

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

NO. 2007-CA-001595-MR

BRENT CANTRELL

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 06-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Brent Cantrell appeals from an order of the Johnson Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his May 19, 2007 conviction, and remand for a new trial. Or, in the alternative, for the Court of Appeals to remand for another hearing on the RCr 11.42 motion. The basis of Cantrell's RCr 11.42 collateral attack on his conviction

is that he received ineffective assistance of counsel. After careful consideration of the issues, we find no error and affirm the decision of the trial court.

We adopt the facts as set forth by the Supreme Court of Kentucky on Cantrell's direct appeal:

On the morning of January 27, 2006, the Johnson County Sheriff's Department received a tip that a methamphetamine lab was in operation in a trailer located on property owned by Brent Cantrell's father. Three members of the Johnson County Sheriff's Department proceeded to the location in three separate cruisers.

When Deputy Tom Wyatt drove up to the trailer, he noticed Brent Cantrell and Shawna Dalton climbing out an open window and running away. Although it was late in January, Cantrell was wearing only a t-shirt, jeans, and shoes. Dalton was wearing a t-shirt and jeans, but no shoes. Deputy Barry Mayes also observed Cantrell and Dalton climbing out the window and running away. Officer Mayes ordered the pair to stop and they were apprehended. The officers detected the odor of ammonia on both Cantrell and Dalton.

Cantrell gave the officers permission to search the trailer. A strong caustic odor permeated the air around the residence. Upon entry, the officers encountered a foggy haze and more of the strong caustic odor which had been detected outside. In fact, one of the officers began coughing so much because of the fumes that he had to be treated at a local hospital. Inside the trailer, the officers discovered all the chemicals and equipment necessary for the manufacturing of methamphetamine. An individual by the name of Dale Wells was found passed out on a bunk in a back bedroom. A video surveillance system was also discovered inside the trailer, with the camera focused on the driveway leading up to the residence.

Deputy Boyce Williams collected and photographed evidence from the trailer. Among the

evidence collected were cans of butane fuel, a butane torch, ph strips, tubing, kitty litter, a coffee pot, coffee filters, a funnel, a beaker, a mason jar, and hollowed-out light bulbs. Two hollowed-out light bulbs containing residue and three bottles were sent to the Kentucky State Police Laboratory for testing. Lab results showed that these items contained methamphetamine.

*Cantrell v. Com.*, 288 S.W.3d 291, 292-93 (Ky. 2009).

At the conclusion of the jury trial, Cantrell was found guilty of complicity to manufacture methamphetamine; complicity to possession of a controlled substance in the first degree (methamphetamine); complicity to use/possession of drug paraphernalia; and of being a second-degree persistent felony offender. In accordance with the jury recommendation, the trial court sentenced Cantrell to a fifty-year sentence of imprisonment. The Kentucky Supreme Court, in the aforementioned case, issued a unanimous opinion, which affirmed Cantrell's conviction. *Id.* at 300.

On June 28, 2007, during the pendency of the direct appeal, Cantrell, with the assistance of counsel from the Department of Public Advocacy, filed this RCr 11.42 motion. In this motion, Cantrell contended that he received ineffective assistance of counsel for the following reasons: trial counsel only spoke with him at judicial hearings; trial counsel did not discuss trial strategy with him; trial counsel did not interview witnesses; trial counsel failed to properly inform him of the Commonwealth's plea offer, trial counsel was not prepared for trial and led him to believe that the trial would be continued; trial counsel did not review the potential jury list; and finally, trial counsel had serious mental and physical health

conditions during the trial, which rendered him unable to appropriately represent him.

On July 6, 2007, the trial court held a hearing on the RCr 11.42 motion. The Commonwealth declined to call any witnesses and Cantrell called only one witness, his former attorney, Lowell E. Spencer. In response to Cantrell's arguments of ineffective assistance of counsel, Spencer testified that while he met with Cantrell prior to the trial only in the courtroom, he made repeated efforts to get Cantrell to come to his office but Cantrell would not cooperate. And although he did not meet with the trial witnesses, Cantrell's father brought him the list of witnesses and advised him about their testimony. Spencer met with Cantrell's father five to eight times prior to trial.

At the conclusion of the hearing, the trial judge denied Cantrell's RCr 11.42 motion and opined that Spencer had presented a "stout defense" and "vigorously defended" the case. An order memorializing the ruling was issued on July 9, 2007. Thereafter, Cantrell appealed the denial of his motion to this Court.

On June 2, 2008, our Court held this appeal in abeyance until the outcome of the direct appeal before the Kentucky Supreme Court. Following the rendering of that decision, this appeal was returned to the active docket. We then granted the Department of Public Advocacy's motion to withdraw as counsel and set another briefing schedule. On January 21, 2010, Cantrell's new counsel filed an entry of appearance and a motion to remand this matter to the trial court in order to supplement the certified record on appeal and for an extension of time to file a

brief. In particular, Cantrell asked to remand this matter to the trial court for further testimony and attached affidavits and statements indicative of his claims that the original attorney failed to investigate and prepare. The Commonwealth opposed Cantrell's motion and noted that his request for another evidentiary hearing was frivolous. Our Court denied Cantrell's motion to remand on April 21, 2010, but granted his request for more time to file the brief.

In essence, Cantrell maintains that he was denied effective assistance of counsel because his trial counsel's performance did not meet an objective standard of reasonableness and he was prejudiced by the deficiency for the following reasons. In particular, Cantrell claims that his trial counsel failed to investigate his case, failed to adequately counsel him about his right to testify, provided insufficient counsel during the plea bargaining phase, and finally, trial counsel's performance was materially affected by his health problems.

Thus, Cantrell maintains that the alleged deficiency caused prejudice since his case was not adequately presented, and therefore, he did not receive a fair trial or a reliable verdict. In contrast, the Commonwealth counters that the trial court correctly denied Cantrell's RCr 11.42 motion because it was procedurally defective; counsel did adequately prepare and investigate the case; counsel did adequately counsel his client about his right to testify and the plea bargain offer; and lastly, no evidence has been provided that counsel's health problems adversely affected the legal services provided Cantrell.

As the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To be found ineffective, counsel's performance must first be shown to be below the objective standard of reasonableness and second must be shown as so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* The reviewing court when reviewing an appeal from the denial of a claim of ineffective assistance must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that a counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305, 54 USLW 4789 (1986). Further, to ascertain whether counsel was ineffective, a reviewing court "must be highly deferential in scrutinizing counsel's performance," and second-guessing should be avoided. *Harper v. Com.*, 978 S.W.2d 311, 315 (Ky. 1998).

Finally, under *Strickland*, Cantrell must show that but for the alleged ineffective assistance, a reasonable probability exists that the outcome of the proceeding would not only have been different, but would have been more favorable to him. And it is not enough merely to demonstrate the existence of ineffective assistance of counsel. Cantrell must also show that but for the alleged ineffective assistance, the outcome of the trial would have been different. *Gall v. Com.*, 702 S.W.2d 37, 39 (Ky. 1985).

To begin our analysis of Cantrell's claim of ineffective assistance of counsel, we note that initially, as the Commonwealth highlighted, the motion itself was procedurally defective since it was not verified as is required. Section two of RCr 11.42 requires that the motion "be signed and verified by the movant[.]" Cantrell did not swear to the truth of the statements made in his motion to vacate the judgment, and thus, the motion might have been summarily dismissed. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). Although we do not choose to summarily dismiss this motion, it is an example of the failure to strictly adhere to legal procedural requirements found throughout Cantrell's case.

We will now address Cantrell's specific charges as to his claims of ineffective assistance of counsel. In response to Cantrell's complaint about his counsel stating at the opening of the trial that he was not ready to begin, the testimony at the original RCr 11.42 hearing is dispositive on this point. At the hearing, counsel explained that he made the statement because Cantrell repeatedly refused to cooperate in preparation for the trial. Indeed, in the trial court's written order denying the RCr 11.42 motion, it notes that the preparation and trial strategy by Cantrell's counsel were limited by defendant's failure to cooperate in any way with counsel.

Next we address Cantrell's allegations that counsel failed to investigate properly, did not adequately counsel Cantrell about his right to testify, provided insufficient counsel during the plea bargaining process, and finally, was

hampered by health problems, which allegedly, rendered him unable to represent Cantrell effectively.

With regards to whether Spencer properly investigated Cantrell's case, the Commonwealth makes several observations. First, it points out that even assuming that Spencer should have retained an investigator in this case, it is Cantrell's burden of proof to establish any prejudice resulting from this failure, and he did not do so. As far as counsel's failure to question witnesses that would provide testimony placing Cantrell elsewhere at the time of the criminal act, counsel testified at the RCr 11.42 hearing that he spoke five to eight times with Cantrell's father, who informed him about the witnesses' statements. The Commonwealth also notes that it was Cantrell's burden, even assuming that his attorney should have questioned potential witnesses, to establish prejudice resulting from counsel not questioning potential witnesses. Cantrell did not do so.

Again, as far as counsel's supposed failure to investigate jurors, this claim is also baseless. Importantly, the record reveals that the attorney did file, on January 22, 2007, a motion for a new trial on the issue of the jurors after it was brought to his attention by Cantrell's parents after the trial. Nonetheless, Cantrell still makes the allegation that counsel did not perform his function with regard to the jury selection. Cantrell, however, provides no evidence showing any juror's incompetence or its pretrial discoverability or that Cantrell could have identified the jurors (rather than his parents) or even if counsel had asked for these jurors to



be struck, he would have succeeded. There is no particularity or prejudice to this charge. Merely offering a conclusory statement does not make the statement true.

In essence, rather than establishing that his counsel's trial preparation, including investigation, was inadequate and caused prejudice to his case, Cantrell has merely shown that he did not cooperate in any way with trial counsel. Refusal to cooperate with one's attorney does not equate to inadequate or prejudicial assistance of counsel.

Next, we review Cantrell's contentions that his counsel did not adequately counsel him about his right to testify or provide sufficient counsel during the plea bargaining process. As to Cantrell's statement regarding inadequate counsel about his right to testify, this claim was not raised or mentioned in his original RCr 11.42 motion. "The appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision." *Turner v. Com.*, 460 S.W.2d 345, 346 (Ky. 1970). Thus, there is nothing for the Court to consider.

Regarding the issue of inadequate counsel for the plea bargain, Cantrell alleges that since the plea bargain was for a ten-year sentence and he received a fifty-year sentence, he did not receive good counsel. He maintains that this disparity shows that he was not adequately counseled. But Cantrell must do much more than raise doubt in order to demonstrate ineffective assistance of counsel. It is his burden of proof to show that he was not adequately represented. *Dorton v. Com.*, 433 S.W.2d 117, 118 (Ky. 1968). And further, Cantrell has not

overcome the strong presumption that counsel rendered adequate assistance.

*Strickland*, 466 U.S. at 689.

Cantrell's final argument supporting his claim of ineffective assistance of counsel is based on his counsel's alleged poor health. To support his contention, Cantrell supplies affidavits attesting to his counsel's poor health with his motion to remand. Notwithstanding this assertion, clearly, the affidavits attached to Cantrell's motion to remand for another RCr 11.42 motion are not a part of the certified record, and therefore, have no bearing on this case. *See U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 542-543 (Ky. App. 2007). Moreover, Kentucky Rules of Civil Procedure (CR) CR 76.12(4)(c)(vii) provides that "[e]xcept for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." As such, it is improper for an appellate court to review such material.

Besides the lack of recognizable evidence regarding Spencer's health, Cantrell again demonstrated no particularity or prejudice that might stem from this claim. Plus, Cantrell ignores the record. At the RCr 11.42 hearing, Spencer, Cantrell's attorney, testified that he had heart bypass surgery in 2000. By the time of Cantrell's 2007 trial, he was working five-and-a-half days per week at eight hours per day. He denied any physical or mental incapacity. Spencer confirmed that he had an active law practice and that neither he nor his doctor felt that he was

unable to practice law. Plus, we have already denied Cantrell's motion to remand this matter to the trial court for another evidentiary hearing.

Hence, Cantrell's claim of error by the trial court in denying his RCr 11.42 motion fails because his assertions of the ineffective assistance of counsel lack merit. The order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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