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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000794-MR

KENT MASON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY J. KALTENBACH, JUDGE
ACTION NO. 09-CR-00538

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, J. LAMBERT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kent Mason, *pro se* appeals from the McCracken Circuit Court's order entered March 6, 2013, denying his motion to alter, amend, or vacate judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons that follow, we reverse and remand.

PROCEDURAL FACTS

On June 10, 2010, a jury found appellant guilty of first-degree burglary, fourth-degree assault for breaking into his ex-girlfriend's house and brutally assaulting her, and for being a first-degree felony offender. He was sentenced to thirty-years' imprisonment. Appellant appealed as a matter of right to the Kentucky Supreme Court, and on November 23, 2011, the Supreme Court affirmed the judgment and sentence of the McCracken Circuit Court in an unpublished opinion (2010-SC-000412-MR). On February 18, 2013, appellant filed a motion in the circuit court to vacate his judgment and sentence pursuant to RCr 11.42, raising various claims of ineffective assistance of counsel. The trial court entered an order denying appellant's RCr 11.42 motion on March 6, 2013. Appellant now appeals from that order. Further facts will be developed as necessary in this opinion.

STANDARD OF REVIEW

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The reviewing court must examine trial counsel's conduct in light of professional norms based on a standard of reasonableness. *Id.* at 688.

When ruling upon a motion for relief from judgment and sentence under RCr 11.42, a circuit court must conduct an evidentiary hearing only when

there is “a material issue of fact that cannot be determined on the face of the record.” *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998). A hearing is unnecessary if the trial court, “determines that the allegations, even if true, would not be sufficient to invalidate the conviction.” *Id.* at 904.

ANALYSIS

Appellant contends his trial counsel was ineffective for failing to request an instruction on voluntary intoxication and for failing to introduce the laws of tenancy to the jury. He further claims that the trial court erred when it denied his motion on these issues without a hearing. The trial court held that because the issues had been addressed on direct appeal, they could not be addressed in a subsequent RCr 11.42 motion. We conclude that the trial court’s ruling in this regard is in error.

Prior to the Kentucky Supreme Court’s decision in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), appellant’s claims of ineffective assistance of counsel would have been barred for raising issues identical to those raised on direct appeal. In *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998), the Kentucky Supreme Court held that RCr 11.42 motions were “limited to issues that were not and could not be raised on direct appeal. 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 909.

However in *Leonard*, 279 S.W.3d 151, following its rationale set forth in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Supreme Court

reversed its ruling in *Sanborn*, 975 S.W.2d 905, holding that in order to prevent a palpable error analysis from being dispositive of an ineffective assistance claim, an issue can be presented in “ineffective assistance of counsel claims in the RCr 11.42 context even though the underlying claim of error had been denied on direct appeal.” *Leonard*, 279 S.W.3d at 157. Explaining its rationale behind the reversal, the Court wrote:

When 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.

Id. at 157-58.

Here, appellant’s first claim in his RCr 11.42 motion is that his trial counsel was ineffective for failing to instruct the jury on voluntary intoxication. In a similar claim on direct appeal, appellant alleged that the trial court failed to *sua sponte* instruct the jury on voluntary intoxication. The Kentucky Supreme Court, reviewing this issue on direct appeal for palpable error, concluded that appellant would have been entitled to a voluntary intoxication instruction had he requested it.

However, the Court found no manifest injustice because appellant was not so intoxicated as to be unable to form the necessary intent to be guilty of the crimes for which he was accused.

The trial court, upon review of appellant's RCr 11.42 motion, incorrectly construed the Kentucky Supreme Court's finding of no manifest injustice as tantamount to appellant not being prejudiced by his attorney's failure to request the voluntary intoxication instruction. However, as the Kentucky Supreme Court held, palpable error review is much more stringent than a review for ineffective assistance of counsel. *Id.* Rather than determining whether the failure to have a voluntary intoxication instruction was manifestly unjust, the trial court's focus upon review of this issue in appellant's RCr 11.42 motion would have been on why no request was made, whether it was trial strategy, and the severity of the defect. Although the underlying issues are similar, appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel and the trial court should have given this issue a proper RCr 11.42 review. *Id.*

Concerning appellant's second issue, he alleged on direct appeal that the trial court erred when it failed to grant his motion for a directed verdict on the charge of burglary based on the Commonwealth's failure to prove the element of intent to commit the crime. Appellant claimed that because he was a resident of the victim's townhouse, the intent element of the burglary charge could not be proven.

A court will grant a motion for a directed verdict only if it finds that “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.” *Brewer v. Commonwealth*, 206 S.W.3d 313, 318 (Ky. 2006). In other words, by denying his motion for a directed verdict, the trial court believed that a reasonable jury could infer, based on the evidence, that appellant was not a resident, and therefore could form the proper intent to commit the crime of burglary. The Kentucky Supreme Court, finding that the issue was unpreserved below, reviewed for palpable error, which again requires a finding of manifest injustice. “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). The Kentucky Supreme Court agreed with the trial court that there was ample evidence to suggest that the appellant did not reside at the victim’s townhouse. He had no key, he was not allowed in the house while the victim was not home, and he broke up with the victim the day before the burglary, agreeing he would not stay there anymore. Based on this evidence, the Kentucky Supreme Court found that a manifest injustice did not occur when the trial court denied appellant’s motion for a directed verdict.

In contrast to his direct appeal, appellant alleges in his RCr 11.42 motion that his *counsel* was ineffective because he believes that had his attorney introduced the laws of tenancy, at least one juror could have reasonably believed, based on the evidence in the record, that he *was* a resident of the victim’s

townhouse, resulting in a different outcome at trial. Essentially, appellant argues that the jury should have been permitted to interpret the laws of tenancy in Kentucky. We disagree.

Whether a jury is properly instructed is a question of law and is reviewed by our Court under a *de novo* standard. *Hamilton v. CSX Transp. Inc.*, 208 S.W.3d 272 (Ky. App. 2006). It is fundamental in Kentucky that a jury must resolve all questions of fact presented by the evidence in a criminal proceeding. *Mishler v. Commonwealth*, 556 S.W.3d 676 (Ky. 1977). However, issues of law including the interpretation of statutes are reserved solely for resolution by the trial court. *Johnson v. Commonwealth*, 875 S.W.2d 105 (Ky. App. 1994). The issue of whether appellant was a resident of the victim's townhouse looked to a question of law that was previously resolved by the trial court and the Kentucky Supreme Court. Since the interpretation of the laws of tenancy could not be properly submitted to the jury at appellant's trial, his attorney could not have been ineffective as counsel by failing to introduce said laws of tenancy at trial. Accordingly, this claim for relief under RCr 11.42 must fail.

Consequently, we find that because his RCr 11.42 claims of attorney error are not the same as his claims of trial court error on direct appeal, and because the issues are not afforded the same standard of review, appellant's claim of ineffective assistance of counsel was properly raised in his RCr 11.42 motion as concerns the failure to request an instruction on voluntary intoxication and should have been given a proper review by the trial court.

For the foregoing reasons, we reverse the order of the McCracken Circuit Court and remand with instructions to consider the issues in appellant's 11.42 motion based on the evidence in the record and conduct an evidentiary hearing if necessary, on counsel's failure to request an instruction on voluntary intoxication.

ALL CONCUR.

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