

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000386-MR

JOSEPH HARRIS LAWTON, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 98-CR-00806-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BUCKINGHAM, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joseph Harris Lawton, Jr. brings this *pro se* appeal from a January 26, 2005, order of the Fayette Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. We affirm.

Following a jury trial, appellant was found guilty of intentional murder, giving a peace officer a false name, and alcohol intoxication. He was sentenced to a maximum term of life imprisonment. A direct appeal ensued to the Kentucky Supreme Court and was affirmed in Appeal No. 1998-SC-1126-MR.

Thereafter, appellant filed a *pro se* RCr 11.42 motion to vacate sentence. Therein, he raised a plethora of contentions. The circuit court ultimately appointed counsel to represent appellant, but counsel did not supplement appellant's pleadings. On January 26, 2005, the circuit court entered an order denying appellant's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

An RCr 11.42 motion is properly denied without an evidentiary hearing if the allegations raised therein are conclusively refuted upon the face of the record. Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). Additionally, mere conclusory allegations that are not supported by specific facts do not justify an evidentiary hearing. Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998).

In the case at hand, appellant has raised several allegations of error. Initially, he contends that trial counsel was ineffective for failing to subpoena a witness for his defense. To prevail, appellant must demonstrate that trial counsel was defective and that such deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

In his brief, appellant merely alleges:

Prior to trial, Appellant informed his trial counsel of an available witness through letters written to a witness by Appellant's co-defendant [Hamilton]. The letters contained information which was in

complete contradiction of what Hamilton was falsely asserting. In light of the information and letters provided to trial counsel, he failed/ refused to even interview the witness and refused to subpoena her to testify at trial.

Appellant has failed to inform this Court as to the specific testimony of the alleged witness. Moreover, appellant failed to point out how this witness's testimony would have changed the outcome of his trial. For instance, we do not know how Hamilton's testimony would have been contradicted by the alleged witness. The mere conclusory statements concerning the content of the witness's testimony is simply insufficient to prove prejudice in this case. As such, we are of the opinion that appellant failed to demonstrate that trial counsel was ineffective for failing to call the alleged witness.

Appellant also asserts that trial counsel was ineffective for failing to investigate and properly raise a diminished capacity defense based upon his alleged intoxication at the time he committed murder. Upon a review of the record, the jury instructions indicate that the defense of intoxication was submitted to the jury for consideration. The defense was properly presented to the jury and thus, we reject appellant's contention.

Appellant further argues that trial counsel was ineffective for failing to move for suppression of the handgun

that he allegedly used to shoot the victim. Again, appellant failed to demonstrate how introduction of this handgun constituted prejudicial error. Even if trial counsel were deficient for failing to move for its exclusion, we cannot say that exclusion of the handgun would have resulted in a different outcome. Indeed, in the direct appeal, the Supreme Court held that there was sufficient evidence to induce a reasonable jury to believe beyond a reasonable doubt that appellant intentionally killed his victim. The Supreme Court summarized the evidence as follows:

[T]he Commonwealth proved that Appellant requested and obtained a firearm from Hamilton; that he previously had \$350.00 in his pants, which were first mysteriously missing, then turned up in the possession of Price; that Appellant apparently removed the .357 revolver from the glove compartment of Hamilton's vehicle and then attempted to hide it from Jones when he entered the house looking for Price; that he brandished a gun during the scuffle in which Price was shot and killed; and the he as much as admitted to Hamilton that he killed Price because "I had to do what I had to do."

As is evident from the Supreme Court's opinion, the evidence amassed against appellant was compelling. The introduction of the handgun into evidence did not affect the outcome of the trial. Thus, we reject appellant's contention that trial counsel was ineffective for failing to move for suppression of the handgun.

Appellant further contends that he was denied the right to effective assistance of post-conviction counsel in pursuing this appeal. He alleges that his post-conviction counsel failed to assist him with any RCr 11.42 issues. We again reject appellant's contention as appellant has failed to demonstrate how counsel was ineffective. The fact that appointed counsel may have found the RCr 11.42 appeal to be totally meritless is not being ineffective.

Appellant next alleged that he was entitled to an evidentiary hearing. Again, we disagree as none of the issues raised by appellant are supported by specific facts and otherwise can be determined on the face of the record. Thus, the trial court did not err by denying appellant a hearing. RCr 11.42(5).

Based on the foregoing analysis, we view appellant's remaining argument of "cumulative error" to be totally without merit.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Harris Lawton, Jr.  
*Pro Se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Robert E. Prather  
Assistant Attorney General of  
Kentucky  
Frankfort, Kentucky