

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000686-MR

JAMES PRITCHARD

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 02-CR-00397

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON, DIXON, AND HOWARD,¹ JUDGES.

HOWARD, JUDGE: James Pritchard appeals from the denial by the Hardin Circuit Court of his RCr 11.42 motion for a new trial, following his conviction of Robbery 1st Degree. For the reasons stated below, we affirm.

The factual background of this case is as follows.
Mr. Pritchard was arrested on July 1, 2002 and subsequently indicted on a charge that he approached a young woman as she was getting into her car at a Shell Five Star market in

¹ Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

Elizabethtown, Kentucky, reached through the car door, struck her in the face, took her wallet from the car seat and ran off across the parking lot toward a nearby Budget Host Motel. Police were called and within a few minutes had encountered a young woman, Destiny Van Winkle, in the motel parking lot. Ms. Van Winkle was apparently Mr. Pritchard's girlfriend and had been staying at the motel with him. Based on information obtained from her, the officers went to Room 111 of the motel and knocked. The Appellant answered the door and gave the officers consent to search the room.

In the room the officers found \$119 in cash between the mattress and box springs and a shirt and pants matching the description given by the victim. Outside an open bathroom window they found a clear plastic bag containing the victim's wallet. After the victim was allowed a few minutes to calm down, she was transported to the Budget Host Motel, where she identified both Mr. Pritchard and the clothes.

A statement was obtained from Ms. Van Winkle that she was in the room when Mr. Pritchard came running in, sweating. He threw a wallet at her and said he got it from a "fat bitch at the store." He then went into the bathroom. She told him she wanted nothing to do with a robbery, and left the motel room.

Mr. Pritchard was tried by a jury on June 2, 2003. Both the victim and Ms. Van Winkle testified at the trial in a

manner consistent with their statements. The Appellant was convicted of Robbery 1st Degree and was sentenced on September 16, 2003 to twenty years in prison, pursuant to the jury's recommendation. He appealed that conviction to the Kentucky Supreme Court and his conviction was affirmed by an unpublished opinion rendered January 20, 2005.² On November 14, 2005, he filed a *pro se* motion for a new trial pursuant to RCr 11.42 and CR 60.02³, alleging ineffective assistance of counsel at his trial. That motion was denied by an order entered February 21, 2006, which order also denied his request for an evidentiary hearing and for appointment of counsel to represent him on the motion. Mr. Prichard brings this appeal from that order.

The Appellant raises several issues on appeal: that his attorney failed or was not allowed to impeach Ms. Van Winkle concerning her plea agreement, her employment and lifestyle or her past criminal record; that Ms. Van Winkle's testimony should not have been allowed at trial, as the plea agreement made with her by the Commonwealth amounted to the illegal bribing of a witness and his counsel failed to raise this objection; that the pants allegedly worn by the perpetrator would not fit him and his attorney failed to pursue this defense; that he was not

² 2003-SC-0803-MR.

³ While the motion was brought under both RCr 11.42 and CR 60.02, there was nothing asserted therein which would, even on its face, support a motion for new trial under CR 60.02. We will therefore, as did the circuit court, discuss the Appellant's arguments under RCr 11.42 only.

afforded an opportunity to have counsel present when the victim first made the out-of-court identification of him and his attorney failed to raise this issue; that his attorney did not present any character witnesses on his behalf; in general, that the evidence against him was insufficient to support a conviction and that the circuit court erred by failing to grant him an evidentiary hearing on his RCr 11.42 motion or appoint an attorney to represent him on that motion.

We note first that those issues which either were or could have been raised on Mr. Pritchard's direct appeal are not proper grounds for a RCr 11.42 motion or for this appeal. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003); *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2000) and *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990). Therefore, the Appellant's arguments concerning what evidence was or was not admitted at the trial or whether that evidence was sufficient to support a verdict, are not properly raised on this appeal. We will consider only those issues specifically concerning the sufficiency of the legal representation provided to Mr. Pritchard by his attorney.

The legal standard which must be met to show ineffective assistance of counsel under RCr 11.42 was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001):

The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so ineffective that defeat was snatched from the hands of probable victory. *Haight*, 41 S.W.3d at 441.

A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if the issues he raises in that motion reasonably require such a hearing for a determination. On the other hand, he is not entitled to such a hearing if his motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965). If an evidentiary hearing is required, the court should appoint counsel to represent him at that hearing, if he is indigent and requests such appointment in writing. RCr 11.42(5). If no evidentiary hearing is required, neither is it necessary that counsel be appointed. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

Applying these principles to the facts of this case, we find no error in the circuit court's thorough and well-reasoned order. The record reflects that Mr. Pritchard's attorney did cross-examine Ms. Van Winkle concerning her plea agreement and attempted to cross-examine her further concerning her lifestyle and employment. This testimony was disallowed by the trial court, placed in the record by avowal and was a subject of Appellant's direct appeal.

Mr. Pritchard also complains that his counsel failed to cross-examine Ms. Van Winkle concerning her prior criminal record. As the trial court noted in its order, only previous felony convictions would have been the proper subject of cross-examination. KRE 609. Mr. Pritchard failed to offer any evidence that Ms. Van Winkle had a prior felony record. He refers for the first time in his brief, filed in this court, to a particular Meade County case, but did not cite that case or file anything regarding it in the trial court. Therefore, it is not part of the record on this appeal.⁴ Merely conclusory allegations contained in a RCr 11.42 motion, unsupported by specific facts, are insufficient to support a new trial motion,

⁴ The Commonwealth has responded in kind and attached to its brief a record from the Meade Circuit Court which purports to show that the case cited by Mr. Pritchard actually involved a Donald Estes, and had nothing to do with Ms. Van Winkle. However, that document also was not filed of record in the circuit court. Therefore, this court will not consider either the allegations made by Mr. Pritchard, nor the document filed in response by the Commonwealth, as to this issue.

or even to require an evidentiary hearing on such motion. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003).

It is true that Mr. Pritchard's counsel did not object to the totality of Ms. Van Winkle's testimony on the grounds that her plea agreement constituted a "bribe" that would make such testimony inadmissible. However, Kentucky law is well established that a plea agreement with a Commonwealth witness does not make that witness' testimony inadmissible, but merely goes to the weight to be given that testimony, and is therefore a proper subject for cross-examination. *Darnell v. Commonwealth*, 558 S.W.2d 590 (Ky. 1977). It is not ineffective assistance of counsel to fail to make improper objections. *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998).

As to the pants, Mr. Pritchard's counsel argued before the trial court for the opportunity to have him try on the pants before the jury. That motion was denied by the circuit court, and any error in that regard could have been raised on direct appeal. Thus, the record specifically refutes the claim that counsel's representation was inadequate on this issue. *Mullins v. Commonwealth*, 454 S.W.2d 689 (Ky. 1970).

Mr. Pritchard complains that his attorney did not object to the out of court identification of him by the victim, made that night at the motel, on the grounds that he was not afforded the opportunity to have an attorney present when that

identification was made. Again, the response to this argument is that this testimony was properly admissible. Kentucky law is well established that it is not necessary for the police to delay such a "show-up" identification in order to allow the suspect to have counsel present. *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995) and *Stidham v. Commonwealth*, 444 S.W.2d 110 (Ky. 1969). The court in *Stidham* stated:

This was not a staged police line-up at which counsel could be present. There was no opportunity to appoint counsel. The police needed to know immediately whether to hold these two suspects or to release them. They needed to know whether to continue the search for the guilty. The victim of the crime had within an hour faced the guilty parties in a lighted room. We believe it good that he could again face them within such a short time while his memory was still fresh concerning the details. We do not find anything in the cases cited by petitioner that requires a police officer to unduly delay the process of identification so that counsel can be appointed. *Stidham*, 444 S.W.2d at 111-112.

It is not ineffective assistance of counsel to fail to object to admissible evidence. *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002).

As to the claim that his attorney failed to call any character witnesses, Mr. Pritchard filed nothing at all in the record indicating what any character witnesses who might have been called on his behalf would have said; nor is any reason given to believe such witnesses might have changed the outcome

of the trial. A vague allegation that counsel failed to investigate or call additional witnesses, without offering specifics as to what such witnesses would have said, is insufficient to support a RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002).

Finally, Appellant complains that he was not granted an evidentiary hearing on this motion, nor appointed an attorney to assist him. Our review of this record indicates that all of the issues raised by Mr. Pritchard, which go to the question of the effectiveness of his counsel, are either refuted by the record or have no merit on their face; that is, even if true, they would not entitle him to a new trial. Therefore, he was not entitled to an evidentiary hearing nor to the appointment of counsel. *Maggard v. Commonwealth, supra; Fraser v. Commonwealth, supra.*

For the reasons set forth above, the order of the Hardin Circuit Court, denying the Appellant's motion for a new trial pursuant to RCr 11.42, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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