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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000703-MR

DOMINIC BUCKNER APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, JUDGE
ACTION NO. 05-CR-00576

COMMONWEALTH OF KENTUCKY APPELLEE

<u>OPINION</u>
<u>AFFIRMING IN PART</u>
<u>AND</u>
<u>REMANDING IN PART</u>

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND LAMBERT, JUDGES.

COMBS, JUDGE: Dominic Buckner appeals the order of the Daviess Circuit Court which denied his motion for an evidentiary hearing and for relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. Following our review, we affirm in part and remand in part.

On June 28, 2006, a jury convicted Buckner of wanton murder and kidnapping. He received two sentences of twenty-years' incarceration to be served concurrently. The Supreme Court affirmed the convictions upon his direct appeal. *Buckner v. Commonwealth*, 2008 WL 5051578 (Ky. 2008). On November 23, 2011, Buckner filed a motion to vacate the judgment pursuant to RCr 11.42, alleging that he had received ineffective assistance of counsel. Without conducting an evidentiary hearing, the trial court denied the motion on March 6, 2012. This appeal follows.

RCr 11.42 permits a prisoner to challenge his conviction and sentence on collateral grounds. RCr 11.42(1). Where, as here, the grounds are based on claims of ineffective assistance of counsel, the appellant must satisfy a two-prong analysis:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984), adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both prongs must be met in order for the test to be satisfied. The Court further observed: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Upon appeal, we may only review the denial of a motion for an evidentiary hearing by determining whether the allegations are refuted by the record and whether, if true, they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record on its face contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Buckner argues that his counsel was ineffective for not objecting to the jury instruction on wanton murder. He also alleges that the court erred in failing to include a renunciation instruction. The Commonwealth argues that we are precluded from addressing this argument because it was decided by the Supreme Court in Buckner's direct appeal. It cites *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) as authority that the law-of-the-case doctrine prevents us from examining Buckner's argument.

*Leonard* actually abolished a previous precedent; namely, that "an issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." *Id.* at 157, 159. The Supreme Court restated the holding of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006),[1] and announced a new rule: that a collateral claim of ineffective assistance of counsel -- albeit related to an error previously alleged on direct appeal

[1] *Martin* had not discussed the previous line of cases that dealt with the issue; however, *Leonard* explicitly overruled them.

-- may be raised ***if different issues exist*** relating to the alleged ineffectiveness.

*Leonard v. Commonwealth* 279 S.W.3d at 158. It reasoned as follows:

> When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental [*sic*] 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[.]

*Id*. at 157-58 (quoting *Martin v. Commonwealth,* 207 S.W.3d at 4).

Applying *Leonard* in this case indeed precludes us from addressing the issue of the wanton murder instruction. The Supreme Court addressed Buckner's renunciation argument under what appears to be the standard of clear error[2] rather than that of palpable error. *Buckner v. Commonwealth*, at *22-23. Additionally, we are unable to discern a distinction between Buckner's claim before the Supreme Court and his claim in the present appeal. The Supreme Court has directly determined that the instruction was not erroneous, and we cannot revisit that issue. Thus, we affirm the trial court regarding the wanton murder instruction.

Buckner's other argument is that he received ineffective assistance because counsel encouraged him to reject a plea offer and to proceed to trial. The Supreme Court of the United States has recently held as follows:

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[2] The memorandum opinion of the Supreme Court does not articulate a standard of review for this issue.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

*Lafler v. Cooper*, --- U.S. ---, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012).

In this case, the Commonwealth made two offers to Buckner that included sentences significantly less severe than the one he received. Therefore, he was inherently prejudiced by going to trial. *Id*. at 1386. The question is whether counsel was deficient in advising Buckner on this issue.

In its denial of Buckner's motion to vacate, the trial court relied on a set of letters to Buckner from his counsel advising Buckner that the Commonwealth's evidence against him was weak. Counsel explained to Buckner that if any of his co-defendants pled guilty, they could be required to testify against him at trial. A subsequent letter informed Buckner that one of his co-defendants had reached a plea bargain of five-years' incarceration and would be testifying at trial. Counsel then sent Buckner a letter outlining two alternate plea offers from the Commonwealth. One would have classified him as a violent offender;[3] the other would not. The sentences would have been either eleven years (with 85% to serve) or sixteen years (with 20%) to serve.

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[3] Since Buckner's trial, the Supreme Court ruled that he was improperly sentenced as a violent offender because he was a juvenile at the time of the crime. *Buckner v. Commonwealth*, at *29-30.

The trial court found – and the Commonwealth reiterates – that because Buckner's counsel had explained the offers, its representation was not deficient. However, the question is whether Buckner's counsel had advised Buckner of the potential consequences of going to trial – not solely the effects of the plea offers – separate and apart from the ramifications of a trial. Buckner does not dispute that counsel explained the plea offers. The record shows that counsel had discussed with Buckner the respective sentences connected with the plea offers – as letters in the record indicate. However, the letters contain no discussion of the relative consequences of going to trial rather than accepting either of the plea offers. The plea bargain of his co-defendant for five-years' incarceration could have led Buckner to believe that the offers of eleven and sixteen years were excessive. Buckner was a juvenile when the crime was committed and the proceedings began. Due to the lack of information on the face of the record, we believe that the trial court should have conducted an evidentiary hearing before denying his motion.

In summary, we affirm the denial of Buckner's motion as it applies to the renunciation instruction issue. However, we remand for an evidentiary hearing to determine whether Buckner received accurate information about potential consequences of rejecting the plea offer and continuing to trial.

ALL CONCUR.

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