IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONNIE LEE MARTIN,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
vs.	)	No. F-2011-563
	)	
THE STATE OF OKLAHOMA,	)	
	)	FILED
Appellee.	)	IN COURT OF CRIMINAL APPEALS
		STATE OF OKLAHOMA
OPINION		SEP 21 2012
		MICHAEL S. RICHIE
		CLERK

SMITH, JUDGE:

Ronnie Lee Martin was tried in a non-jury trial and convicted of Trafficking in Illegal Drugs After Former Conviction of Three Felonies in violation of 63 O.S.2001, § 2-415, in the District Court of Atoka County, Case No. CF-2007-038. The Honorable Richard E. Branam sentenced Martin to life imprisonment without the possibility of parole. Martin appeals from this conviction and sentence and raises one proposition of error in support of his appeal.

In his only proposition of error, Martin alleges that trial counsel, Caesar Latimer, failed to provide Ronnie Martin with reasonably effective assistance of counsel. After thorough consideration of the record before us, including the original record, transcripts, exhibits and briefs, we conclude the law and evidence support Martin's claim.

On March 16, 2007, Oklahoma Highway Patrol Trooper Roland stopped a northbound car which was impeding traffic. Roland had the driver, Vanessa Johnson, sit in his patrol car while he wrote out a warning. He saw the passenger, Martin, moving in the front seat as if Martin were putting something in his pocket.

Johnson did not have the car's registration form, so Roland went to the car to get it. He also took Martin's driver's license. Roland ran a check on both persons; neither had outstanding warrants, but Martin had a record including weapons charges. Roland wrote Johnson a warning, returned her papers, told her she was free to go, and asked whether he could search the car and run his drug dog around the car. Johnson agreed. Roland asked Martin to step out of the passenger seat; as Martin did so, Roland noticed what appeared to be a rock of crack cocaine on the seat. Roland asked whether he could pat Martin down for weapons, and Martin agreed. During the pat-down Roland felt large hard objects in Martin's front pocket. Martin pulled out a Tylenol bottle. Roland noticed that when the bottle moved, it did not sound like it contained Tylenol gelcaps. He asked Martin what was in the bottle. Martin took the lid off, turned the bottle upside down, and poured several rocks of crack cocaine on the ground. Roland arrested Martin, retrieved three other bottles from Martin's pocket, and picked up 55 rocks of loose crack cocaine; taken together, the bottles contained 7.3 grams of crack cocaine.[1] Martin also had approximately $2900 in cash. While Roland searched the car, Martin and Johnson sat in Roland's patrol car. Martin told Johnson where to find his remaining crack cocaine and asked her to dispose of it. Roland found no other contraband in the car.

Martin was originally charged with possession of cocaine with intent to distribute, after two prior felony convictions. Martin retained Latimer to represent him before preliminary hearing. Before preliminary hearing, the State offered a

[1] The first chemist to test the drugs and prepare a report died before trial, and the State had the drugs re-tested and a second report was prepared. The original chemist's report found 8.6 grams.

negotiated plea of 35 years, with 25 suspended and 10 years imprisonment. On the advice of counsel, Martin refused the offer. For purposes of preliminary hearing defense counsel Latimer stipulated to the two alleged felonies. At the close of preliminary hearing, in conformity with the evidence, Martin was bound over on a trafficking charge. Latimer withdrew his stipulation, and the State offered certified copies of three previous felony convictions; Martin was bound over after three former convictions.

To prevail on an ineffective assistance claim, Martin must show that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Wiley v. State*, 2008 OK CR 30, ¶ 4,199 P.3d 877, 878; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). He must show counsel's acts or omissions were so serious he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). We review counsel's performance against an objective standard of reasonableness under prevailing professional norms, and we will not second-guess strategic decisions. *Harris v. State*, 2007 OK CR 28, ¶ 29, 164 P.3d 1103, 1114-15; *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). For the Court to reach Martin's claim of deficient performance, he must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2068.

This case is unusual in that the Oklahoma Supreme Court has already disciplined Latimer based in part on Martin's claims. This arises from Latimer's

failure to properly appeal the case, which resulted in a four-year delay in this Court's appellate proceedings. In 2011, the Oklahoma Supreme Court suspended Latimer for two years and a day based on Latimer's acts and omissions in several cases. *State ex rel. Oklahoma Bar Ass'n v. Latimer*, 2011 OK 78, 262 P.3d 757. Count V of the disciplinary proceedings detailed Martin's grievances against Latimer in the criminal case now before this Court. The Supreme Court reviewed Martin's allegations about a plea offer, Latimer's actions before and during the trial, and Latimer's complete failure to properly perfect an appeal to this Court, as well as Latimer's failure to communicate with Martin and neglect of his appellate case. Latimer failed to respond to the complaint, the facts were deemed admitted, and the Supreme Court found Latimer's actions warranted discipline. *Latimer*, 2011 OK 78, ¶ 21, 262 P.3d at 765-66. In doing so the Supreme Court noted that a witness before the trial panel testified that Latimer was ineffective in Martin's case. *Id.* In its conclusion, the Supreme Court found "clear and convincing evidence of [Latimer's] current unfitness to practice law." *Latimer*, 2011 OK 78, ¶ 32, 262 P.3d at 769. In good conscience, this Court cannot disregard the Oklahoma Supreme Court's findings and conclusions as they relate to the issues in this case. This unusual situation is similar to collateral estoppel – an issue (Latimer's ineffective assistance in Martin's criminal case) has been determined by a valid and final judgment, the party against whom the claim was made was a party to the prior litigation, and that party had a full and fair opportunity to litigate the issue in the prior action. *State v. Hooley*, 2012 OK CR 3, ¶ 8, 269 P.3d 949, 951; *Smith v. State*, 2002 OK CR 2, ¶ 7, 46 P.3d 136, 137.

In 2008, this Court found Latimer provided ineffective assistance of counsel. *Wiley*, 2008 OK CR 30, 199 P.3d 877. Among the failures supporting our conclusion that "counsel's conduct clearly fell below that expected of a reasonably competent defense attorney", we listed "counsel's obvious unpreparedness, his failure to comply with discovery requirements, . . . [and] to know the proper sentencing range for one of the charged crimes." *Wiley*, 2008 OK CR 30, ¶ 6,199 P.3d at 879. The record in Martin's case provides examples of all these deficiencies.

The entirety of the record in this case is rife with confusion, errors and delays on the part of defense counsel. Martin specifically claims counsel was ineffective in four separate areas.

Martin first claims Latimer failed to provide him adequate counseling regarding the State's plea offer. In connection with this claim the State filed a motion to supplement the record on March 24, 2011. The State offers an affidavit from the prosecutor who handled Martin's case. Martin does not object to this request, and the affidavit would assist the Court in determining this issue. We grant the motion, and consider the affidavit in reaching our decision on this issue. Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012); *Coddington v. State*, 2011 OK CR 17, ¶ 21, 254 P.3d 684, 698. Martin was originally charged with unlawful possession of cocaine with intent to distribute, after two former felonies. This carried a potential punishment of four years to life imprisonment. According to the affidavit of Greg Jenkins, the prosecutor, at the preliminary hearing conference he offered Martin ten (10) years to do. According to the record on this issue developed in the Oklahoma Supreme Court, Martin thought

the offer was 35 years, with ten to do and 25 suspended. *Latimer*, 2011 OK 78, ¶ 21 n.24, 262 P.3d at 765 n.24. Martin testified before the trial panel in *Latimer* that Latimer told him not to accept that offer because he, Latimer, could get a better deal. *Id.* Martin rejected the offer and it was withdrawn after the first witness was called at preliminary hearing. Martin was subsequently bound over on a trafficking charge, with a mandatory sentence of life imprisonment without parole.

The State argues that Latimer's advice was not deficient because, at the time it was given, Martin was not facing a sentence of life imprisonment without parole. The record does not support this claim. Martin was bound over on trafficking because the chemist's report admitted at preliminary hearing showed that Martin was carrying 8.6 grams of cocaine base. This is well above the 5 grams necessary to support a trafficking charge. Latimer received the chemist's report within five days before preliminary hearing began. Merely reading the report should have put a competent attorney on notice that his client potentially faced a charge with much harsher punishment, and that the charge might well be amended after the evidence was admitted at preliminary hearing. Preliminary hearing was held on May 16th and 17th, 2007. At the bench trial held January 16, 2008, Latimer admitted he had not read the original chemist's report – the one admitted in preliminary hearing – in detail. Latimer agreed that he stipulated to the report but said he did not realize until trial that Martin was charged with possessing crack cocaine and that he "had not read the original report in detail." Latimer said, "[H]ow much he had in each item and how much of it is sufficient to make it a trafficking charge, we never went into that." To make matters worse, the record shows that neither Latimer, nor the

prosecutor, nor the trial judge, knew at either preliminary hearing or during the bench trial that Martin's trafficking conviction would carry a mandatory life without parole sentence. It was not until sentencing that the prosecutor referred to the statute for the correct penalty.

The combination of Latimer's failure to read the chemist's report, failure to know the correct punishment for trafficking, and advice to Martin not to take the ten years offered, was disastrous for his client. Before the first witness testified at preliminary hearing, Martin could have accepted a negotiated plea which included ten years in prison. After that first witness testified, Martin faced life without parole. Given the large quantity of crack cocaine Martin carried, ten years was a remarkable offer from the prosecutor. While the record shows Latimer conveyed the offer, his advice not to take the offer deprived Martin of the ability to meaningfully consider the offer. Latimer's errors in pretrial proceedings would adversely affect Martin's case even if Martin received a fair and impartial trial. "A right to effective assistance of counsel in plea-bargaining logically implies that counsel's failure to convey a plea offer can prejudice a defendant even though he ultimately stands a fair and impartial trial." *Jiminez. v. State*, 2006 OK CR 43, ¶ 12,144 P.3d 903, 907.

Martin next complains that Latimer was ineffective in motions practice. Latimer filed many motions in this case, beginning with a Motion to Quash and Suppress. However, many of the motions were only a few sentences long. There were few citations to authority, and most of the documents have grammatical and typographical errors. All the initial motions on Martin's behalf were stricken when Latimer failed to appear at the motions hearing. Latimer vigorously argued a Motion

to Suppress using a case which was completely distinguishable on facts from Martin's case and had no relevance to the suppression issue. Latimer also filed a motion requesting a sample of the drugs seized from Martin, for independent testing. This motion was granted, but the record does not reflect that Latimer prepared an Order for the trial court's signature, as directed by the court. On September 7, 2007, Latimer asked for a continuance in part because he had not been able to arrange an independent test. In Martin's February 19, 2008, Motion for New Trial, Latimer actually claimed that the trial court did not allow Martin to have an independent chemist test the drugs. Latimer filed several motions which depended in whole or in part on Martin's race, and alleging that Roland stopped Johnson and Martin based on race; no evidence supports these claims. Latimer sought and was granted several continuances; he sought and was denied several more, including on the day of trial and the day of sentencing, and at a post-trial motions hearing. In denying Latimer's motion for continuance on the day of trial, the trial judge noted that he had been patient with Latimer's previous requests, and with his arrival two hours late in court that day. We have held that failure to follow proper procedure in motions practice may constitute ineffective assistance of counsel. *Warner v. State*, 2001 OK CR 11, ¶ 16, 29 P.3d 569, 575. The State argues that Martin fails to show how he was prejudiced by any specific error in motions practice. This argument misunderstands Martin's claim and the nature of the error involved. The sheer volume of motions filed, their incompleteness and failure to conform to basic standards of practice, and their misstatements of and failure to

understand relevant or controlling law, casts serious doubt on defense counsel's competency.

Martin claims Latimer was unprepared for trial. He raises three specific claims. Latimer asked for a continuance the day of trial because he wanted to call the driver of the car, Vanessa Johnson, as a witness. Johnson was not present in court and Latimer explained she was working that day, but could come on a different date. Latimer admitted that he had not subpoenaed Johnson, because she was his witness. He agreed that Johnson had testified at preliminary hearing, said he did not believe that her trial testimony would differ from her previous testimony, and did not object to the trial court reading and considering the transcript of Johnson's previous testimony in reaching its decision. However, when opening his case, defense counsel said he was unprepared because he did not have Johnson as a witness. Martin correctly notes that this entire episode is troubling. As the prosecutor pointed out at trial, failure to subpoena Johnson showed a lack of due diligence. *Young v. State*, 2008 OK CR 25, ¶¶ 16-18, 191 P.3d 601, 606-07.

Martin argues that defense counsel was unprepared to handle the State's forensic evidence. As discussed above, the cocaine was analyzed, and the chemist's report given to defense counsel, before preliminary hearing. Also as discussed above, Latimer admitted that he had not read the original chemist's report, and claimed that he first realized Martin had crack cocaine on the day of trial – although Roland testified at preliminary hearing that Martin had 55 rocks of crack cocaine. After the original chemist died, the State re-submitted the cocaine to a second chemist for analysis between preliminary hearing and trial. As Latimer had no

working fax machine, the report was mailed to him and the prosecutor called him to discuss the situation. Latimer acknowledged this before trial started, yet asked for a continuance based on the new report and new witness. He argued that he was not prepared to cross-examine the new chemist. Latimer also stated he did not know anything about two other State witnesses although he had received discovery on both.

Martin claims counsel was ineffective in calling him to give testimony on his own behalf. After denying Latimer's renewed motion for continuance, the trial court asked whether he had any witnesses to present. Before calling anyone, Latimer attempted to argue that Martin's prior offenses were too old to be used for sentence enhancement. He admitted he was not familiar with the law. Latimer called Martin. Latimer asked Martin whether he heard Roland testify that he recovered some contraband from Martin. Martin said he had, Latimer asked whether it was true, Martin said yes, and Martin agreed when Latimer asked whether that was for Martin's personal use. By his questions, Latimer had his client confess to the elements of the crime of trafficking. During cross-examination Martin tried to deny his previous testimony, then claimed the Fifth Amendment privilege. Latimer first argued that Martin's testimony to that point should remain in evidence, then asked that Martin be allowed to claim his privilege if he felt his testimony would incriminate him. The trial court struck all Martin's testimony. While the error created by Martin's admission was, technically, cured when the testimony was struck, we cannot find that a reasonably competent criminal defense lawyer would deliberately elicit a confession from his client on the stand.

Finally, Martin complains about defense counsel's post-trial litigation. A sentencing hearing was held on February 12, 2008. Latimer asked for a continuance to be able to contest items in the Pre-Sentence Investigation, as well as the viability of Martin's prior convictions used for sentencing enhancement. The trial court refused the continuance. Latimer offered neither evidence nor argument, stating that rather than delay the proceedings he would let the court make its judgment, and file a motion for new trial. Martin was advised of his appeal rights and announced a desire to appeal. On February 19, 2008, and again on February 22, Latimer filed almost identical Motions for New Trial. Neither motion contained citation to the record or legal authorities. Several more motions for relief were filed, again without citation to the record or authorities. Additional briefing time was provided, but no further briefs were filed. These motions were all denied on April 8, 2008. On June 19, 2009 – over a year after the last motions were denied – Latimer filed a motion to vacate and dismiss based on newly discovered evidence. He argued that Martin's rights were violated by the search after a traffic stop, and the case was an example of racial profiling; both issues had been raised in previous motions. This motion was heard on October 13, 2009. After denying Latimer's request for a continuance, the trial court heard argument. Latimer repeated arguments made in previous motions. The matter was continued several times. Rather than file a supplemental brief, Latimer filed another motion for continuance and dismissal. The motions to dismiss were eventually denied. On May 4, 2010, Martin filed a letter firing Latimer; he filed a *pro se* application for an appeal out of time on May

13. Despite this, Latimer continued to file motions in the case through August 2010.

In addition to the motions for new trial, Latimer unsuccessfully attempted to appeal the conviction to this Court. He filed an insufficient notice of intent to appeal on February 19, 2008. The motion was not in the appropriate format and lacked a Designation of Record, and was improper under our Rules. Rule 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). A proper but untimely notice of intent to appeal was filed on April 9, 2008. In that document, Latimer included a certificate falsely stating that Martin did not wish to appeal. No further attempt at an appeal was made. The record shows that Martin asked Latimer about the status of his appeal several times, and was told that the appeal had been filed and was proceeding. The Oklahoma Supreme Court discussed the failure to perfect an appeal as part of its findings that Latimer did not provide Martin with competent representation. *Latimer*, 2011 OK 78, ¶ 21, 262 P.3d at 765. Four years passed from Martin's sentencing to his appeal in this Court.

The State admits that "in the instant case counsel's conduct could be said to have fallen below that expected of a reasonably competent defense attorney." The State argues that, despite this, Martin is not entitled to relief because he was not prejudiced by counsel's deficient performance. On the contrary, the record shows that, given counsel's unreasonable representation, Martin was deprived of a fair trial with reliable results. Defense counsel's errors connected with the plea offer substantially prejudiced his client. This Opinion offers examples of counsel's numerous other errors throughout the proceedings. While each error in motions

practice, conduct of the trial, and post-trial proceedings may not in isolation have affected the outcome, Latimer's "conduct in this case so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Wiley*, 2008 OK CR 30, ¶ 6, 199 P.3d 877, 879. No matter how strong the evidence against him, or how difficult the case might have been to defend, the Constitution requires at least that Martin have a fair trial with competent counsel, and that the case be subject to the adversarial process.

DECISION

The Judgment and Sentence of the District Court of Atoka County is **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion. The State's Motion to Supplement the Record is **GRANTED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ATOKA COUNTY
THE HONORABLE RICHARD E. BRANAM, DISTRICT JUDGE

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OPINION BY SMITH, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR IN RESULTS

LUMPKIN, JUDGE: CONCUR IN RESULTS

While I agree with the result reached by the Court in this case, I have some disagreement with the method of resolution of the issue.

First, I do not find that this situation is "similar to collateral estoppel." The issues before the Oklahoma Supreme Court and this Court are not identical. *See State ex. rel. Oklahoma Bar Association v. Latimer*, 2011 OK 78, ¶ 7, 262 P.3d 757, 762; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Further, the District Attorney and the Oklahoma Bar Association/Oklahoma Supreme Court are not the same party. *See State v. Hooley*, 2012 OK CR 3, ¶ 20, 269 P.3d 949, 955 (finding that the Oklahoma Department of Public Safety and the District Attorney are not the same party for the purposes of collateral estoppel).

Second, the State's attachments to its brief are not properly before this Court for review of the proposition on the merits. *Warner v. State*, 2006 OK CR 40, ¶ 14, 144 P.3d 838, 858; Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). This Court only reviews what has been admitted in the district court through the adjudicatory process or as a result of a remand for evidentiary hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). *See Dewberry v. State*, 1998 OK CR 10, ¶ 9, 954 P.2d 774, 776; Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012) ("The Record on appeal is formulated only by matters which have been

admitted during proceedings in the trial court."). The attachments can only be used to determine whether an evidentiary hearing is required not to adjudicate the issue on appeal. *Warner*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d at 858 n. 3. Nonetheless, I agree that under the facts of the present case an evidentiary hearing is not required.

Third, the Opinion applies the wrong standard of review. I agree with the Opinion's ultimate conclusion that Appellant's case was not subjected to the adversarial testing required under the Constitution. However, for this reason, the Opinion should apply the presumption of prejudice standard set forth in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), instead of the customary two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Under *Strickland* an appellant must show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). However, a presumption of prejudice is warranted under *Cronic*, "'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Bell v. Cone*, 535 U.S. 685, 696, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002) (*quoting Cronic*, 466 U.S. at 658-59, 104 S.Ct. at 2046).

Because the Opinion applies *Strickland*, it appears that the Court is diminishing the necessity or quality of prejudice. As defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing we apply the presumption of prejudice found in *Cronic*. The State has failed to overcome this presumption. Therefore, I agree that this case should be remanded for a new trial.