

RENDERED: OCTOBER 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002458-MR

JERMAINE CHATMAN

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2009-SC-000465-D

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 04-CR-00153

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: ACREE AND MOORE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: This matter is before the Court upon remand from the Supreme Court, which has ordered us to reconsider the appeal in light of the holding of

¹ Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009). Having reconsidered the matter, we vacate portions of the October 27, 2005 opinion and order of the Simpson Circuit Court denying Chatman’s motion pursuant to Rule of Criminal Procedure (RCr) 11.42, affirm other portions of the order, and remand for additional proceedings.²

A jury convicted Chatman of trafficking in a controlled substance, second offense, and of being a first-degree persistent felony offender (PFO). In accordance with the jury’s verdict, the trial court sentenced Chatman to twelve years’ imprisonment, enhanced to thirty years by virtue of Chatman’s first-degree PFO status.

Chatman filed a direct appeal following his conviction in which he raised issues pertaining only to jury selection. The Supreme Court, finding no error in the manner in which Chatman’s jury was selected, affirmed the circuit court’s judgment. *Chatman v. Commonwealth*, 241 S.W.3d 799 (Ky. 2007).

Subsequently, Chatman filed the underlying motion to vacate, set aside, or correct his judgment pursuant to RCr 11.42. The circuit court denied his motion. Appeal to this Court followed.

This Court affirmed the circuit court’s denial of the RCr 11.42 motion finding all the issues Chatman raised could or should have been brought on direct appeal. The Supreme Court undertook discretionary review of the appeal, and remanded for reconsideration of the case in light of *Leonard, supra*.

² We have recited the statement of facts and procedure as we did in our original opinion, 2007-CA-002458, to the extent that doing so is helpful.

Leonard clarified existing case law, addressing which issues must be brought on a direct criminal appeal, if at all, and which may be brought in a collateral attack on the judgment. *Leonard*, 279 S.W.3d at 156-159. In so doing, the Supreme Court confirmed the holding of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), recognizing “the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error[.] . . . [A] claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues.” *Leonard*, 279 S.W.3d at 158.

This means that, even though the errors Chatman now asserts did not rise to the level of reversible error on direct appeal, he may nonetheless raise his counsel’s mistakes with respect to those matters as a basis for an RCr 11.42 motion. Courts are required to consider his arguments regarding ineffective assistance of counsel so long as he has actually raised a collateral attack in his RCr 11.42 motion, and has not simply attempted to re-challenge alleged errors of the trial court.³

The issues Chatman raised in his RCr 11.42 motion are not the same as those he raised on direct appeal. The direct appeal concerned matters of jury selection, while the instant appeal alleges there were errors in the jury instructions. This means *Leonard* is not directly analogous to the procedural history of the

³ *Leonard* did not set aside the rules articulated in *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972), and *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998), that an RCr 11.42 motion is not designed to permit defendants to re-challenge issues which could and should have been raised on direct appeal, or which actually were brought on direct appeal.

instant case.⁴ However, we acknowledge that its holding still applies. That a defendant could have or should have raised certain errors of the circuit court on direct appeal, but did not, does not preclude him from attributing those errors to the ineffective assistance of counsel in a collateral attack. We proceed accordingly.

Review of the record in light of *Leonard*, *supra*, reveals the circuit court's reasoning in denying Chatman's RCr 11.42 motion was erroneous. Chatman raised the following issues in that motion: (1) that he was denied effective assistance of counsel when his trial attorney failed to object to erroneous jury instructions or to tender proper instructions, and that but for this deficient performance he would have been entitled to a new trial or sentencing phase; (2) that he was denied due process when the trial court erroneously failed to instruct the jury as to the definition of "trafficking;" (3) that the trial court used a jury form that improperly combined the guilt phase of the trafficking charge with the sentencing phase, which included a subsequent offender enhancement; and (4) that the trial court erred by permitting him to be sentenced both as a subsequent offender and as a persistent felony offender for the same criminal behavior. The circuit court denied this motion based on the conclusion that the court had committed no error at trial on any of the four counts. However, this was not the proper analysis.

⁴ In *Leonard*, the appellant "appeal[ed] from a denial of his motion under Civil Rule 60.02 to be relieved from a[n] . . . order denying his RCr 11.42 collateral attack motion, several issues in which were held on appeal to be procedurally barred because related issues had been addressed in his direct appeal." *Leonard*, 279 S.W.3d at 153-54.

The first step in the circuit court's analysis should have been to characterize each of Chatman's arguments. Specifically, the circuit court should have identified Chatman's arguments which merely alleged trial errors subject to direct attack on appeal and those which formed the basis of a true collateral attack, such as ineffective assistance of counsel. *See Leonard*, 279 S.W.3d at 158-159. The court could then dismiss those arguments which should properly have been brought on direct appeal. The rule still stands that RCr 11.42 does not provide an opportunity to revisit issues which already should have been adjudicated in a direct challenge. *See id.* at 156. Chatman's second, third, and fourth asserted errors are of this type – they were all trial errors which should have been presented in his first appeal.

However, where Chatman alleged he received ineffective assistance of counsel, as in his first argument, the circuit court should have performed an analysis pursuant to the *Strickland* line of cases. *Strickland v. Washington*, 466 U.S. 668 (1984) (“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”). Here, Chatman alleged both prongs of the *Strickland* test: that trial counsel's performance was deficient and that such deficiency caused an unjust result. *Id.* at 687. Even in the absence of error in the jury instruction, a defendant is not precluded from pursuing a collateral attack based upon the *performance of his counsel* in permitting an improper instruction to be presented to the jury. *See Leonard*, 279 S.W.3d at 158.

We are permitted to affirm the decision of a circuit court when it achieves the correct result, but for an incorrect reason. *Haddad v. Louisville Gas & Electric Company*, 449 S.W.2d 916 (Ky. App. 1969) (citing 5 Am.Jur.2d, Appeal and Error, Section 727, page 170, and *Commonwealth v. McCauley's Ex'r*, 166 Ky. 450, 179 S.W. 411 (1915)). Here, because the Simpson Circuit Court achieved the right result in denying Chatman's RCr 11.42 motion based upon arguments two, three, and four, we affirm.

With respect to Chatman's assertion of ineffective assistance of counsel, however, we vacate that portion the circuit court's opinion and order and remand for analysis pursuant to *Strickland, supra*, in accordance with the holding of *Leonard, supra*.

ALL CONCUR.

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