

RENDERED: MAY 12, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-001055-MR

KENNETH BELCHER

APPELLANT

APPEAL FROM BELL CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 01-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: Appellant Kenneth Belcher appeals the denial of his RCr 11.42 motion for relief from a judgment convicting him of wanton murder for which he was sentenced to twenty years' imprisonment. In denying appellant's motion, the trial judge concluded that the claims supporting his allegation of ineffective assistance of counsel were either conclusively refuted by the record or related to matters which were

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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 KRS 21.580.

irrelevant to the charges against him. Finding no error in the trial judge's denial of appellant's motion without a hearing, we affirm.

Appellant's conviction stems from a shooting incident at his home on November 17, 2000, when two individuals named Wyatt and Carter were leaving after an unsuccessful attempt to purchase marijuana from appellant. At trial, appellant did not deny firing a shotgun in the direction of Wyatt and Carter or that those shots caused the wounds suffered by each victim, but alleged that his actions had been taken in self-defense. Appellant Belcher's subsequent conviction for wanton murder was affirmed by the Supreme Court of Kentucky. Appellant then filed the RCr 11.42 motion which is the subject of this appeal alleging that he had been deprived of effective assistance of trial counsel. His specific contentions in support of this allegation focused upon: 1) ineffectiveness of counsel in failing to prevent the admission of photographs of weapons found at the scene of the shooting; 2) ineffectiveness in failing to call witnesses who would have testified that the deceased had been previously shot at by other individuals; 3) ineffectiveness in failing to inform him of a plea offer by the Commonwealth; and 4) ineffectiveness in failing to establish that the victims were the aggressors at Belcher's home on the night of the shooting.

In rejecting appellant's claim of ineffective assistance, the trial court concluded that the Supreme Court had previously determined that he suffered no due process deprivation in the admission of the photographs; that counsel was not ineffective in failing to call witnesses who could offer only irrelevant testimony; that the record confirms the fact that the plea negotiations took place and that all offers and counter-offers had been rejected by the parties; and that his contention with respect to establishing that the victims had been the aggressors was in reality merely a disagreement with the jury's view of the evidence. Appellant argues a fifth contention in his brief to this Court concerning counsel's failure "to obtain instruction on lesser included," but does not specify what instruction he maintains was erroneously omitted.

The criteria for assessing collateral attacks alleging ineffective assistance of counsel are well settled in this Commonwealth. In order to prevail in an appeal from the denial of an RCr 11.42 motion, an appellant is required to satisfy the criteria set out in Strickland v. Washington<sup>2</sup> which include a showing that the performance of counsel fell below an objective standard of reasonableness and was so prejudicial as to deprive him of fair trial. Our review of the issues raised in appellant's motion convinces us that he failed to meet the

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<sup>2</sup> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984).

Strickland standard, and that the trial judge correctly denied his collateral attack on the judgment convicting him of wanton murder.

First, with respect to the contention that counsel was ineffective in allowing the introduction of evidence which "inflamed the minds of the jury" by showing several weapons that had no relevance to the crimes charged, the Supreme Court reviewed this contention on direct appeal and found no error. Because the challenged evidence was found to be admissible by the Supreme Court, counsel cannot be labeled ineffective for failing to preclude its introduction, nor can appellant re-litigate the question of its admissibility by presenting it in the form of an ineffective assistance of counsel claim.<sup>3</sup>

Next, appellant complains of counsel's failure to call witnesses "on the issue that the deceased had been shot before by other individuals." Not only does appellant fail to identify these witnesses or the substance of the testimony they would have offered, he fails to demonstrate in what way the previous unrelated shooting might have any relevance to the shooting at his home. Neither this Court, nor the trial court, is entitled to assume facts in order to support appellant's bare assertions or to shore up deficiencies in his motion. This principle was

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<sup>3</sup> Sanborn v. Commonwealth, 975 S.W.2d 905, 908-909 (Ky. 1998).

recently reiterated by the Supreme Court in Hodge v.

Commonwealth which held:

The RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation.<sup>4</sup>

Appellant next challenges counsel's effectiveness by arguing that she failed to inform him of a plea offer by the Commonwealth. The record contains trial counsel's statement that she not only informed appellant and his family about the Commonwealth's offer, but conducted a demonstration which compared the plea offer to the potential penalty range. Thus, the record supports the trial judge's finding that counsel was not ineffective in failing to communicate the plea offer.

The final allegation of ineffective assistance presented to the trial court centered on his complaint that counsel failed to establish that the victims were the aggressors in the incident which precipitated the shooting. Contrary to appellant's assertion, the trial transcript confirms that counsel thoroughly and adequately presented his self-defense claim. Again, appellant fails to allege facts or witnesses that counsel should have presented to further his self-defense claim. The mere fact that the jury chose not to accept appellant's

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<sup>4</sup> 116 S.W.3d 463,468 (Ky. 2003).

version of events in no way implicates the effectiveness of his counsel.

Appellant also includes in his brief without further explanation the statement that "Counsel failed to obtain instruction on lesser included." Even had this argument been presented in a proper form, we would decline to address it because it had not been presented to the trial judge for consideration.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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