

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

NO. 2009-CA-000441-MR

MARK EDWARD NEWTON

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT  
2010-SC-228-D

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 05-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: This matter is before the court on remand from the Kentucky Supreme Court, which has ordered us to reconsider Mark Edward Newton's appeal in light of its holdings in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), and *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). Having

reconsidered the matter, we affirm the Hardin Circuit Court's order denying Newton's motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42.

Newton was convicted of first-degree sodomy (four counts) and received a sentence of seventy years' imprisonment and a fine of \$4,000. Newton filed a direct appeal, claiming the trial court improperly admitted evidence of bad character against him, as well as evidence that bolstered the victim's testimony. The Kentucky Supreme Court, finding no error, affirmed his conviction and sentence.<sup>2</sup>

Newton then moved *pro se* to vacate, set aside, or correct his judgment pursuant to RCr 11.42, alleging ineffective assistance of trial counsel. The trial court denied his motion. Appeal to this court followed.

This court affirmed the trial court's denial of Newton's RCr 11.42 motion, finding, in relevant part, that because the Supreme Court on direct appeal found no error with respect to the admission of character evidence and bolstering testimony, Newton failed to show his case was prejudiced and, therefore, failed to show ineffective assistance of counsel.<sup>3</sup> The Supreme Court undertook discretionary review of the appeal, and remanded the matter to this court for reconsideration in light of *Leonard* and *Martin*, *supra*.

In *Leonard*, the Supreme Court confirmed its holding in *Martin*, recognizing that appellate resolution of an alleged direct error under a palpable error standard

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

<sup>2</sup> *Newton v. Commonwealth*, No. 2005-SC-0496-MR, 2006 WL 2987085 (Ky. Oct. 19, 2006).

<sup>3</sup> *Newton v. Commonwealth*, No. 2009-CA-000441-MR, 2010 WL 743794 (Ky. March 5, 2010).

of review cannot serve as a procedural bar to a related claim of ineffective assistance of counsel, since the standard for evaluating potential palpable errors on direct appeal is more stringent than evaluating a claim of ineffective assistance of counsel in a post-conviction RCr 11.42 motion. The Court noted that

[w]hen an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process. However, on collateral attack, when claims of ineffective assistance of counsel are before the court, the inquiry is broader. In that circumstance, the inquiry is not only upon what happened, but why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect and why there was no objection at trial. Thus, a palpable error claim imposes a more stringent standard and a narrower focus than does an ineffective assistance claim. Therefore, as a matter of law, a failure to prevail on a palpable error claim does not obviate a proper ineffective assistance claim.

*Leonard*, 279 S.W.3d at 157-58 (quoting *Martin*, 207 S.W.3d at 4-5).

The holdings in *Leonard* and *Martin* apply to palpable error review on direct appeal, which did not occur in Newton's case. In this case, the Supreme Court found on direct appeal no error existed with respect to the admission of character evidence and bolstering testimony; the Court did not undertake a palpable error review.<sup>4</sup> Accordingly, the holdings in *Leonard* and *Martin* do not render erroneous this court's conclusion that the Court's finding of no error on direct appeal

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<sup>4</sup> The concurring opinion of then Chief Justice Lambert does discuss palpable error review, but the majority opinion makes no such reference.

precluded Newton from alleging ineffective assistance of counsel relating to these claims.

With regard to Newton's remaining claims of ineffective assistance of counsel, the record reflects that the trial court properly considered and denied those claims under the *Strickland* analysis, which requires that in order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1986). Further, "the defendant must overcome the presumption that counsel provided a reasonable trial strategy." *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008) (citation omitted).

Here, the trial court found that Newton's counsel's decision not to present character witnesses at trial was a tactical decision, in light of the fact that if witnesses had been called to testify as to Newton's character, unfavorable character evidence in the form of prior bad acts, including details of Newton's criminal record, could have been elicited on cross-examination. *See* KRE<sup>5</sup> 405(b). Indeed, counsel for Newton described the presentation of character testimony as a "double-edged sword." The court found that none of the identified potential character witnesses were called at the evidentiary hearing to explain what they may have testified to and the Commonwealth, therefore, did not have an opportunity to

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<sup>5</sup> Kentucky Rules of Evidence.

reveal what information may have been disclosed on cross-examination of these witnesses. As a result, the court held that Newton failed to present sufficient evidence to show these character witnesses were willing to testify for him and that the benefit of their testimony would have outweighed the detriment.

Furthermore, the trial court found that Newton's counsel's decision not to present mitigating evidence during the penalty phase of trial was reasonable trial strategy. Counsel for Newton testified at the evidentiary hearing that he recalled discussing with Newton whether to call witnesses during the penalty phase and recalled reaching an understanding with the Commonwealth to limit the penalty phase evidence; the Commonwealth agreed not to put the victim and her family back on the stand and counsel for Newton agreed not to call any mitigating witnesses. Though this agreement is not documented in the record, the court found that counsel for Newton exercised reasonable trial strategy by attempting to limit the potentially devastating impact of the victim's further testimony and the potential cross-examination of any witnesses called for mitigation.

The trial court further found that counsel for Newton was not ineffective for failing to present expert witness testimony. The court referenced the report of the Commonwealth's medical expert, who found no physical evidence of the alleged sodomy of the victim, but stated that in some circumstances, the passage of time may eliminate proof that may have existed closer to the events' occurrence. Counsel for Newton explained that he did not feel that obtaining an expert to examine the victim or to contradict the report of the Commonwealth's

medical expert was an appropriate use of resources since he did not believe the medical report of the Commonwealth's expert was a substantial negative piece of evidence in the case, given that the expert found no physical evidence of the alleged sodomy. The trial court agreed, and concluded that Newton failed to show that any expert witness would have contradicted the report of the Commonwealth's medical expert or that the decision of his counsel not to present an expert witness affected the outcome of the trial.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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