

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-000232-MR

JIMMY "BO" BUSH

APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NOS. 98-CR-00009 AND 98-CR-00009-02

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Jimmy "Bo" Bush brings this *pro se* appeal from a March 15, 2005, order of the Menifee Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. We affirm.

Pursuant to a jury verdict, Bush was convicted in 2002 of arson in the second degree and of tampering with physical evidence. Upon the jury's

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<sup>1</sup> Senior Judge Thomas D. Emberton 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.

recommendation, the trial court sentenced Bush to ten years' imprisonment upon the second-degree arson charge and five years' imprisonment upon the tampering with physical evidence charge to run consecutively for a total of fifteen years' imprisonment. The court also ordered the fifteen-year sentence to run consecutively with a ten-year sentence upon a separate charge in Pendleton County for a total of twenty-five years' imprisonment. Bush pursued a direct appeal to this Court, and the appeal was affirmed in Appeal No. 2002-CA-000721-MR rendered October 3, 2003. Thereafter, Bush filed an RCr 11.42 motion seeking to vacate his sentence of conviction. The circuit court denied Bush's RCr 11.42 motion without either an evidentiary hearing and without appointing counsel for Bush. This appeal follows.

Bush contends the circuit court committed error by summarily denying his RCr 11.42 motion to vacate sentence. Bush believes he raised material issues of fact that were not refuted upon the face of the record, thus requiring an evidentiary hearing and appointment of counsel. We disagree.

We initially observe that Bush has filed a *pro se* brief and has raised numerous allegations of error. The arguments contained in the brief are difficult to discern, but we have made every effort to do so.

Bush specifically alleges that the trial court erred by failing to hold a hearing before his trial to determine whether trial counsel had a conflict of interest and whether there was a communication breakdown with trial counsel. We believe this issue should have been raised on direct appeal. It is well-established that Bush cannot raise an issue in an RCr 11.42 motion that could have or was raised on direct appeal. *See Haight*

*v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001). Thus, we summarily reject the above contention.

Bush has additionally raised a plethora of allegations relating to the alleged ineffective assistance of his trial counsel. To prevail, Bush must demonstrate that trial counsel's performance was deficient and that such deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). It is firmly established that an RCr 11.42 motion must state specific grounds for relief and also must state facts in support of these grounds. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). An evidentiary hearing is only mandated if the motion raises grounds that could not be conclusively refuted upon the face of the record. *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). Conclusory allegations of error are insufficient to mandate an evidentiary hearing. *Wedding v. Commonwealth*, 468 S.W.2d 273 (Ky. 1971).

Bush's specific allegations of error include: (1) trial counsel failed to seek an independent testing of hair or of fibers; (2) trial counsel failed to interview witnesses; (3) trial counsel failed to call witnesses that Bush desired to be called; (4) trial counsel failed to adequately prepare for trial; (5) trial counsel failed to call Bush as a witness on his own behalf; and (6) trial counsel failed to object to the testimony of certain witnesses.

Bush has failed to demonstrate entitlement to relief. His allegations of ineffective assistance of trial counsel are either conclusory or lack any basis in fact. Furthermore, Bush has failed to prove any prejudice resulting from counsel's alleged ineffective assistance. Throughout his brief, Bush has stated facts without any evidentiary basis and has advanced some incredulous arguments. Simply put, we hold

that Bush's claims of ineffective assistance of trial counsel are refuted upon the face of the record and that the circuit court did not commit error by summarily denying his RCr 11.42 motion.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jimmy "Bo" Bush, *Pro Se*  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Louis F. Mathias, Jr.  
Assistant Attorney General of Kentucky  
Frankfort, Kentucky