

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001144-MR

TOMMY PERDUE

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 90-CR-00073-002,
NO. 90-CR-00074-002, AND NO. 90-CR-00075-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; GUIDUGLI,¹
SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Tommy Perdue appeals from the denial of his
motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.
He alleges that he received ineffective assistance of counsel on the bases that: (1)

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trial counsel failed to object to appeals to local prejudice made by the Commonwealth; (2) trial counsel failed to properly investigate and obtain discovery related to the mental health reports on two key witnesses for the Commonwealth; and (3) the cumulative effect of counsel's alleged ineffectiveness violated his constitutional rights. We affirm.

Perdue was convicted of complicity to arson and complicity to commit murder. He received a sentence of life imprisonment for complicity to arson and death for complicity to commit murder. On direct appeal, the Supreme Court of Kentucky affirmed the convictions but reversed his sentence and remanded for a new sentencing hearing. *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1996). Prior to the new sentencing hearing, Perdue entered into an agreement with the Commonwealth to receive two consecutive sentences of 25 years' imprisonment. The sentence was affirmed. *Perdue v. Commonwealth*, 82 S.W.3d 909 (Ky. 2002). Subsequently, Perdue filed a motion pursuant to RCr 11.42 alleging that he received ineffective assistance of counsel. The motion was submitted on the pleadings. The trial court denied the motion. This appeal followed.

Perdue argues that counsel was ineffective for failing to object to appeals to local prejudice made by the Commonwealth. In his first direct appeal, our Supreme Court addressed the issue as follows:

A more troubling statement is found in the Commonwealth's assertion that "I believe Cynthia Moore will testify that Frank had said they had brought

[the victim] here to Russell County because you could get away with murder in Russell County. So they came here, to our Russell County, for this murder to take place.” Later the Commonwealth rhetorically asked “[w]hat does this man think? Does he think that a jury in Russell County is going to let him get by with this? No.” These statements were without objection.

We condemned appeal to local prejudice in *Taulbee v. Commonwealth*, Ky., 438 S.W.2d 777 (1969). In *Taulbee*, the prosecutor stated, among other things, that “I just hope if the jury turns him loose that he leaves and won’t be back here in Estill County robbing and stealing from our people over here.” *Id.* at 778. The arguments made in the present case are of a similar character. However, as there was no objection, we cannot say that the jury might have been persuaded to find appellant not guilty of these crimes but for the offensive statements. See *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 668 (1990).

Perdue points out that our Supreme Court found that the admission of similar statements in the trial of his co-defendant, Frank Eldred, constituted an abuse of discretion that prejudiced the defense when there was a proper objection. *Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994). Perdue maintains that because the Supreme Court found reversible error when the similar statements were objected to, then his counsel was necessarily ineffective for failing to object to the statements and obtaining the same reversal as Eldred. We disagree.

At the outset, we note that the rejection of palpable error allegations on direct appeal does not foreclose review for ineffective assistance of counsel because the respective inquiries differ. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). Despite Perdue’s insistence to the contrary, there is a difference

between review under RCr 10.26 and review of unpreserved errors in a case where the death penalty had been imposed. As our Supreme Court stated in *Perdue*'s direct appeal:

Where the death penalty has been imposed, we nonetheless review allegations of these quasi errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis.

Perdue, 916 S.W.2d at 155. Moreover, the prejudice prong of ineffective assistance of counsel analysis focuses on whether a defendant was deprived of a fair trial or whether the outcome of the trial would have been different. *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). Secondly, prejudice must be affirmatively demonstrated and not presumed in cases involving collateral attacks. *Commonwealth v. Young*, 212 S.W.3d 117, 121 (Ky. 2007).

The Supreme Court of Kentucky found that *Perdue* received a fundamentally fair trial. *Perdue*, 916 S.W.2d at 162. Based upon our review of the record, we conclude likewise. Nor are we convinced that the comments were so prejudicial as to have altered the outcome of the trial. The mere possibility of reversal upon appellate review does not demonstrate ineffective assistance of counsel. Reversal is unwarranted.

Next, Perdue argues that the trial counsel's failure to obtain mental health reports on key witnesses for the Commonwealth constituted ineffective assistance of counsel. Again, Perdue points to the result of Eldred's appeal and argues that he would also have been entitled to reversal on this issue but for the ineffectiveness of his trial counsel. The Supreme Court addressed this issue as follows:

By means of a supplemental brief, appellant claims error in the Commonwealth's failure to provide the results or reports of any physical or mental examinations of Sue Melton or Cynthia Moore. This argument stems from *Eldred v. Commonwealth*, 91-SC-678-MR, 906 S.W.2d 694 (Ky. October 27, 1994), which held the trial court's refusal to allow specifically requested discovery of these items, which limited proper cross-examination, to be reversible error.

The present case is distinct from *Eldred* in that preservation was not at issue there. In *Eldred*, defense counsel's motion for discovery of these records was overruled. In the present case, however, the record is without any reference to such a request, and cross-examination on such matters was without the boundaries placed upon counsel in *Eldred*. Contained in this record are several instances which demonstrate appellant's familiarity with and reference to the *Eldred* record. Appellant makes no claim that he ever requested the records of Melton and Moore, nor that his defense was prejudiced by his supposed inability to obtain them. There was both a different judge and prosecutor at appellant's trial, and we can find no error committed by the trial court on this issue.

Id. at 162-63.

Again, we note that the Supreme Court was not reviewing for palpable error but that it was utilizing the special death penalty standard. Perdue's

argument regarding access to the medical records is simply repackaged as an ineffective assistance of counsel claim. This is not permitted. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). The record indicates that Perdue was aware of the medical histories, and he did not allege prejudice from a lack of access on direct appeal. The Supreme Court found that there was no error. We conclude that counsel was not ineffective. Further, based on our review of the record, we cannot conclude that any cumulative errors deprived Perdue of a fair trial or that the result would have been different.

Accordingly, the order of the Russell Circuit Court is affirmed.

ALL CONCUR.

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