engaged in a lengthy plea colloquy pursuant to *Boykin v. Alabama*.<sup>5</sup> Hughes explained the circumstances surrounding the homicide and acknowledged that he understood the ramifications of pleading guilty. Hughes told the court that he was satisfied with the assistance rendered by his attorneys, and his attorneys informed the court that they had explained to Hughes all of his legal options. The circuit court properly relied on the record to resolve the issues raised in Hughes's motion, and an evidentiary hearing was unnecessary.

It is well settled that "a voluntary guilty plea . . . waive[s] all defenses other than that the indictment charges no offense."<sup>6</sup> Hughes, however, argues his plea was involuntary due to alleged ineffective assistance of counsel.

We must consider a two-part test when evaluating a claim of ineffective assistance in a guilty plea proceeding:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not

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<sup>5</sup> 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

<sup>6</sup> *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990).

have pleaded guilty, but would have insisted on going to trial.<sup>7</sup>

Hughes claims counsel were ineffective for failing to explain the availability of an extreme emotional disturbance defense and the potential outcome of using the defense at trial. Hughes asserts he pleaded guilty only because he did not know that he could argue at trial that he was suffering from extreme emotional disturbance at the time of the homicide.

This claim is without merit. Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop and present such defenses, Kentucky has adopted a three-part analysis. First, it must be determined whether a reasonable investigation would have uncovered the defense. If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. Such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability

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<sup>7</sup> *Sparks, supra, note 4*, at 727 (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985)).

that, but for counsel's unprofessional errors, the result would have been different.<sup>8</sup>

In this case, Hughes failed to meet the first prong of the test. In particular, he has failed to assert any facts to establish that a reasonable investigation by trial counsel would have uncovered a colorable defense of extreme emotional disturbance. Since Hughes bore the burden of showing entitlement to relief under RCr 11.42, the circuit court did not err by denying his motion without a hearing.

Hughes's second claim of ineffective assistance of counsel also lacks merit. Hughes argues that counsel failed to advise him that the PFO charge would not enhance his sentence on the murder charge. During the hearing on the guilty plea, the Commonwealth advised the court that the PFO charge had no effect on Hughes's ultimate sentence. Hughes pleaded guilty to being a persistent felon and admitted to the court his prior felony convictions. The PFO charge was dismissed prior to sentencing; however, Hughes now claims counsel were ineffective for failing to challenge the PFO charge in the indictment. After review of the record, we find no evidence of ineffective assistance.

Hughes next claims that his attorneys rendered ineffective assistance when they failed to retain a medical

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<sup>8</sup> *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). See also *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

expert to evaluate his mental health. This issue was not raised below and thus is not properly preserved for our review.<sup>9</sup>

Hughes's final allegation is that his claims constitute cumulative error. Since all of Hughes's claims are without merit, "[a] combination of non-errors does not suddenly require reversal."<sup>10</sup>

The order denying Hughes's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
ATTORNEY GENERAL OF KENTUCKY

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<sup>9</sup> See *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002).

<sup>10</sup> *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998).