View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

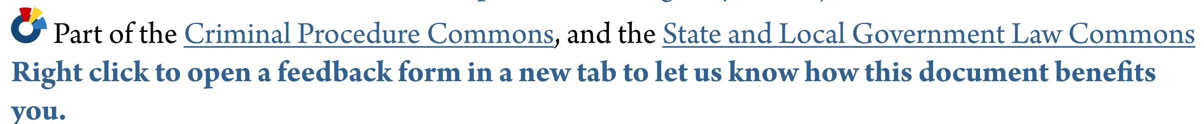
Volume 68 | Issue 3 Article 8

1980

Kentucky Law Survey: Criminal Procedure

Wayne F. Collier
Arnold, Bulleit & Kinkead

Follow this and additional works at: https://uknowledge.uky.edu/klj



Part of the Criminal Procedure Commons, and the State and Local Government Law Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Collier, Wayne F. (1980) "Kentucky Law Survey: Criminal Procedure," *Kentucky Law Journal*: Vol. 68 : Iss. 3 , Article 8.
Available at: https://uknowledge.uky.edu/klj/vol68/iss3/8

This Special Feature is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Criminal Procedure

By Wayne F. Collier*

I. Recent Developments In RCr 13.04 and 11.42

Within the past year, two Kentucky Rules of Criminal Procedure have received an expansive interpretation by the Kentucky courts. Kentucky Rule of Criminal Procedure (RCr) 13.04, which had formerly been read narrowly, was given an interpretation which expanded, at least by one, the number of Rules of Civil Procedure applicable in criminal actions. Further, the Kentucky Court of Appeals held that counsel is now required to assist indigents in drafting an RCr 11.42 motion.

A. *RCr 13.04*

RCr 13.04 determines which Rules of Civil Procedure are available to supplement the Rules of Criminal Procedure. RCr 13.04, as amended effective July 1, 1975, states: "Rules of civil procedure heretofore applicable to criminal procedure shall continue to be applicable to the extent not superseded by these Rules." A literal interpretation of this section would imply that it was intended to "grandfather" in only those Rules of Civil Procedure used prior to July 1, 1975. This reading is in fact erroneous, in light of past legislative action and judicial interpretations.

1. *Historical Development of RCr 13.04*

In 1952, the Kentucky General Assembly enacted Kentucky Revised Statutes (KRS) section 447.155[1] which provided that "[t]he rules of the Court of Appeals shall apply to criminal procedure in all situations where any provision of the Civil Code, superseded by those rules, has heretofore been made applicable to criminal procedure either by express reference or by interpretation." The courts interpreted this provi-

---

* Associate in the firm of Arnold, Bulleit & Kinkead, Lexington, Kentucky. J.D. 1979, University of Kentucky

[1] 1952 Ky. Acts, ch. 18, § 5.

sion literally.[2] For example, in *Ex parte Noel,*[3] the appellant urged application of CR 52.01[4] to require the judge to "find facts specifically and to state separately [his] conclusion of law. . . ."[5] The Court held that CR 52.01 was unavailable to the appellant since the old Civil Code had never been applied in a habeas corpus action.[6] Clearly, this interpretation limited the use of the Rules of Civil Procedure to rules not superseded by the Rules of Criminal Procedure and whose application was justified by prior decision.[7]

Effective January 1, 1963, RCr 13.04 was adopted as part of the new Kentucky Rules of Criminal Procedure.[8] It stated that the "[r]ules of civil procedure heretofore applicable to criminal procedure by virtue of KRS § 447.155 shall continue to be applicable to the extent not superseded by these Rules." This provision is substantially equivalent to KRS section 447.155. Moreover, subsequent cases were decided in the same manner as were decisions under KRS section 447.155.[9] Further, the repeal of KRS section 447.155 in 1966 had no appar-

---

[2] *See* Commonwealth v. Reynolds, 365 S.W.2d 853 (Ky. 1963) (KY. R. CIV. P. 43.07) [hereinafter cited as CR]; Anderson v. Commonwealth, 353 S.W.2d 381 (Ky.), *cert. denied,* 369 U.S. 829 (1962) (CR 43.09 did not prevent an attorney who was a prosecution witness from remaining in the courtroom when other witnesses were excluded).

[3] 338 S.W.2d 930 (Ky. 1960).

[4] *See* CR 52.01 (1974). CR 52.01 has been amended twice since *Ex parte Noel,* once on October 19, 1962 and again by order dated October 10, 1973.

[5] 338 S.W.2d at 906.

[6] *Id.*

[7] An interesting application of this interpretation is found in Owsley v. Commonwealth, 428 S.W.2d 199 (Ky. 1968). An affidavit for a search warrant had been sworn before a notary public. The court held that it was permissible for a notary to administer this oath through the application of KY. REV. STAT. § 447.155 [hereinafter cited as KRS] and KY. R. CRIM. P. 13.04 [hereinafter cited as RCr] by applying CR 43.13 and CR 28.01. CR 43.13 specifies that officers who may take depositions are enumerated in CR 28.01, which lists notary publics. 428 S.W.2d at 201.

[8] The new rules are those contained in the 1962 Ky. Acts, ch. 234, § 0.

[9] For example, in Shirley v. Commonwealth, 378 S.W.2d 816 (Ky. 1964), it was permissible to impeach a witness for the prosecution because § 597 of the CIVIL AND CRIMINAL CODES OF PRACTICE OF KENTUCKY, Title XIII, Evidence (6th ed., Carroll 1919) (old Civil Code) had permitted such practice. The appellant was on trial for robbery and had attempted to impeach the witness with prior bad acts. The court, however, sustained the Commonwealth's objection since the prior acts were not felony convictions. Note that both KRS 447.155 and RCr 13.04 were in effect at that time. *Id.* at 818.

ent effect upon the Court's approach to the applicability of the Rules of Civil Procedure.[10]

Nine years later, apparently as a belated housekeeping modification, the language "by virtue of KRS § 447.155" was deleted from RCr 13.04. The amended rule, effective July 1, 1975, reads as follows: "Rules of Civil Procedure heretofore applicable to criminal procedure shall continue to be applicable to the extent not superceded by these rules."[11] This rule was interpreted as KRS section 447.155 had been construed.[12]

---

[10] 1966 Ky. Acts, ch. 255, § 283. Stone v. Commonwealth, 456 S.W.2d 43 (Ky. 1970), raised theoretical questions as to the proper application of the Rules of Civil Procedure under RCr 13.04. The Court reversed and remanded for a new trial on an error which was in the record but not argued by the appellant. In support of this action, the Court relied on both RCr 9.26 and CR 61.02. RCr 9.26 states that "[a] conviction shall be set aside on motion in the trial court, or the judgment reversed on appeal, for any error or defect when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced." Ky. Crim. Code § 9.26 is a codification of prior practices and former rules, one of those being CrC 340 whose language was similar to RCr 9.26. *See* KY. REV. STAT. ANN., RCr 9.26 (Baldwin 1978) (annotations from former section). According to Rutherford v. Commonwealth, 78 Ky. 639 (1880), the Court granted relief on an issue not pleaded by the appellant. This interpretation is therefore valid today.

The question arises, however, why the Court found it necessary to apply CR 61.02 also, since RCr 9.26 affords an adequate remedy. The scope of CR 61.02 is quite similar to that of RCr 9.26. CR 61.02 provides that:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by the Court of Appeals on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The correct interpretation, under the old pre-emption reading afforded RCr 13.04, would be to apply RCr 9.26 alone. For additional criminal cases applying the Rules of Civil Procedure, *see* Hord v. Commonwealth, 450 S.W.2d 530 (Ky. 1970) (CR 59.04; judgment to become final 10 days after being properly signed by the judge); Brown v. Commonwealth, 440 S.W.2d 520 (Ky. 1969) (CR 43.01 (5); Commonwealth permitted to cross-examine own witness after she became hostile); Askew v. Commonwealth, 437 S.W.2d 205 (Ky. 1969) (CR 43.05; leading questions by prosecutor of own witness); Taylor v. Commonwealth, 432 S.W.2d 805 (Ky. 1968) (CR 43.07; impeachment use of felony convictions); Owsley v. Commonwealth, 428 S.W.2d 199 (Ky. 1968) (*see* note 7 *supra* for a discusson of this case); Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966) (CR 43.07; impeaching a defendant with felony convictions).

[11] RCr 13.04 (amended, effective July 1, 1975).

[12] *See* Keller v. Commonwealth, 572 S.W.2d 157 (Ky. 1978) (CR 43.07); Lewallen v. Commonwealth, 584 S.W.2d 748 (Ky. Ct. App. 1979) (CR 60.02); Bartug v. Commonwealth, 582 S.W.2d 61 (Ky. Ct. App. 1979) (CR 60.02; time spent in hospital did not count towards sentence because defendant was not in custody); Ross v. Commonwealth, 577 S.W.2d 6 (Ky. Ct. App. 1978) (CR 45.05; use of depositions at trial);

In 1978, however, the rule was modified judicially.

2. Commonwealth v. Burris

In 1978, the Kentucky Court of Appeals decided *Commonwealth v. Burris,*[13] and in so doing applied a civil rule which had not been held "heretofore applicable," as seemingly required by RCr 13.04. In *Burris,* the convicted defendant obtained a judgment notwithstanding the verdict (n.o.v.) on grounds of insufficient evidence. The Commonwealth argued the traditional interpretation of RCr 13.04: "that since no previous decisions had ever declared a judgment non obstante verdicto (judgment n.o.v.) was applicable to a criminal case, [RCr 13.04] could not have intended to 'grandfather' in such a rule."[14] The court reversed the judgment n.o.v. after reassessing the evidence produced at Burris' trial, but rejected the Commonwealth's argument that the civil remedy of judgment n.o.v. is unavailable in criminal cases.[15] This decision was premised on two grounds:[16] (1) the holding of *Burks v. United States;*[17] and (2) the purpose of RCr 13.04. In 1979, the Kentucky Supreme Court agreed with the determination that judgment n.o.v. is available in criminal cases but held that the court of appeals had no authority to reverse the judgment, because it was not appealable by the Commonwealth.[18]

In *Burks,* the United States Supreme Court held that the double jeopardy clause prevents a second trial to afford the prosecution an opportunity to supply such evidence as it failed to produce in the first trial.[19] Thus, a new trial cannot be granted on the basis of insufficient evidence.[20] The Ken-

---

Shanks v. Commonwealth, 575 S.W.2d 163 (Ky. Ct. App. 1978); Salisbury v. Commonwealth, 556 S.W.2d 922 (Ky. Ct. App. 1977); Blankenship v. Commonwealth, 554 S.W.2d 898 (Ky. Ct. App. 1977) (CR 52.04; findings upon material issues of fact).

[13] No. 78-CA-212-MR, 25 KY. L. SUMM. 5, p. 9 (Ky. Ct. App. Nov. 10, 1978) [hereinafter cited as KLS], *rev'd on other grounds,* 590 S.W.2d 878 (Ky. 1979).

[14] Commonwealth v. Burris, No. 78-CA-212-MR, slip op. at 1, 25 KLS 15, p. 9 (Ky. Ct. App. Nov. 10, 1978), *rev'd on other grounds,* 590 S.W.2d 878 (Ky. 1979).

[15] *Id.,* slip op. at 2.

[16] *Id.*

[17] *Id.*

[18] 437 U.S. 1 (1978).

[19] Commonwealth v. Burris, 590 S.W.2d 878 (Ky. 1979).

[20] 437 U.S. 1 (1978). The Supreme Court went further and commented that "it

tucky Supreme Court recognized this rule and determined that a judgment n.o.v. was "the only effective remedy provided at the time Burris acted."[21] However, prior interpretation of RCr 13.04 would not have allowed the use of judgment n.o.v. The Supreme Court examined the policy behind the rule and agreed with the court of appeals that "[t]he purpose of RCr 13.04 was clearly to provide parties to criminal actions with such remedies permitted under both the criminal and civil rules to prevent a miscarriage of justice."[22]

The significance of the *Commonwealth v. Burris*[23] decision has been diminished by the creation of RCr 10.24,[24] effective July 1, 1979, which specifically provides for judgment n.o.v. in criminal cases. When coupled with the language of the Court that the purpose of RCr 13.04 is to "prevent a miscarriage of justice," it appears that the Court has attempted to restore a conservative construction of RCr 13.04. The Court is allowing an expansive interpretation of RCr 13.04 only when the defendant has no other effective remedy and now has provided such a remedy in the instant case through RCr 10.24. Therefore, it is doubtful that the Court will read RCr 13.04 expansively in the future.

B. *RCr 11.42*

1. *Introduction*

In the post-conviction area, the RCr 11.42 motion has be-

---

makes no difference that a defendant has sought a new trial as one of his remedies, or even as his sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Id.* at 17.

[21] 590 S.W.2d 878, 879 (Ky. 1979).

[22] *Id.*

[23] *Id.*

[24] RCr 10.24 provides that:

> Not later than five (5) days after the return of a verdict finding him guilty of one or more offenses, a defendant who has moved for a directed verdict of acquittal at the close of all the evidence may move to have the verdict set aside and a judgment of acquittal entered. Likewise, if he has been found guilty under any instruction to which at the close of all the evidence he objected upon the ground that the evidence was not sufficient to support a verdict of guilty under that instruction, he may move that to that extent the verdict be set aside and a judgment of acquittal entered. A motion for a new trial may be joined with this motion.

come extremely important. Under RCr 11.42, a motion may be made to vacate, set aside or correct a sentence.[25] This motion must "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds."[26] It is of utmost importance that all grounds be included in the motion, as RCr 11.42 relief may only be sought once.[27] Should the court grant the movant relief, it "shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate."[28]

It is important to note the differences between appeals, RCr 11.42 motions, and habeas corpus petitions. Considered in order of availability, an appeal is the first procedure which the defendant/appellant may use. Each issue must be presented to the trial court in a timely fashion to preserve any error for review by the appellate court.[29] If the error was not preserved, the appellate court may still grant relief if "upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced."[30]

The defendant may avail himself of RCr 11.42 only after unsuccessful exhaustion of an appeal. When setting forth the

---

[25] RCr 11.42(1) provides that "(a) prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it."

[26] RCr 11.42(2).

[27] RCr 11.42(3) provides that "(t)he motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding."

[28] RCr 11.42(6). This determination may be appealed by either the movant or the Commonwealth under RCr 11.42(7).

[29] "Allegations of error, properly preserved by objections as provided in these rules, in respect to rulings, orders or instructions of the court need not be presented in a motion for a new trial in order to be preserved for appellate review." RCr 10.12. *See, e.g.*, Hennemeyer v. Commonwealth, 580 S.W.2d 211 (Ky. 1979); Russell v. Commonwealth, 482 S.W.2d 584 (Ky. 1972); Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965). Effective January 1, 1976, KY. CONST. § 115 (Supp. 1978), required in part that "[a]ppeals shall be on the record and not by trial de novo." The rationale of this provision is clear: the appellate courts are not fact finding bodies and are not equipped with the fact finding mechanisms available to trial courts.

[30] RCr 9.26. *See* note 10 *supra* for a more detailed discussion of the scope of this rule.

grounds for his motion, the defendant cannot seek relief on matters that were raised or could have been raised at trial. Accordingly, any error which was appealable cannot be the subject of an 11.42 motion.[31] Habeas corpus relief, on the other hand, is available only where an 11.42 motion would be inadequate.[32] The petitioner has the burden of proving the inadequacy of 11.42 relief.[33]

2. *Appointment of Counsel*

Assuming that an indigent has filed an 11.42 motion, the court is required to appoint counsel to represent the movant at a subsequent hearing "[i]f the answer [to the motion] raises a material issue of fact that cannot be determined on the face of the record . . . ."[34] In the recent case of *Ivey v. Commonwealth*,[35] the Kentucky Court of Appeals determined that appointment of counsel was necessary to assist the inmate in preparing an 11.42 motion.

The movant in *Ivey* argued that under RCr 11.42(3), the final disposition of an 11.42 motion is conclusory as to all issues that could have been raised. Therefore, the motion preparation stage is a critical one, necessitating counsel to prevent accidental waiver of rights.[36] In support of this argument, the appellant contended that KRS section 31.110 controlled. That statute provides for representation of indigents in appeals and

---

[31] *See* Yates v. Commonwealth, 375 S.W.2d 271 (Ky. 1964).

[32] *See, e.g.*, Debose v. Cowan, 490 S.W.2d 480 (Ky. 1973); Gray v. Wingo, 423 S.W.2d 517 (Ky. 1968). *See* KRS §§ 419.020—.120 (1972), 419.130 (Supp. 1978) (habeas corpus).

[33] *See* Ayers v. Davis, 377 S.W.2d 154 (Ky. 1964); Jones v. Thomas, 377 S.W.2d 155 (Ky. 1964); Burton v. Thomas, 377 S.W.2d 155 (Ky. 1964); Pryor v. Thomas, 377 S.W.2d 156 (Ky. 1964); Brown v. Thomas, 377 S.W.2d 156 (Ky. 1964); Coles v. Thomas, 377 S.W.2d 157 (Ky. 1964).

[34] RCr 11.42 (5) states:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

[35] Nos. 78-CA-892-MR & 78-CA-1071-MR, 26 KLS 9 (Ky. Ct. App. June 29, 1979), *disc. rev. granted*, 589 S.W.2d 892 (Ky. Dec. 13, 1979).

[36] *Id.* slip op. at 5.

"in any other post-conviction proceeding that the attorney and the needy person considers [sic] appropriate."[37]

The conflict was this: RCr 11.42(5) requires appointment of counsel only if the trial court believes that a material issue of fact exists;[38] KRS section 31.110 contemplates the assistance of an attorney when drafting an 11.42 motion.[39] Applying the maxim that "conflicting acts are to be considered together and harmonized,"[40] the court read RCr 11.42(5) as not prohibiting the appointment of counsel at the preparation

---

[37] 1972 Ky. Acts, ch. 353, § 11. KRS § 31.110 (Supp. 1978) reads as follows:

> (1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:
>
> (a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
>
> (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.
>
> (2) A needy person who is entitled to be represented by an attorney under subsection (1) is entitled:
>
> (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;
>
> (b) To be represented in any appeal; and
>
> (c) To be represented in any other post-conviction proceeding that the attorney and the needy person considers appropriate. However, if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.
>
> (3) A needy person's right to a benefit under subsections (1) and (2) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

This section was enacted to equate the justice available to one without financial resources with that available to the affluent defendant. While no mention is made of Lane v. Brown, 372 U.S. 477 (1963), that case specifically requires that the criminal justice system be as fair to the indigent as to the wealthy defendant. This statute may be a legislative recognition of that constitutional standard.

[38] *See* note 33 *supra* for citation of case authority.

[39] A careful reading of KRS § 31.110 in conjunction with the realities of the criminal system would logically lead one to conclude that if one could afford it, he would have his attorney draft his 11.42 motion. No less must be granted the indigent.

[40] Nos. 78-CA-892-MR & 78-CA-1071-MR, slip op. at 4.

stage. The drafting of an 11.42 motion was deemed to be a "critical stage" because it was clear that the appellant's substantial rights would be affected.[41] Therefore, all prisoners must have access to counsel for drafting of an 11.42 motion.

Access to counsel in the drafting stage does not necessarily mean that the attorney will comply with the prisoner's desires. KRS section 31.110(2) provides that an indigent be entitled to counsel in a post-conviction proceeding that is considered "appropriate" by both counsel and the indigent.[42] This language is qualified in subsection (2)(c), which states:

> [I]f the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.[43]

This contemplates a determination by counsel of the merits of the proposed motion. Should the attorney decide that the motion is without merit, he need not process it. Of course, the indigent may still proceed *pro se* with the benefit of the attorney's analysis of the case.

In a meritless case, does *Ivey* require the attorney to file an *Anders* brief? In *Anders v. California*,[44] appointed counsel was permitted to withdraw from what he considered a wholly frivolous *appeal* only if his request was accompanied by a brief which anlayzed all issues that could possibly support the appeal.[45] The appellate court would then grant or deny the withdrawal based upon the merit of the proposed arguments. Kentucky has codified this procedure for appeals in KRS section 31.115, but there is no similar provision for collateral proceedings.[46] As noted above, KRS section 31.110(2) does not,

---

[41] *Id.* slip op. at 5.

[42] *See* note 37 *supra* for the language of the statute.

[43] KRS § 31.110(2)(c) (Supp. 1978).

[44] 386 U.S. 738 (1967).

[45] *Id.*

[46] KRS § 31.115 (Supp. 1978), provides:

(1) It shall be the duty of the attorney representing a client under any public advocacy plan to perfect an appeal if his client requests an appeal.

(2) After the attorney has filed a notice of appeal as required by the Rules

on its face, require the public advocacy attorney to file an *Anders* brief.[47]

The answer to *Anders* question may lie in that there is no *right* to an 11.42 motion. The United States Supreme Court has said that the sixth and fourteenth amendments require that an indigent be afforded counsel upon any first appeal provided by the state as of right.[48] However, as to discretionary appeals, the Court has rejected due process and equal protection arguments and held that counsel need not be appointed.[49]

Section 115 of the Kentucky Constitution provides for an appeal as of right in both civil and criminal cases.[50] This mandate is reflected in KRS section 31.110 and KRS section 31.115.[51] However, there is no constitutional provision which grants a defendant 11.42 relief as of right, and KRS section

---

of Criminal Procedure, he shall forward to the office for public advocacy a copy of the final judgment, the notice of appeal, a statement of any errors committed in the trial of the case which should be raised on appeal, and a designation of that part of the record that is essential to the appeal.

(3) No attorney participating in any public advocacy plan shall be compensated for his services until he has perfected an appeal for a client who requests an appeal and has filed the information required in subsection (2) of this section.

(4) Any public advocate attorney who is representing a client on appeal who after a conscientious examination of said appeal believes the appeal to be wholly frivolous after careful examinations of the record may request the court to which the appeal has been taken for permisson to withdraw from the case. The attorney must file with that request a brief which sets forth any arguments which might possibly be raised on appeal. A copy of the request for permisson to withdraw and the brief must be served upon the client in sufficient time so that the client may raise any argument he chooses to raise.

[47] *See* note 37 *supra* for the language of the statute.

[48] Douglas v. California, 372 U.S. 353 (1963).

[49] Ross v. Moffitt, 417 U.S. 600 (1974).

[50] KY. CONST. § 115 (Supp. 1978), states:

In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certificaton of law, and the general assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

[51] *See* notes 37 and 46 *supra* for the language of the statutes.

31.110 accordingly grants both the court and counsel the right to review whether counsel should represent the movant. This does not run afoul of *Lane v. Brown*,[52] which requires only the presence of counsel in collateral proceedings when an attorney would have been retained under similar circumstances by one with adequate financial means.[53] One may conclude, then, that neither the federal or Kentucky Constitutions, nor legislative or procedural enactments of the Commonwealth, require that counsel be appointed in every instance. This determination is properly left to the public advocacy attorney as KRS section 31.110 clearly indicates. Under this analysis the attorney is not required to file an *Anders* brief in a meritless case.

3. *Reinstatement of the Right to an Appeal*

Confusion has arisen concerning when and where an appeal may be reinstated. The following discussion will categorize the issue by cases: those in which a notice of appeal was filed, whether perfected or unperfected; those cases involving belated appeals, and those cases in which no notice of appeal was filed and the right to appeal was waived. The latter category will then be subdivided according to whether or not the right to an appeal had been knowingly and intelligently waived.[54]

A 1978 decision, *Cleaver v. Commonwealth*,[55] appears to have answered the reinstatement question with respect to individuals who filed notice of appeal. In *Cleaver*, the appeal was dismissed after several motions for extensions of time in which to file the record and appellant's brief. Counsel for the appellant then filed an 11.42 motion arguing his own ineffective assistance as grounds for reinstatement of the appeal.

---

[52] 372 U.S. 477 (1963).

[53] *Id.* at 479. There is additional support for the proposition that indigents have more limited rights in procedures which are not accorded them as of right. *See* United States v. MacCollom, 426 U.S. 317 (1976) (no federal constitutional or statutory requirement that indigents be furnished with free trial transcripts for federal collateral attack proceedings).

[54] For a synopsis of belated appeals procedure under the old code, *see* S. MILLER, KENTUCKY APPELLATE PRACTICE AND FORMS § 84 (Baldwin 1920).

[55] 569 S.W.2d 166 (Ky. 1978).

The circuit court granted the motion and the Supreme Court again dismissed. By way of explanation, Justice Sternberg summarized the essential nature of the 11.42 motion as being "a resumption or continuation of the criminal proceeding . . .[;] it is primarily an attack on a sentence or judgment"[56] and not a method of obtaining an appeal since "RCr 11.42 does not confer jurisdiction on a circuit court to reinstate a right of appeal."[57] In a practical sense, to allow a circuit court to reinstate a right to an appeal "would leave every order of dismissal from [the appellate court] subject to judicial review by the trial court."[58] The Court concluded by noting that in order to reinstate a lapsed or belated appeal, one must move the court which would have heard the appeal originally.[59]

Cleaver is on solid ground in holding that a circuit court may not reinstate an appeal, because the circuit court's power to grant relief under RCr 11.42 is limited. If the court vacates a sentence or judgment, it may only "discharge, resentence, grant him a new trial, or correct the sentence as may be appropriate."[60] If a new trial were to be granted and the petitioner subsequently convicted, he would be entitled to another appeal,[61] but this would not constitute a reinstatement because the granting of a new trial voids all prior proceedings. Should other relief be granted, both parties could appeal,[62] but that appeal is limited to "the final order or judgment of the trial court in a proceeding brought under [RCr 11.42]."[63] Finally, when notice of appeal has been filed or the time limit

---

[56] *Id.* at 169.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] RCr 11.42(6) provides:

> At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

[61] RCr 11.42(7) states that "[e]ither the movant or the Commonwealth may appeal from the final order of judgment of the trial court in a proceeding brought under this Rule."

[62] *Id.*

[63] *Id.*

for filing notice has expired, the circuit court loses jurisdiction of the appeal.[64] The circuit court continues to have jurisdiction over post-conviction remedies.[65]

The remedy suggested in *Cleaver,* however, is questionable. *Cleaver* holds that the only method available to gain reinstatement is to move the court which originally would have heard the appeal.[66] With the exception of judgments "imposing a sentence of death or life imprisonment or imprisonment for twenty years or more[,]"[67] the Kentucky Court of Appeals would be the proper court. If the court of appeals were to reinstate, it would permit the defendant to initiate procedures for securing an appeal as if the judgment and sentencing of the circuit court had just occurred. The first step would be to file a notice of appeal and then perfect.[68] But this violates RCr 1.10,[69] which explicitly provides that "[t]he time for . . . taking an appeal shall not be extended." If notice of appeal has been filed, however, the appellate court may extend the time for certification of the record if a motion is made within the original period allowed for certification or before the expiration of any extension.[70] Therefore, the court of appeals does

---

[64] *See* Hoy v. Newberg Homes, Inc., 325 S.W.2d 301 (Ky. 1959); Monsour v. Humphrey, 324 S.W.2d 813 (Ky. 1959) (jurisdiction transferred to court of appeals upon filing notice of appeal). If notice of appeal has been filed, the circuit court may under RCr 1.10 and CR 73.08 extend the time for certificaton of the record, but this must be done within 120 days of the first notice filed. The appellate court may grant another extension within the 120 day period, the original period, or any prior extension. *See* CR 73.08. RCr 1.10 prohibits an extension of the time for taking an appeal under RCr 12.04.

[65] RCr 11.42(8) provides that "[t]he final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall remain suspended until final disposition of an appeal duly taken and perfected."

[66] 569 S.W.2d at 169.

[67] KY. CONST. § 110 (Supp. 1978).

[68] RCr 12.04 provides in pertinent part that "[a]n appeal is taken by filing a notice of appeal in the trial court."

[69] RCr 1.10 states: "Where these Rules do not provide otherwise the Civil Rules relating to time shall apply. The time for a motion for new trial, for a motion in arrest of judgment, or for taking an appeal shall not be extended except as provided in Civil Rule 73.08.

[70] RCr 1.10 states that the time for certifying the record may be extended pursuant to CR 73.08, which states:

> The record on appeal as constituted under Rule 75 or Rule 76 shall be

not have the power to grant a belated appeal if the motion for an extension is not "made before the expiration of the period as originally prescribed or as extended by a previous order."[71] Counsel's failure to secure an extension, or the court's failure to grant an extension, would effectively remove the case from the appellate court's jurisdiction. This is directly analogous to the situation wherein no notice of appeal was filed. In that case, the appellate court is without jurisdiction to entertain an appeal[72] and likewise would be unable to grant a belated appeal. If the court is without jurisdiction, it cannot act. The *Cleaver* rule still applies, however, since granting an extension to file is not a reinstatement for the simple reason that the appeal has not yet lapsed. Since the Kentucky Court of Appeals must comply with the rules promulgated by the Kentucky Supreme Court, the court of appeals has no power to hear belated or lapsed appeals.[73]

Although one may waive his constitutional rights,[74] section 115 of the Kentucky Constitution[75] provides one appeal as of right. *Lane v. Brown*[76] suggests that procedures which

---

prepared and certified by the clerk of the court from which the appeal is taken within 60 days after the date of filing the notice of appeal except that when more than one appeal is taken from the same judgment the court from which the appeal is taken may prescribe the time for certification, which shall not be less than 60 days after the date on which the first notice of appeal was filed. In all cases the court from which the appeal is taken may in its discretion, with or without motion or notice, extend the time for certifying the record on appeal, if its order for extension is made before the period for certification as originally prescribed or extended by a previous order, but shall not extend the time to a day more than 120 days after the date on which the first notice of appeal was filed. The appellate court may upon motion and showing of good cause extend the time for certificaton of the record on appeal if the motion for extension is made before the expiration of the period as originally prescribed or extended by a previous order.

[71] *Id.*

[72] Department of Highways v. Matney, 161 S.W.2d 617 (Ky. 1942). *See also* RCr 1.10 and RCr 12.04.

[73] *See* KY. CONST. §§ 115, 116 (Supp. 1978); KRS § 21A.050 (Supp. 1978); KRS § 22A.020 (Supp. 1978).

[74] *See* Lomax v. Commonwealth, 581 S.W.2d 27 (Ky. Ct. App. 1979). In *Lomax*, the court found that since the appellant knew of his right to an appeal and had opted not to appeal on the advice of counsel, he had waived his right and was not entitled to any extensions or to vacation of judgment solely on that ground.

[75] *See* note 50 *supra* for the text of § 115.

[76] 372 U.S. 477 (1963).

fail to accord a defendant those rights are unconstitutional. Where an appeal has been taken and counsel fails to perfect against the wishes of the defendant, there has been no waiver. It follows that there must be a remedy available which would allow such a defendant to reinstate the appeal.

The Kentucky Constitution empowers the Supreme Court to promulgate rules concerning appellate jurisdiction and to provide for expeditious and inexpensive appeals.[77] According to KRS section 21A.050, the Supreme Court may use the Rules of Civil and Criminal Procedure as well as any other rules it might create to establish procedures for appellate review.[78] The fact that the Kentucky Court of Appeals is unable to reinstate a lapsed or belated appeal does not necessarily mean that *Lane* has been violated. The *Cleaver* Court was correct in stating that by moving the proper court, an appeal may be reinstated. In this instance, the Kentucky Supreme Court is the only possibility. The reason that the Supreme Court is appropriate is two fold: first, section 115 of the Kentucky Constitution and *Lane* mandate that the appeal be heard; second, since the Supreme Court has the power to control appellate procedure, it is the only body which may entertain a motion to reinstate an appeal.[79]

Lest there be any doubt concerning the validity of *Cleaver*, the Kentucky Supreme Court unanimously affirmed the rationale of that decision in *Gregory v. Commonwealth*[80] and *Amburgey v. Commonwealth*.[81] The *Cleaver* rule is controlling, and several cases from the Kentucky Court of Ap-

---

[77] KY. CONST. § 115 (Supp. 1978). *See* note 50 *supra* for the text of § 115.

[78] KRS § 21A.050 (Supp. 1978) provides in pertinent part:

> (2) The method of bringing a judgment, order or decree of a lower court to the Supreme Court for review shall be established by Supreme Court rule. The procedures for appellate review shall be established by the Rules of Civil Procedure, Rules of Criminal Procedure and other rules promulgated by the Supreme Court.

[79] *See* Lane v. Brown, 372 U.S. 477 (1963).

[80] 574 S.W.2d 308 (Ky. 1978). *See also* Gilbert v. Commonwealth, No. 78-SC-190-MR, 25 KLS 12, p. 22 (Ky. Sept. 19, 1978) (mem.).

[81] 579 S.W.2d 376 (Ky. Ct. App. 1979). The *Cleaver* rule was affirmed, and the *Blankenship* belated appeal case was cited but not discussed. The *Amburgey* court affirmed the dismissal of appellant's reinstatement motion because only the Supreme Court could reinstate on murder, rape and sodomy charges. *Id.* at 378.

peals implicitly are overruled with respect to their pronouncements on the reinstatement doctrine.[82]

Hammershoy v. Commonwealth[83] is one such case and was the leading decision in the area of frustrated, lapsed and belated appeals. In *Hammershoy,* the defendant wished to appeal. His attorney filed notice of appeal, and the defendant, apparently dissatisfied with counsel, moved *pro se* to have new counsel appointed to represent him. The court never ruled on defendant's *pro se* motion but appointed another attorney to assist the defendant's present counsel in determining if the appeal had merit. The attorneys found the appeal to be frivolous and apparently did not perfect for that reason. Since the defendant lost his appeal, he moved the circuit court under RCr 11.42 to vacate his sentence. The circuit court denied the motion, and the movant appealed.

Justice Palmore's opinion granted the appellant relief and directed the circuit court to vacate the conviction or grant the defendant an appeal.[84] The court relied on *Lane v. Brown*[85] which held a procedure unconstitutional which subjected a defendant's right of appeal to a determination of meritoriousness or feasibility.[86] The relief given by the Court was identical to that rendered in *Lane* and was in conflict with prior case law which held that "an attack on the trial judgment is not the appropriate remedy for a frustrated right of appeal."[87]

---

[82] One such case is Blankenship v. Commonwealth, 554 S.W.2d 898 (Ky. Ct. App. 1977). In *Blankenship,* the court reversed and remanded, granting the appellant a belated appeal where notice of appeal had been filed, but the public defender negligently failed to perfect. The issue was raised under an 11.42 motion rendering *Blankenship* identical to *Cleaver.* The court granted relief under Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966) (to be discussed in text accompanying note 83 *infra*), which is distinguishable in that no notice had been filed at all. Also, *Hammershoy* has been implicitly overruled by *Cleaver. See* Fullen v. United States, 378 U.S. 139 (1964); Adams v. Commonwealth, 551 S.W.2d 249 (Ky Ct. App. 1977); Perkins v. Commonwealth, 516 S.W.2d 873 (Ky. 1974), *cert. denied,* 421 U.S. 971 (1975); McIntosh v. Commonwealth, 368 S.W.2d 331 (Ky. 1963). All of these decisions were cited in *Blankenship* and illustrate the pre-*Cleaver* attitude of the Kentucky courts.

[83] 398 S.W.2d 883 (Ky. 1966).

[84] *Id.* at 884.

[85] 372 U.S. 477 (1963).

[86] *Id.* at 483-85.

[87] 398 S.W.2d at 884 (*citing* McIntosh v. Commonwealth, 368 S.W.2d 331, 335 (Ky. 1963)). Note that *McIntosh* is in agreement with *Cleaver.*

In so doing, the Court failed to mention that the United States Supreme Court directed only that the appellant be afforded an appeal on the merits to the Indiana Supreme Court[88] and made no mention of state procedures because there were none available. In order to gain federal habeas corpus relief, which was the route taken by the defendant in *Lane,* he must have exhausted state remedies.[89]

Under the *Cleaver* rationale, an appeal cannot be reinstated via an 11.42 motion. However, according to the foregoing discussion, a reinstatement remedy was available and so the relief given in *Lane* would not be applicable in a *Hammershoy* situation simply because a state procedure existed. The appellant in *Hammershoy* was before the correct court but for the wrong reason; he should have moved the court to reinstate his appeal. If one is unable to move the court to reinstate an appeal, then an 11.42 motion can be utilized, but it must be appealed to the Kentucky Supreme Court since it is the only court with the power to reinstate the appeal.

The second reinstatement categorization concerns situations wherein no appeal has been filed and the time for filing has expired, otherwise termed belated appeals. In these cases, one must determine whether or not the right to an appeal has been waived. Briefly, the applicable standard requires a knowing and intelligent waiver but does not require technical legal knowledge.[90] The defendant need only be aware of the relief available to him so that he may make a reasonable choice.

In Kentucky, the court is required to "advise the defendant of his right to appeal . . . ."[91] The judge generally will instruct the defendant that he has a right to an appeal and to counsel and inform him of the time limits involved. Counsel may provide further information as to the pros and cons of

---

[88] Lane v. Brown, 372 U.S. at 485.

[89] *Id.* at 481-82. *See* 28 U.S.C. § 2254(b) (Supp. 1977); Brown v. Allen, 344 U.S. 443 (1953) (need only exhaust one remedy); *Ex parte* Hawk, 321 U.S. 114 (1944) (cannot raise claims which may still be heard in state courts); Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978) (discussion of Wainwright v. Sykes, 433 U.S. 72 (1977); "cause" and "prejudice" standard as being narrower than the Fay v. Noia, 372 U.S. 391 (1963) "deliberate by-pass rule").

[90] *See, e.g.,* Faretta v. California, 422 U.S. 806 (1975).

[91] RCr 11.02.

taking an appeal.[92] If court and counsel act in good faith and fulfill their obligations, the defendant will be bound by his elected course of action.

Given that no appeal has been filed or that time has run and that the defendant has not waived his right to an appeal, what is his remedy? According to *Cleaver,* he cannot use an 11.42 motion to reinstate his right of appeal. His remedy is to move the proper court to allow reinstatement. Assuming merit, the court must grant this motion if the appellant is correct or provide for an appropriate procedure if it deems the motion procedurally improper. The result is the same. The reason? If no procedure exists, *Lane* requires that the sentence be vacated or the appeal be reinstated.[93] If evidence need be taken, the case can be remanded to the circuit court for an evidentiary hearing.

The final category concerns the situation in which no notice of appeal was filed and the defendant waived his right to an appeal.[94] In that case, the defendant will not have his appeal reinstated. A recent decision of the Kentucky Court of Appeals confirms this outcome. In *Jones v. Commonwealth,*[95] no appeal was made by the defendant from a conviction for murder. Eighteen months later he filed an 11.42 motion seeking to reinstate his right of appeal. He claimed that he had requested his attorney to file an appeal on two occasions and that counsel had guaranteed his release in thirteen months. At the 11.42 hearing, the court heard testimony and held that the movant had waived his appeal.

The defendant appealed.[96] The Commonwealth argued that the court of appeals had no jurisdiction to hear the appeal of the 11.42 motion. It cited *Cleaver* for the proposition that to obtain a belated appeal, one must move the court which is to entertain it.[97] In *Jones,* the defendant had been

---

[92] *See* Adams v. Commonwealth, 551 S.W.2nd 249 (Ky. Ct. App. 1977).

[93] 372 U.S. 477 (1963).

[94] *See* note 74 *supra* for discussion of such a case.

[95] No. 78-CA-1267-MR, 26 KLS 7, p. 1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21, 1979).

[96] *Id.*

[97] No. 78-CA-1267-MR, slip op. at 3, 26 KLS 7, p. 1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21 1979).

convicted of murder. Under section 110 of the Kentucky Constitution, only the Supreme Court had jurisdiction to hear the appeal[98] and, according to *Cleaver,* the right to reinstate it.[99] As the foregoing analysis indicates, *Cleaver* implicitly had overruled earlier cases which conflicted with its formulation of the reinstatement doctrine. Nevertheless, the *Jones* court decided that *Williams v. Venters*[100] was controlling. *Williams* held that even where an appeal could be heard only by the Kentucky Supreme Court under section 110, "[a] judgment or order denying a postconviction motion . . . is not a judgment 'imposing sentence.' Hence an appeal from it is addressable to the Court of Appeals."[101] Considering *Cleaver,* this analysis is no longer sound.[102] The purpose of the 11.42 motion in this instance is to reinstate an appeal. The court of appeals does not have jurisdiction to hear it and cannot obtain jurisdiction by semantic artifice.

Jones v. Commonwealth exposes the practical difficulties inherent in current reinstatement practice. All motions for re-

---

[98] KY. CONST. § 110 (Supp. 1978) provides:

(1) The Supreme Court shall consist of the chief justice of the commonwealth and six associate justices.

(2) (a) The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice.

(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

[99] Cleaver v. Commonwealth, 569 S.W.2d 166, 169 (Ky. 1978). This point has been thoroughly discussed in text accompanying notes 55-73 *supra.*

[100] 550 S.W.2d 547 (Ky. 1977), *cited in* Jones v. Commonwealth, No. 78-CA-1267-MR, slip op. at 4, 26 KLS 7, p. 1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21, 1979).

[101] 550 S.W.2d at 548.

[102] Jones v. Commonwealth, No. 78-CA-1267-MR, slip op. at 8, 26 KLS 7, p. 1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21, 1979). The *Jones* court cited *Hammershoy* with approval. The court reasoned that since *Cleaver* had not specifically overruled *Hammershoy,* it was still viable. Jones v. Commonwealth, No. 78-CA-1267-MR, slip op. at 7, 26 KLS 7, p.1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21, 1979). This conclusion is not warranted by a close reading of *Cleaver* as this article has argued. A case need not be specifically mentioned to be overruled.

instatement must be made to the Kentucky Supreme Court.[103] Even where waiver occurs and no notice of appeal is filed, the defendant may move the Supreme Court to reinstate the appeal. The Court should promulgate a rule providing for all motions to reinstate an appeal or file a belated appeal, to be made in the court which would hear the appeal. Alternatively, the Court should amend RCr 12.04 to allow the taking of an appeal within thirty days after the date of entry of the judgment or order from which it was taken, as in civil cases under CR 73.02. However, the best solution is found in section 2953.05 of the Ohio Revised Code which provides that an appeal may be taken by leave of the court to which the appeal is taken following the expiration of normal filing deadlines.[104]

II. PLEADING INEFFECTIVE ASSISTANCE ON APPEAL

Recently, the Kentucky courts have encountered a novel argument: counsel pleads his own ineffective assistance as a means of obtaining a new trial for his client. The issue has yet to be addressed squarely. It presents both substantive and procedural problems. This section will explore the appropriateness of the plea as well as the difficulty in preserving the question for appellate review.

A. *Pleading One's Own Ineffective Assistance*

In *Cleaver v. Commonwealth*,[105] counsel pleaded his own ineffective assistance as one of the grounds for a motion to

---

[103] *See* text at notes 66-79 for analysis of this point.

[104] *Ohio Rev. Code Ann.* § 2953.05 (Page 1975) in its entirety reads as follows:

> Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence in felony cases, whichever is the latter. Appeals from judgments or final orders as above defined in magistrate courts shall be taken within ten days of such judgment or final order. After the expiration of the thirty day period or ten day period as above provided, such appeal may be taken only by leave of the court to which the appeal is taken. An appeal may be taken to the supreme court by giving notice as provided by law and rule of such court within thirty days from the journalization of judgment or final order of the court of appeals in all cases as pro ided by law.

[105] 569 S.W.2d 166 (Ky. 1978).

reconsider a dismissal of defendant's appeal. The Supreme Court dismissed the motion without comment. Soon after *Cleaver*, the Supreme Court was faced with an identical fact pattern in *Gilbert v. Commonwealth.*[106] The ineffective assistance issue was again dismissed without comment. To date, no attorney has pleaded his ineffective assistance at trial on direct appeal in the Kentucky courts.[107] It should be helpful, then, to examine the approach of other courts.

In the Sixth Circuit Court of Appeals, evidentiary weight has been given to an affidavit filed by trial counsel admitting inexperience and faulty trial conduct for the purpose of satisfying "cause and prejudice" requirements for federal habeas corpus relief.[108] Perhaps in later cases, the filing of this affidavit may trigger a presumption in favor of a sixth amendment violation.

The leading case involving counsel's pleading his own ineffective assistance is *Shelton v. United States.*[109] The Dis-

---

[106] No. 78-SC-190-MR, slip op. at 1, 25 KLS 12, p.22 (Ky. Sept. 19, 1978).

[107] *See also* Wedding v. Commonwealth, 394 S.W.2d 105 (Ky. 1965). In *Wedding*, the entire Harrison County Bar was appointed to represent the defendant. No one assisted him until trial and following his conviction the defendant filed an RCr 11.42 motion. He alleged ineffective assistance at trial. When questioned, the attorneys admitted that they had made no reasonable preparation for trial. Since the court found that the trial had not constituted a farce and a mockery, they apparently relied heavily on this testimony. *Id.* at 105-06. The dissent pointed out that unless the trial could be found a "farce and a mockery," no relief could be granted. *Id.* at 106-09. For greater insight into the application of Kentucky's farce and mockery standard, *See, e.g.,* Nickell v. Commonwealth, 565 S.W.2d 145 (Ky. 1978); Vaughan v. Commonwealth, 505 S.W.2d 768 (Ky. 1974); Rice v. Davis, 366 S.W.2d 153 (Ky. 1963); Blankenship v. Commonwealth, 554 S.W.2d 898 (Ky. Ct. App. 1977). *But see* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (standard for ineffective assistance in the Sixth Circuit). For a critique on these two theories, *see* Campbell, *Kentucky Law Survey—Criminal Procedure,* 63 KY. L.J. 701 (1975); Comment, *Kentucky's Standard for Ineffective Counsel: A Farce and a Mockery?,* 63 KY. L.J. 803 (1975).

In Kentucky, it also is difficult to obtain the dismissal of an appointed attorney. "Adequate and sufficient cause for removal of counsel . . . includes (1) complete breakdown of communications between counsel and defendant, (2) conflict of interest, and (3) legitimate interests of the defendant are being prejudiced." Baker v. Commonwealth, 574 S.W.2d 325, 327 (Ky. Ct. App. 1978).

[108] *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978); Canary v. Bland, 583 F.2d 887 (6th Cir. 1978). For an explanation of federal habeas corpus relief, *see* Quick, *Kentucky Law Survey—Criminal Procedure,* 66 KY. L.J. 605, 620-24 (1978).

[109] 323 A.2d 717 (D.C. 1974). *See also* Reavis v. United States, 395 A.2d 75, 79 n.

trict of Columbia Court of Appeals commented:

> It is apparent to us that an attorney has an inherent conflict of interest in such a situation. On the one hand, it is his duty as a member of the bar to argue in behalf of the defendant as vigorously as possible. On the other hand, he has his own self-interest to consider; that is, his reputation as an attorney.[110]

The court also delineated the standard to which counsel must adhere in pleading his case:

> [W]here an attorney has represented a convicted defendant at trial and, as the defendant's attorney on appeal, concludes in good faith that a legitimate issue exists as to the constitutional adequacy of his representation of the defendant at trial, it is the duty of the attorney to move to withdraw as counsel on appeal.[111]

Canon 7 of the Code of Professional Responsibility obligates a lawyer to represent his client "zealously within the bounds of the law."[112] In the present context, an attorney must put aside his feelings of embarrassment and plead his ineffective assistance or inform present counsel of his beliefs to preserve the defendant's rights on appeal. However, one should do this only if there exists "a legitimate issue . . . as to the constitutional adequacy of his representation. . . ."[113]

Such a rule is not without its ethical problems and potential for abuse. In some respects, an attorney arguing his own ineffective assistance analogizes to the situation of the attorney acting as a witness. Disciplinary Rule 5-102(A) obligates counsel to withdraw his representation if he must serve as a witness.[114] This dilemma can be solved by strictly enforcing

---

3 (D.C. 1978); Harling v. United States, 372 A.2d 1011, 1013 (D.C. 1977).

[110] 323 A.2d at 718.

[111] *Id.*

[112] Canon 7, AMERICAN BAR ASSOCIATION (ABA) CODE OF PROFESSIONAL RESPONSIBILITY.

[113] 323 A.2d at 718.

[114] "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he . . . ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial. . . ." Disciplinary Rule 5-102(A), ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as DR].

the good faith requirement of *Shelton*. Perhaps the more difficult problem is the creation of a conflict of interest. If the attorney continues his representation of the defendant, will he be honest even to the detriment of his professional reputation? Disciplinary Rule 5-101(A) indicates that an attorney "shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." Reading Disciplinary Rules 5-102(A)[115] and 5-105(A)[116] together, the spirit of the provisions requires an attorney to withdraw if substantial rights of his client may be affected or prejudiced.

In light of the above analysis, the *Shelton* approach is the soundest resolution. First, the attorney must in good faith believe his effectiveness at trial may be legitimately questioned. If he so concludes, then he must move to withdraw to avoid a Canon 5 conflict of interest.

B. *Ineffective Assistance and the Right of Appeal*

According to the weight of precedent in Kentucky, an appellate court will not review the issue of ineffective assistance of counsel unless it has been presented to the trial court for consideration,[117] or where no transcript has been prepared.[118] In most circumstances, the defendant will be unable to present the issue before the appellate court on direct appeal and must rely on a post-conviction motion. This occurs because (1) the average criminal defendant is unable to evaluate the performance of counsel, (2) the trial attorney *rarely* pleads his own ineffective assistance, and (3) if new counsel is appointed

---

[115] *See* note 114 *supra* for text of DR 5-102(A).

[116] "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . ."

[117] Hennemeyer v. Commonwealth, 580 S.W.2d 211, 216 (Ky. 1979); Hamilton v. Commonwealth, 580 S.W.2d 208, 210 (Ky. 1979).

[118] McIntosh v. Commonwealth, 582 S.W.2d 54, 61 (Ky. Ct. App. 1979). *See also* Bendingfield v. Commonwealth, 78-SC-427-MR, 26 KLS 8, p. 10 (Ky. June 12, 1979) (*mem. per curiam*) in which the Kentucky Supreme Court reversed and remanded the issue of ineffective assistance of counsel to the trial court to hold an evidentiary hearing allowing the trial attorney to explain his conduct.

for appeal, it is usually after time has expired for making a motion for a new trial.[119] Ultimately, this results in a bifurcated process for the consideration of error. The concern is that if error should be considered partially on appeal and the remainder under an 11.42 motion, then the appellant may be denied relief even though the error, if considered as a whole, may constitute an adequate basis for granting relief.

In Kentucky, there is one appeal as of right. Section 115 of the Kentucky Constitution, which became effective January 1, 1976, provides that "[i]n all cases, civil and criminal, there shall be allowed as of right at least one appeal to another court . . . [and that such] [a]ppeals shall be upon the record and not by trial de novo." The case law is consistent in requiring that the claim or error be preserved for review,[120] but overlooks the fact that as a practical matter, ineffective assistance is rarely so preserved.

Ivey v. Commonwealth[121] offers insight into a possible

---

[119] RCr 10.06 provides:

> The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.

[120] Hamilton v. Commonwealth, 580 S.W.2d 208, 210-11 (Ky. 1979). In *Hamilton*, the Court noted that the United States Supreme Court in Potts v. Kentucky, 435 U.S. 919 (1978) had "dismissed for want of a substantial federal question" an appeal from the Kentucky Court of Appeals, which had upheld a determination "that the issue of ineffectiveness of counsel could not be raised on appeal when it has never been presented to the trial court." *Id.* at 211. The Kentucky Supreme Court concluded that dismissal for "want of a substantial federal question" constituted a decision on the merits. *See* Hicks v. Miranda, 422 U.S. 332 (1975). Normally, this is a sound conclusion. Here, however, the opinion below was merely a one-line affirmance. *See* Potts v. Commonwealth, 561 S.W.2d 682 (Ky. Ct. App. 1977). The decision affirmed was an unpublished opinion of the Greenup Circuit Court. The findings of fact, conclusions of law, and opinion of the circuit court are unavailable. An unpublished opinion may not be cited in any case in Kentucky. *See* CR 76.28(4)(c) which provides that "[o]pinions that are not to be published shall not be cited or used as authority in any other case in any court of this state." *See also* Jones v. Commonwealth, No. 78-CA-1267-MR, 26 KLS 7, p. 1 (Ky. Ct. App. May 4, 1979), *petition for reh. denied,* 26 KLS 13, p. 10 (Ky. Ct. App. Aug. 21, 1979); Yocum v. Justice, 569 S.W.2d 678 (Ky. Ct. App. 1977). In light of the foregoing, *Potts* is no precedent at all. Additionally, it is unclear if the potential conflict with section 115 of the Kentucky Constitution which allows one appeal as of right was addressed.

[121] Nos. 78-CA-892-MR & 78-CA-1071-MR, 26 KLS 9, p. 8 (Ky. Ct. App. June

means of assuring protection of a defendant's rights in this context. In *Ivey*, the court of appeals determined that the preparation of an 11.42 motion was a critical stage requiring the assistance of counsel because an appellant, unskilled in the practice of law, might unknowingly fail to include all proper grounds for his motion, thus precluding consideration by the court except by way of extraordinary relief.[122] The court relied upon KRS section 31.110, which provides for assistance of counsel in post-conviction proceedings.[123] KRS section 31.110 is stringent with respect to the appointment of counsel on appeal providing that an indigent has the right "[t]o be represented in any appeal . . . ."[124] If *Ivey* means that legal assistance for the drafting of 11.42 motions is a critical stage, then it follows that the review of an attorney's performance after conviction and prior to appeal is also a critical stage. The rules provide only five days for a motion for new trial. If the attorney, the court, or the prosecution believes there is a question of adequacy of representation and has substantial proof on the matter, then independent counsel should be appointed immediately. An automatic extension of the time for filing the new trial motion should be granted to allow the new counsel to review the matter.

29, 1979), *disc. rev. granted*, 589 S.W.2d 892 (Ky. Dec. 13, 1979).

[122] *Id.* slip op. at 5.

[123] *Id.* at 4-5.

[124] KRS § 31.110(2)(b). Naturally, counsel is only available to an indigent to the same extent as a person having his own counsel, KRS § 31.110 (Supp. 1978), but the right to an appeal is automatic, KY. CONST. § 115 (Supp. 1978), and therefore counsel should be provided to implement the appeal.