

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001197-MR

YAQOB TAFAN THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL JR., JUDGE  
ACTION NO. 03-CR-00460

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Yaqob Tafan Thomas brings this appeal from a May 22, 2007, order of the Fayette Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion without an evidentiary hearing. We affirm.

Appellant was indicted by a Fayette County Grand Jury upon the charges of murder, tampering with physical evidence, and for being a persistent felony offender in

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<sup>1</sup> Senior Judge David C. Buckingham 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.

the first degree. Following a jury trial, appellant was found guilty of murder and tampering with physical evidence. He was ultimately sentenced to a total of forty-years' imprisonment on December 15, 2004. Appellant filed a direct appeal to the Supreme Court of Kentucky. The Supreme Court ultimately affirmed appellant's conviction in Appeal No. 2005-SC-0085-MR. On May 25, 2006, appellant filed an RCr 11.42 motion to vacate his judgment and sentence. By order entered May 22, 2007, the Fayette Circuit Court denied appellant's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

When reviewing a denial of an RCr 11.42 motion without an evidentiary hearing, we must determine whether appellant's allegations are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001). If there were material issues of fact that could not be conclusively proved or disproved upon the face of the record, the circuit court erred by denying the RCr 11.42 motion without an evidentiary hearing. *Id.*

Appellant contends that trial counsel was ineffective for not seeking state funds to hire a ballistics expert to aid in his defense. To prevail, appellant must demonstrate that trial counsel's performance was deficient and absent such deficiency, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985).

The facts underlying this case were summarized by the Supreme Court in its opinion affirming appellant's conviction as follows:

On December 29, 2002, Appellant met with Gregory Baltimore regarding a cocaine purchase. Baltimore arranged for Appellant to purchase seven ounces of cocaine from [Dionte] Burdette for \$7,000. Appellant was to pay Baltimore \$2,000 for this arrangement.

Appellant and Baltimore met Burdette at a Waffle House in Lexington. After they ate, the three men entered Burdette's SUV. According to Baltimore, Appellant was in the backseat. After circling the parking lot several times, Appellant grabbed Burdette from behind and held a handgun to Burdette's head, demanding the cocaine. With the handgun pointed in a downward direction, Appellant shot Burdette once in the leg. Appellant once again demanded the cocaine, and Burdette replied that it was located with his partner across the street. Appellant shot Burdette three more times, and Burdette rolled out of the driver's side door. Appellant and Baltimore then left the vehicle and ran. According to Baltimore, when they stopped running for a moment, Appellant threatened to kill him if he said anything. Baltimore noticed Appellant throw the gun into some bushes.

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The record reflects that Gregory Baltimore testified at trial to the above events. Also, Donna Brooks, mother of the victim, testified at trial that appellant confessed to shooting the victim. Moreover, a forensic pathologist testified that the victim had been shot four times, once in the knee and three times in the chest. The pathologist opined that the gunshot wounds were consistent with the victim being shot by a person in the backseat of a vehicle.

To support his contention that trial counsel was deficient, appellant offers only mere speculation concerning the proposed testimony of a ballistics expert. This is simply insufficient. *See Hodge v. Com.*, 116 S.W.3d 463 (Ky. 2003); *Rigdon v. Com.*, 144 S.W.3d 283 (Ky.App. 2004). Moreover, considering the strong case amassed against appellant, we are simply unable to conclude that the result of the proceeding would have been different with the testimony of a ballistics expert. As such, we reject this contention of error.

Next, appellant argues that trial counsel was ineffective for failing to move for a mistrial when a juror was allegedly sleeping during a portion of the trial.

Specifically, appellant maintains that a juror slept during the testimony of the forensic pathologist and the ballistics expert. Appellant claims that he pointed out to trial counsel that the juror was asleep, but trial counsel improperly failed to inform the trial court or move for mistrial.

Even if the juror were asleep during portions of the trial, we think it incumbent upon appellant to demonstrate how he was prejudiced by the occurrence. *See Ratliff v. Com.*, 194 S.W.3d 258 (Ky. 2006). Simply put, even if trial counsel were deficient in this regard, appellant has failed to adequately demonstrate that absent such deficiency the outcome of the proceedings would have been different. *See Strickland*, 466 U.S. 668.

Considering our resolution of appellant's allegations of error, we also conclude that he was not entitled to an evidentiary hearing as the allegations of error were refuted upon the face of the record. *See Fraser*, 59 S.W.3d 448.

In sum, we are of the opinion that the circuit court properly denied appellant's RCr 11.42 motion without an evidentiary hearing.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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