

RENDERED: MARCH 3, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-001485-MR

CALVIN WAYNE CARRENDER

APPELLANT

v. APPEALS FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
INDICTMENT NOS. 02-CR-00200 & 02-CR-00321-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

KNOPF, JUDGE: Calvin Wayne Carrender appeals from a May 13, 2005, Pulaski Circuit Court order denying his motions to set aside his conviction pursuant to RCr 11.42 and to appoint counsel for him. After reviewing the record, we conclude that

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

the record does not clearly refute Carrender's claims of ineffective assistance of counsel. Hence, we reverse the trial court's order and remand for appointment of counsel and an evidentiary hearing on the merits of the motion.

On September 25, 2002, a Pulaski County grand jury returned Indictment No. 02-CR-00200, charging Carrender with first-offense manufacturing methamphetamine while in possession of a firearm.<sup>2</sup> The charge arose out of Carrender's arrest on June 3, 2002. Subsequently, on December 10, 2002, the Pulaski County grand jury returned Indictment No. 02-CR-00321-001, charging Carrender with another count of first-offense manufacturing methamphetamine arising from a separate arrest on September 7, 2002. The two indictments were subsequently consolidated and heard together.

On December 24, 2003, and January 16, 2004, the Commonwealth filed identical motions in both actions seeking to amend the indictments. In both motions, the Commonwealth noted the recent decision by the Kentucky Supreme Court in Kotilla v. Commonwealth,<sup>3</sup> holding that KRS 218A.1432(b) requires that a defendant possess all of the equipment or all of the chemicals

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<sup>2</sup> Manufacturing methamphetamine, first offense is a class B felony, KRS 218A.1432, which is enhanced to a class A felony by possession of a firearm. KRS 218A.992.

<sup>3</sup> 114 S.W.3d 226 (Ky. 2003).

in order to be guilty of manufacturing methamphetamine. The Commonwealth conceded that the evidence would not support a conviction under this standard. Consequently, the Commonwealth moved that the charge be amended to possession of methamphetamine precursors.<sup>4</sup>

On February 11, 2004, Carrender appeared in court and entered a plea of guilty to two counts of possession of methamphetamine precursors, second offense. In accord with the Commonwealth's recommendation, the trial court sentenced Carrender to five years on each count, to be served consecutively for a total of ten years. The court further ordered the sentence suspended and Carrender placed on supervised probation for a period of five years. Subsequently, however, the trial court revoked Carrender's probation due to his violation of the conditions imposed on him.

Thereafter, Carrender filed a motion to set aside the conviction pursuant to RCr 11.42, alleging that he had received ineffective assistance of counsel prior to entering his guilty plea. Carrender also moved the court to appoint counsel for him and to conduct an evidentiary hearing. The trial court denied

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<sup>4</sup> KRS 218A.1437. Possession of methamphetamine precursors is a class D felony for the first offense and a class C felony for each subsequent offense. KRS 218A.1437(3).

the motions without a hearing in an order entered on May 13, 2005. This appeal followed.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding.<sup>5</sup> The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.<sup>6</sup> Carrender alleges that his trial counsel failed to conduct a reasonable investigation into the charges against him.

As previously noted, the Commonwealth admitted that it could not proceed against Carrender on the methamphetamine-manufacturing charge because Carrender did not possess either all of the chemicals or all of the equipment to complete the process.<sup>7</sup> Carrender further notes that KRS 218A.1437, which criminalizes possession of methamphetamine precursors and to which he pleaded guilty, did not become effective until July 15, 2002. Thus, the statute could not be applied to the conduct charged in Indictment No. 02-CR-00200. While Carrender concedes

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<sup>5</sup> Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky., 1985).

<sup>6</sup> Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999).

<sup>7</sup> Kotilla, *supra* at 237-41.

that KRS 218A.1437 would have been applicable to the charges set out in Indictment No. 02-CR-00321-001, he notes that the statute as then written required evidence showing possession of more than twenty-four grams of ephedrine, pseudophedrine, or phenylpropanolamine or their salts, isomers or salts of isomers.<sup>8</sup> The record does not clearly indicate that Carrender had this quantity of ephedrine in his possession at the time he was arrested. Based upon these facts, Carrender asserts that he would not have pleaded guilty had his trial counsel properly investigated and raised these defenses.

In rejecting this argument, the trial court correctly noted a validly entered guilty plea precludes a defendant from challenging the sufficiency of the evidence on that charge.<sup>9</sup> The court also noted that it had engaged Carrender in a full Boykin<sup>10</sup> colloquy, at which Carrender stated that his guilty plea was voluntary and that he was satisfied with the performance of his counsel. But while such pronouncements in open court raise

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<sup>8</sup> KRS 218A.1437(2)(a).

<sup>9</sup> Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003); Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990).

<sup>10</sup> Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

a strong presumption that counsel's assistance was constitutionally sufficient,<sup>11</sup> that presumption may be overcome.

A defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In addition to meeting the Strickland elements for establishing ineffective assistance of counsel, a defendant who challenges a guilty plea must also show that that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the appellant would not have pled guilty but would have insisted on going to trial.<sup>12</sup>

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis. First, it must be determined whether a reasonable investigation should have uncovered the defense. If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of

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<sup>11</sup> Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Pelphrey, *supra* at 463.

<sup>12</sup> Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Phon v. Commonwealth, 51 S.W.3d 456, 459-460 (Ky. 2001).

correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.<sup>13</sup>

Carrender has identified two significant defenses to the charges of possession of methamphetamine precursors which may have altered the outcome of this case had trial counsel raised them. In Kotilla, the Supreme Court suggested that a defendant who possessed less than all the necessary chemicals to manufacture methamphetamine could be convicted of criminal attempt to violate KRS 218A.1432(1)(a) if he had already begun the manufacturing process, or if the defendant engaged in other actions leaving no reasonable doubt of a criminal intent.<sup>14</sup> Based upon this language, the trial court stated that the Commonwealth could have proceeded against Carrender under an attempt theory, and that Carrender still would have been facing a sentence of ten to twenty years considering the subsequent offense and the firearm enhancement. But while this may be true, this conclusion flies in the face of the admission by the

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<sup>13</sup> Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001). See also Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

<sup>14</sup> Kotilla, *supra* at 245.

Commonwealth that it could not proceed on the methamphetamine-manufacturing charges in either indictment.

Thus, we are left with the two amended charges of possession of methamphetamine precursors - one of which clearly was improper because the charged conduct occurred prior to the effective date of the statute.<sup>15</sup> On the other hand, the charge in Indictment No. 02-CR-00321-001 arose out of conduct which occurred after the effective date of the statute. Furthermore, assuming that there was sufficient evidence to establish a *prima facie* case under KRS 218A.1437(2)(a), that charge would have been subject to enhancement due to a prior offense. Consequently, Carrender was still facing a conviction for a class C felony, supporting a sentence of five to ten years. Viewed in this light, the Commonwealth's offer was not quite the "sweet deal" that the trial court believed it to be. Nevertheless, the offer was still favorable to Carrender given that the Commonwealth's recommendation of probation allowed Carrender to be released without serving any additional time.

Advising a client to plead guilty is not, by itself, evidence of ineffective assistance of counsel.<sup>16</sup> Furthermore, it may be a reasonable tactical choice for trial counsel to advise

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<sup>15</sup> Id. at 246.

<sup>16</sup> Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983).

a defendant to accept a guilty plea even if the defendant must waive potentially meritorious defenses. But that tactical decision must be based upon an objectively reasonable investigation by counsel of the law, the evidence, and the circumstances surrounding the plea offer.<sup>17</sup> If counsel failed to conduct that inquiry and the defense is likely to have affected the defendant's decision to plead guilty, then counsel's ineffective performance prejudicially affected the outcome of the plea process.<sup>18</sup>

This case presents a fairly close call regarding the effectiveness of Carrender's trial counsel in advising him to plead guilty. Ultimately, the matter comes down to the reasonableness of trial counsel's investigation into the available evidentiary and legal defenses. Where an evaluation of the circumstances supporting or refuting claims of ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, then an evidentiary hearing is necessary.<sup>19</sup> Likewise, an RCr 11.42 movant whose facially meritorious allegations are neither refuted nor confirmed by the underlying record is

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<sup>17</sup> See Wiggins v. Smith, *supra* at 522-523, 123 S. Ct at 2536.

<sup>18</sup> Hill v. Lockhart, *supra* at 59, 106 S. Ct. at 370.

<sup>19</sup> Rodriguez v. Commonwealth, 87 S.W.3d 8, 11 (Ky. 2002).

entitled to an evidentiary hearing at which his allegations may be tried.<sup>20</sup> Under the circumstances presented in this case, we conclude that Carrender was entitled to appointed counsel and to an evidentiary hearing on the merits of his RCr 11.42 motion.

Accordingly, the May 13, 2005, order of the Pulaski Circuit Court is reversed, and this matter is remanded with directions to appoint counsel for Carrender and to conduct an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Calvin W. Carrender, *pro se*  
Green River Correctional  
Complex  
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
Robert E. Prather  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>20</sup> Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).