RENDERED: April 19, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001060-MR

LANDON N. PRICE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 98-CR-00889

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Landon D. Price has appealed from an order of the Fayette Circuit Court entered on January 24, 2001, which denied his RCr[1] 11.42 motion seeking to vacate his jury conviction on two counts of first-degree trafficking in a controlled substance and being a persistent felony offender in the first degree. Having concluded that Price has not shown that he received ineffective assistance of counsel, we affirm.

On March 4 and 13, 1998, Tara and Bill Babb, who were acting as confidential informants, purchased cocaine from Price

[1]Kentucky Rules of Criminal Procedure.

at his home. As part of the undercover operation, Bill Babb was wearing an audio transmission device and both transactions were recorded. On September 1, 1998, the Fayette County grand jury indicted Price on two felony counts of first-degree trafficking in a controlled substance (cocaine)[2] and being a persistent felony offender in the first degree (PFO I).[3]

During a one-day trial on March 10, 1999, the witnesses included Sergeant Greg Jennings, a narcotics officer who was working with the Babbs, Tara and Bill Babb, Landon Price, and Christy Stokly, Price's girlfriend. Price presented an entrapment defense. The jury found Price guilty on all three counts and recommended consecutive sentences of ten years enhanced to fifteen years on each of the two trafficking offenses based on the PFO I conviction. Price waived his right to a presentence investigation report and the trial court immediately sentenced him to thirty years in prison consistent with the jury's recommendation.

On direct appeal, the Kentucky Supreme Court affirmed the convictions but reversed the sentence.[4] The Court rejected Price's complaint concerning Sgt. Jennings's reference to his extensive criminal record because it was initiated by a question from defense counsel. The Court also found that several instances of hearsay evidence not objected to by defense counsel

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[2]Kentucky Revised Statute (KRS) 218A.1412.

[3]KRS 532.080.

[4]Price v. Commonwealth, 99-SC-297-MR (unpublished memorandum opinion rendered January 20, 2000).

did not rise to the level of palpable error under RCr 10.26. It did, however, find that the sentence exceeded the maximum under KRS 532.110(1)(c) and KRS 532.080(6)(b), and remanded the case for resentencing not to exceed twenty years.[5]

On September 28, 2000, Price filed a motion to vacate the judgment pursuant to RCr 11.42 with an extensive accompanying memorandum of law. In the motion, Price raised three issues of alleged ineffective assistance of counsel and a claim of cumulative errors based on ineffective assistance. On December 1, 2000, the Commonwealth filed an extensive response disputing the claims. On January 22, 2001, Price filed a motion for an evidentiary hearing. On January 24, 2001, the trial court denied the motion without a hearing, ruling that the situations described in the motion could have involved trial strategy by defense counsel and therefore did not constitute ineffective assistance. This appeal followed.

Price contends that his attorney rendered ineffective assistance of counsel with respect to several instances of testimony involving his prior criminal record and information about his alleged drug activity.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was

[5]On January 24, 2001, the trial court entered an amended judgment sentencing Price to two fifteen-year sentences but running ten years of Count 2 concurrently and five years consecutively with the sentence on Count 1 for a total sentence of twenty years.

fundamentally unfair.[6] The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances, counsel's action might be considered "trial strategy."[7] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[8] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[9] In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair.[10] Where the movant is

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[6] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000).

[7] Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

[8] Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

[9] Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993), overruled in part on other grounds, St. Clair v. Roark, Ky., 10 S.W.3d 482 (1999); Harper, 978 S.W.2d at 315.

[10] Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied,
(continued...)

convicted by trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.[11] Because a defendant must show both deficient performance and actual prejudice, a reviewing court need not analyze both prongs where he fails to establish either of the two elements.[12]

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion.[13] An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction.[14] Even claims of ineffective assistance of counsel may be rejected without an evidentiary hearing if they are refuted on the record.[15]

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[10](...continued)
527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

[11]Strickland, 466 U.S. at 694-95, 104 S. Ct. at 2068-69. See also Moore, 983 S.W.2d at 484, 488; Foley, 17 S.W.2d at 884.

[12]See Strickland, 466 U.S. at 697, 104 S. Ct. at 2069; Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863, 864-65 (1986).

[13]Harper, 978 S.W.2d at 314; Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999).

[14]Sanborn, 975 S.W.2d at 909; Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

[15]Haight, 41 S.W.3d at 442.

In his direct testimony, Sgt. Jennings stated that after being arrested on a drug transaction, Tara Babb initially became a confidential informant as part of an agreement not to prosecute her. During cross-examination of Sgt. Jennings, defense counsel asked him if he had offered Price the option of becoming a confidential informant in return for not prosecuting him for the two March drug transactions. Sgt. Jennings responded simply, "No." On re-direct examination, the trial court allowed the prosecutor to elicit testimony from the officer that Price's "extensive record" was one reason for this decision. The trial court overruled defense counsel's objection to Sgt. Jennings's use of the word "extensive" as unfairly prejudicial based on KRE[16] 403. Price asserts that counsel's action constituted ineffective assistance of counsel by opening the door to evidence of his prior criminal history otherwise inadmissible under KRE 404(b).

First, it is not clear that this testimony was inadmissible under KRE 404(b), which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." (Emphasis added.) The testimony went to Sgt. Jennings's reason for not offering Price an immunity deal rather than to show his character and conformity with his drug dealing with the Babbs.

Even assuming it was otherwise inadmissible, this situation did not constitute ineffective assistance. Counsel

[16]Kentucky Rules of Evidence.

asked the question in an attempt to show bias by the police in failing to treat Price similarly to Tara Babb, who was offered an immunity deal. While the answer elicited some detrimental information, it did establish the differential treatment. In addition, this testimony did not rise to the level of actual prejudice. Sgt. Jennings was not allowed to elaborate on the specifics of Price's criminal record. As defense counsel noted during discussion of his objection, the fact that Price was a convicted felon was revealed to the jury when he took the stand to testify. Price admitted having engaged in the two drug transactions with the Babbs. We cannot say that counsel's action was not legitimate trial tactics or that admission of this limited testimony affected the outcome of the trial.

Price also complains about several instances of defense counsel's failure to object to alleged hearsay evidence. First, Sgt. Jennings testified that the police department had received several anonymous tips that Price was selling drugs from his residence and that the Babbs stated to him that an acquaintance of Price's, Jack (Dusty) Wigal, had told them that Price had cocaine to sell them. Second, Tara Babb testified that Jack Wigal's girlfriend told her that Price and Wigal had a single supplier for drugs that they sold. Third, Tara Babb also testified that Wigal told her that both he and Price had drugs to sell her. Fourth, Bill Babb testified that he had been told Price was selling drugs and it was known in the neighborhood that Price sold drugs.

As an initial matter, it is questionable whether any of this testimony constituted "hearsay" evidence. Under KRE 801(c), "hearsay" is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." The examples cited by Price all involve testimony in part offered to describe the circumstances leading to the drug transactions by the informants with Price. They were not necessarily offered to prove that Price was, in fact, a drug dealer but that the police and the Babbs believed that he would possibly sell them drugs. The use of out-of-court statements to show the state of mind of the recipient after hearing the statements rather than for the truth of the matter asserted is a legitimate nonhearsay use where the recipient's state of mind is an issue in the case.[17] The circumstances and reason why the Babbs targeted Price for a possible drug transaction were major issues raised by Price's defense.

Price cites to Hughes v. Commonwealth[18] and Gordon v. Commonwealth,[19] which condemned the use of so-called "investigative hearsay" based on the confrontation clauses of the Sixth Amendment to the United States Constitution and Section 11

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[17]See Robert G. Lawson, The Kentucky Evidence Law Handbook § 8.05 at 365-66 (3rd ed. 1993); Moseley v. Commonwealth, Ky., 960 S.W.2d 460, 462 (1997); Kenyon v. State, 986 P.2d 849 (Wyo. 1999) (listing cases); State v. Ninci, 262 Kan. 21, 936 P.2d 1364 (1997). For example, oral threats made to a defendant are admissible to show his state of mind with respect to a belief in self-defense. See, e.g., Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14 (1999); Wilson v. Commonwealth, Ky. App., 880 S.W.2d 877 (1994); Haynes v. Commonwealth, Ky., 515 S.W.2d 240, 241 (1974).

[18]Ky., 730 S.W.2d 934 (1987).

[19]Ky., 916 S.W.2d 176 (1995).

of the Kentucky Constitution. In Gordon, the Court stated that generally, a police officer may testify that a defendant had become a suspect but may not provide testimony linking him to specific crimes if based on information from third parties.[20]

Price's reliance on these cases, however, is misplaced. As the Court in Gordon noted, such evidence is admissible under limited circumstances when offered to prove why the police acted in a certain manner and if there was an issue in the case about the action of the police.[21] In the case sub judice, Price asserted an entrapment defense. He admitted selling drugs to the Babbs[22] but maintained that he was unfairly singled out for prosecution even though he had never used or sold drugs prior to the March transactions. He specifically placed into issue the procedures and motivations of the police; thus, the information on his prior drug activity was admissible to explain disputed actions taken by the police and the Babbs, and not necessarily for the truth of the matter asserted.

Price testified that other than the two March incidents, he had never used or sold drugs. His girlfriend also testified that she had never known Price to use or sell drugs or to have sold drugs out of their residence. Defense counsel

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[20]Id. at 179.

[21]Id. See also Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988); United States v. Freeman, 816 F.2d 558 (10th Cir. 1987)(holding police testimony of confidential informant's statements concerning defendant's illegal counterfeiting were admissible for nonhearsay purpose of explaining police investigation).

[22]By contrast, the defendant in Gordon denied having sold any drugs to the confidential informant.

indicated in his opening statement and through his cross-examinations of the prosecution witnesses that Price was asserting an entrapment defense. Given the admissibility of the evidence concerning out-of-court statements about Price's reputation and prior drug dealing, defense counsel's failure to object to this testimony was not deficient performance.

Price argues that defense counsel was ineffective for failing to object to alleged inadmissible testimony by Sgt. Jennings that Price asserts was offered to bolster the credibility of the Babbs. He contends that Sgt. Jennings's testimony about the Babbs' reliability and usefulness in the drug operation, which he said resulted in the prosecution of 22 individuals, was inadmissible under KRE 404(e) and KRE 608 because the Babbs' credibility had not yet been attacked by the defense and character evidence cannot include specific acts.

"Bolstering" involves building up a witness's credibility before impeachment has been attempted.[23] This practice is improper because it has the potential for extending the length of trials, asks the jury to accept a witness's testimony on faith, and could reduce the care with which jurors scrutinize a witness's testimony for inaccuracies.[24] Under KRE

[23]United States v. Lindemann, 85 F.3d 1232, 1242 (7th Cir. 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 392, 136 L. Ed. 2d 307 (1996).

[24]United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986).

608, a party may offer supportive evidence only after a witness's credibility has been attacked.[25]

Several federal circuits analyzing Fed. R. Evid. 608(b), the federal counterpart to KRE 608, have held that this federal rule does not apply to extrinsic evidence offered for a legitimate reason such as to justify a cooperation agreement or rebut allegations of bias, as opposed to evidence offered solely to bolster a witness's credibility.[26] They have recognized testimony on the reliability and cooperation of confidential informants in a drug operation is admissible to rebut bias.

> Government informants present a uniquely difficult case for courts determining whether the prosecution has offered the so-called "bolstering" evidence for a permissible or an impermissible purpose. Routinely, defense counsel cross-examines government witnesses about an informant's bias—whether it be a plea agreement, a financial arrangement, or both. On re-direct, the prosecution may want to introduce specific instances of fruitful cooperation under the plea agreement to show that the informant has already cooperated substantially with the police, thereby reducing the marginal temptation to be in the present circumstances. The line between this permissible use and impermissible "bolstering" is indeed a hazy one. In [United States v.] Fusco,[27] the Fifth Circuit held extrinsic evidence of past cooperation admissible to rebut implications that the

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[25]Brown v. Commonwealth, Ky., 983 S.W.2d 513, 515 (1999); Pickard Chrysler, Inc. v. Sizemore, Ky. App., 918 S.W.2d 736, 740 (1995).

[26]See, e.g., United States v. Lochmondy, 890 F.2d 817, 821 (6th Cir. 1989); United States v. Penny, 60 F.3d 1257, 1264 (7th Cir. 1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Lindemann, 85 F.3d at 1243; United States v. Smith, 232 F.3d 236, 242 (D.C. Cir. 2000); United States v. Green, 258 F.3d 683, 692-93 (7th Cir. 2001).

[27]748 F.2d 996 (5th Cir. 1984).

> informant had received $45,000 from the DEA solely for his help in that case: "Because the government was trying to convince the jury that [the informant] was not biased, it was not 'bolstering' [the informant] in a prohibited way, and [the informant's] prior cooperation was not 'extrinsic' as those terms are used in Federal Rule of Evidence 608. Bias, as opposed to general veracity, is not a collateral issue."[28]

Bias is the relationship between a party and a witness which might lead the witness to slant his testimony in favor of, or against, one party. Bias may exist because of a witness's like or dislike, or fear of a party, or his own self-interest.[29]

In the current case, Price attacked the motives of the Babbs through cross-examination and direct testimony. As part of the entrapment defense, defense counsel highlighted the arrangement between the police and Tara Babb that allowed her to avoid prosecution on drug charges in exchange for her participation in eight to ten undercover drug transactions. In addition, both Bill and Tara Babb received monetary compensation for their participation. Price portrayed himself as an innocent Samaritan merely attempting to help two persons he believed to be drug addicts. While introduction of the rehabilitation evidence through the Commonwealth's first witness, Sgt. Jennings, may have been premature, defense counsel's failure to object was not unreasonable given the defense plan to attack the informants as biased and the inevitable admissibility of this evidence.

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[28]Smith, 232 F.3d at 242-43 (internal citations omitted).

[29]Lindemann, 85 F.3d at 1243 (quoting United States v. Abel, 469 U.S. 45, 53, 105 S. Ct. 465, 469-70, 83 L. Ed. 2d 450 (1984)).

Consequently, defense counsel's failure to object to this testimony was not deficient performance.

Price alternatively argues that if any error by counsel, standing alone, would not entitle him to relief, their cumulative effect would justify a new trial. Finally, he contends that he was at least entitled to an evidentiary hearing on his motion.

Price's cumulative error argument fails because he has not shown that counsel was deficient or committed multiple errors. Our above analysis indicates that Price's conclusion that his trial was riddled with inadmissible evidence is unconvincing. Because his claim of ineffective assistance of counsel is clearly refuted on the record, the trial court did not err in failing to conduct an evidentiary hearing on the RCr 11.42 motion.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

COMBS, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with portions of the Majority Opinion, but I respectfully dissent concerning the denial of an evidentiary hearing. I would vacate the order of the Fayette Circuit Court and remand this matter for an evidentiary hearing.

As noted by the Majority Opinion, Price asserts that counsel's action regarding the cross-examination of Sgt. Jennings

constituted ineffective assistance of counsel by "opening the door" to evidence of his prior criminal history that was prejudicial to his defense. KRE 404(b) states that evidence of other crimes or wrongs used to prove the character of a person in order to show conformity with that behavior generally is inadmissible. KRE 404 (b)(1) sanctions admissibility of such evidence if offered for other specific purposes. In addition, the evidence must be relevant, probative and the potential for prejudice must not outweigh the probative value[30]. This limited approach to evidence of other crimes is based on the highly inflammatory nature of this evidence.[31] As our Supreme Court noted in O'Bryan v. Commonwealth,[32] evidence of other crimes tends to

> influence the jury, and the resulting prejudice often outweighs its probative value. Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. An accused is entitled to be tried for one offense at a time and evidence must be confined to that offense. The rule is based on the fundamental demands of justice and fair play [citations omitted].[33]

Although Sgt. Jennings's reference to Price's "extensive record" was not necessarily inadmissable under KRE 404 (b) because it was not offered to prove his criminal disposition, it was highly prejudicial. This testimony became relevant and

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[30]Brown v. Commonwealth, Ky., 983 S.W.2d 513, 546 (1999).

[31]See, e.g., Robert Lawson, The Kentucky Evidence Law Handbook § 2.25 (D) at 93-94 (3rd ed. 1993); KRE 402 and KRE 403.

[32]Ky., 634 S.W.2d 153 (1982).

[33]Id. at 156.

admissible only because defense counsel raised the issue through a question.[34] The Commonwealth argues that defense counsel was attempting to assert Price's entrapment defense by showing that he was treated differently than Tara Babb because the police "knew he did not do drugs." The Commonwealth's argument assumes facts not evident from the record. While defense counsel's question attempted to expose differential treatment toward Price by the police, it is unclear whether defense counsel had information that led him to believe the differential treatment was unfair or improper. Absent further information from defense counsel on how he arrived at his decision to ask this question, a determination of whether his action constituted a legitimate strategy in weighing the risks of soliciting potentially harmful testimony against the benefits of showing unfair differential treatment by the police cannot be made. Since Price's claim of ineffective assistance of counsel cannot be refuted on the record, an evidentiary hearing is required.

I concur with the discussion by the Majority Opinion concerning the admissibility of the testimony by the Babbs. However, unlike the Babbs' testimony, the testimony of Sgt. Jennings that he had received anonymous tips and information from the Babbs that Price was selling drugs out of his home was inadmissible. Price did not directly challenge the actions of Sgt. Jennings, and therefore, this specific testimony was not necessary to explain an issue in the case involving the actions

[34]Evidence of collateral criminal conduct is admissible for purposes of rebutting a material contention of the defendant. Brown, 983 S.W.2d at 513.

of Sgt. Jennings and was highly prejudicial. It is unclear from the record why defense counsel did not object to this testimony, and Price should receive an evidentiary hearing on this issue.

As to Price's complaint that defense counsel was ineffective for failing to object to Sgt. Jennings's testimony which bolstered the credibility of the Babbs, the Commonwealth argues that defense counsel's failure to object to this testimony constituted legitimate trial strategy because it tended to show the Babbs' bias in favor of the Commonwealth. This argument appears to postulate that the defense's possible success in challenging the credibility of the informants increases in direct relationship to the strength of their credibility as supported by the Commonwealth's evidence. To the contrary, the defense would benefit more by excluding supportive evidence than merely relying on the vague claim of bias by close association. Moreover, the defense theory that the Babbs were motivated to implicate and entrap innocent persons because of Tara Babb's immunity agreement would conflict with a conscious decision by defense counsel not to attempt to exclude evidence that their actions led to valid prosecutions. Again, since it is unclear from the record whether defense counsel considered objecting to this testimony by Sgt. Jennings, or if so, why he did not raise an objection, an evidentiary hearing is required.

The Commonwealth argues that in addition to the existence of legitimate trial strategy, Price was not prejudiced by defense counsel's conduct. Price argues that each of the instances of deficient performance, or the combination of errors

cumulatively, created actual prejudice. The Commonwealth contends that the Supreme Court's decision in the direct appeal that the hearsay issues did not constitute palpable error pursuant to RCr 10.26 precludes finding actual prejudice. It asserts that the standard for determining manifest injustice is not nearly as strict as the standard for assessing actual prejudice on a claim of ineffective assistance of counsel. This argument is without merit. Manifest injustice under RCr 10.26 requires a finding that the error created a "substantial possibility that the result of the trial would have been different,"[35] and the error seriously affects the fairness, integrity or public reputation of the judicial proceeding.[36] As stated earlier, actual prejudice under RCr 11.42 involves a "reasonable probability" that counsel's error affected the outcome of the proceeding. However, a defendant need not show by a preponderance of the evidence that the outcome would have been different. Clearly, the palpable error standard is more restrictive than the actual prejudice standard. An ineffective assistance of counsel claim is not precluded by an unsuccessful challenge based on palpable error.[37]

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[35]Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[36]See Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997)(construing KRE 103(e)); Castle v. Commonwealth, Ky. App., 44 S.W.3d 790, 793 (2000).

[37]Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 873 (1998)(stating defendant may seek review of conviction based on ineffective assistance of counsel in a collateral appeal if RCr 10.26 claim is rejected on direct appeal).

While I agree with the Commonwealth that the evidence of Price's guilt was strong and the evidence of the entrapment weak, at this stage of the proceedings without holding an evidentiary hearing, the record does not support a conclusion that Price has not presented at least a colorable claim of actual prejudice. Although none of the instances of alleged deficient performance alone would appear to support a finding of actual prejudice under the ineffective assistance standard, a proper analysis of prejudice cannot be made until it has been determined which issues raised by Price qualify as deficient performance. As explained above, further inquiry and an evidentiary hearing is necessary to determine whether defense counsel had legitimate reasons for his actions. I believe the trial court should conduct a hearing and then make specific factual findings and conclusions of law on each issue of potential deficient performance identified in this Dissent with respect to both deficient performance and actual prejudice.

Because Price's claim of ineffective assistance of counsel is not clearly refuted on the record, I would vacate the denial of the motion for an evidentiary hearing and RCr 11.42 relief, and remand for further proceedings.

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