

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

NO. 2008-CA-000225-MR

MICHAEL KEITH BUTTERY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 03-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART;  
REVERSING IN PART; AND REMANDING

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

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Michael Keith Buttery appeals the Laurel Circuit Court's order denying his RCr<sup>2</sup> 11.42 motion to vacate the judgment against him. After a careful review of the record, we affirm in part concerning Buttery's ineffective assistance

---

<sup>1</sup> Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rule of Criminal Procedure.

of appellate counsel claim, and we reverse in part concerning Buttery's ineffective assistance of trial counsel claim and remand the case for further proceedings.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Buttery was convicted, following a jury trial, of manufacturing methamphetamine, first-degree possession of a controlled substance, first-degree wanton endangerment, and resisting arrest. He was sentenced to twenty years of imprisonment for manufacturing methamphetamine, one year for possessing a controlled substance, five years for wanton endangerment, and twelve months for resisting arrest. Buttery's sentence for resisting arrest was ordered to run concurrently with the other sentences, but his remaining sentences were ordered to run consecutively to each other.

Buttery appealed, and the Kentucky Supreme Court affirmed his conviction. *See Buttrey*<sup>3</sup> *v. Commonwealth*, No. 2005-SC-000320-MR, 2007 WL 1789985, \*1 (Ky. June 21, 2007), *as modified on denial of reh'g* (Ky. Sept. 20, 2007) (unpublished).

Buttery then filed his RCr 11.42 motion to vacate the circuit court's judgment. He requested an evidentiary hearing, but the circuit court denied his motion to vacate without holding an evidentiary hearing.

Buttery now appeals, contending that: (a) he received the ineffective assistance of trial counsel when counsel failed to object to Buttery's convictions

---

<sup>3</sup> We note that the Kentucky Supreme Court spelled Buttery's name as "Buttrey," but in his notice of appeal and brief to our Court, he spells his name "Buttery," so that is the spelling that we will use in this opinion.

for both possession and manufacturing of methamphetamine on double jeopardy grounds; (b) he received the ineffective assistance of appellate counsel when counsel failed to raise the aforementioned issue on direct appeal; and (c) the circuit court erred when it did not hold an evidentiary hearing concerning his RCr 11.42 motion.

## **II. STANDARD OF REVIEW**

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

## **III. ANALYSIS**

### **A. CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

Buttery first claims that he received the ineffective assistance of trial counsel when counsel failed to object to Buttery’s convictions for both possession and manufacturing of methamphetamine on double jeopardy grounds. To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Buttery must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and

(2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

In evaluating this claim, the circuit court noted the elements that Buttery had to establish to prove his ineffective assistance of counsel claim, but the court then merely stated that “[a] double jeopardy claim is not the type of issue permitted to be brought under an RCr 11.42 motion as such an issue should or could have been raised on direct appeal.” The circuit court further cited *Whack v. Commonwealth*, 390 S.W.2d 161 (Ky. 1965), for the proposition that “when a defendant has counsel of his own choosing he ordinarily waives the right to complain of the way in which he was represented.” The court then denied Buttery’s RCr 11.42 motion.

The circuit court did not review Buttery’s claim of ineffective assistance of trial counsel under the correct legal standard, which was set forth in *Strickland*, 466 U.S. at 687, 689. We note that *Strickland* was entered by the United States Supreme Court approximately nineteen years after the decision in *Whack* was entered by Kentucky’s highest court. Therefore, we reverse the circuit court’s decision on this ineffective assistance of trial counsel claim and remand for the circuit court to analyze the claim under the appropriate legal standard.

## **B. CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

Buttery next alleges that he received the ineffective assistance of appellate counsel when counsel failed to raise the aforementioned claim of ineffective assistance of trial counsel on direct appeal. We first note that Buttery

did not raise this claim in the circuit court. Thus, we will not consider it for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Alternatively, even if we were to consider this claim on the merits, the Kentucky Supreme Court has held that “[i]neffective assistance of appellate counsel is not a cognizable issue in” Kentucky. *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001). We are bound by this Kentucky Supreme Court holding. Accordingly, Buttery’s claim is not cognizable.

### **C. CLAIM REGARDING EVIDENTIARY HEARING**

Finally, Buttery contends that the circuit court erred in failing to hold an evidentiary hearing concerning his RCr 11.42 motion. Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record[,] the court shall grant a prompt hearing. . . .” In the present case, because we are reversing and remanding for the circuit court to analyze Buttery’s ineffective assistance of trial counsel claim under the appropriate legal standard, the circuit court may decide to hold an evidentiary hearing on remand, if the court finds that there is a material issue of fact that cannot be determined from the record. Thus, because we are reversing and remanding, we need not decide whether an evidentiary hearing should have been held.

Accordingly, the order of the Laurel Circuit Court is affirmed in part with respect to the ineffective assistance of appellate counsel claim, and the order

is reversed in part with regard to the ineffective assistance of trial counsel claim,  
and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Keith BATTERY  
Pro se  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jeffrey A. Cross  
Assistant Attorney General  
Frankfort, Kentucky