

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001674-MR

LARRY BURNETT

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT  
HONORABLE, TYLER L. GILL, JUDGE  
ACTION NO. 11-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: Larry Burnett appeals from an order of the Todd Circuit Court denying his motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42. After a careful review of the record, we affirm.

Burnett was indicted on the charges of kidnapping, stalking in the first degree, wanton endangerment in the first degree, and possession of a firearm by a

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

convicted felon. Following a trial, he was convicted of all charges and sentenced to thirty years' imprisonment. In 2013, Burnett appealed directly to the Supreme Court of Kentucky. Burnett claimed reversal was required on grounds of double jeopardy, denial of a unanimous verdict, and a note from the trial judge to the parole board. In an unpublished opinion rendered on May 23, 2013, our Supreme Court affirmed Burnett's convictions. *Burnett v. Commonwealth*, 2013 WL 2296199, 2012-SC-000045-MR (Ky. 2013).

Burnett then moved the trial court pursuant to RCr 11.42, to vacate his conviction. In his RCr 11.42 motion, Burnett argued trial counsel was ineffective for failing to preserve for appellate review the three issues he raised in his direct appeal. Further, Burnett argued his trial counsel was ineffective for objecting to testimony by a parole officer about the amount of time Burnett would have to serve before he was eligible for parole. In a September 18, 2014, order, the trial court denied Burnett's motion without an evidentiary hearing upon finding his claims were either resolved on direct appeal or lacked merit. It is from that order Burnett now appeals.

Burnett raises four arguments before this Court, three of which are identical to the issues raised in his direct appeal. We agree with the Commonwealth that these three arguments are procedurally improper because they were raised and rejected by our Supreme Court on direct appeal. Issues, which were raised, or

could have been raised, on direct appeal are not subject to review under RCr

11.42. *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990).

Burnett's sole remaining argument centers on his belief that his trial counsel provided ineffective assistance. In particular, Burnett faults his counsel with failing to "preserve several issues on the record." Specifically, he claims trial counsel failed to: (1) preserve a double jeopardy objection; (2) preserve an objection to a denial of a unanimous verdict; and (3) object to a note the trial judge wrote to the parole board. The alleged merit of each of these claims was reviewed for palpable error by the Supreme Court of Kentucky. We are now asked to review the same allegations for ineffective assistance of counsel, the test for which is set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The *Strickland* test requires the movant to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. *Id.* On review, we examine counsel's performance and any resulting deficiencies *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

When an evidentiary hearing on an RCr 11.42 motion is not held, as is the case here, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). A hearing is not required if the record refutes the claim of error or if "the

allegations, even if true, would not be sufficient to invalidate the conviction.”

*Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

Burnett’s contention his trial counsel was ineffective for failing to make a double jeopardy objection is refuted by the record. In Burnett’s direct appeal, our Supreme Court reviewed the issue of double jeopardy for palpable error. RCr 10.26. Applying the *Blockburger*<sup>2</sup> test to both kidnapping and wanton endangerment, and kidnapping and stalking, the court found that neither violated the constitutional prohibition against double jeopardy. The Court separately analyzed and rejected Burnett’s argument that those convictions violated the statutory double jeopardy provisions of KRS<sup>3</sup> 505.020. Because the Court found no error, the outcome on appeal would have been the same had counsel preserved the alleged error. Accordingly, Burnett was not prejudiced by his trial counsel’s failure to object to double jeopardy.

The same holds true for Burnett’s claim his counsel was ineffective for failing to object to a denial of a unanimous verdict. Our Supreme Court in Burnett’s direct appeal found no denial of a unanimous verdict. Thus, Burnett cannot be said to have been prejudiced by counsel’s failure to preserve the issue

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<sup>2</sup> In *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1936), the United States Supreme Court held “double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute requires proof of an additional fact which the other does not.”

<sup>3</sup> Kentucky Revised Statutes.

for appeal. In both instances, Burnett has failed to satisfy the second prong of the *Strickland* test, and is therefore not entitled to the relief sought.

Finally, Burnett claims trial counsel was ineffective in failing to object to a note the trial judge wrote on his order of final judgment, which stated, “Judge strongly recommends against early release and/or parole.” We disagree.

*Strickland* prejudice requires a defendant show that the outcome of the trial would have been different but for the alleged ineffective assistance. We fail to see how the trial judge’s note to the parole board had any effect on the outcome of the proceedings. Moreover, any effect the note might have on the parole board is purely speculative. The prejudice required for ineffective assistance of counsel must appear more obvious than as a matter of mere speculation. “No conclusion of prejudice . . . can be supported by mere speculation.” *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (citations omitted). Once again, Burnett has not carried his burden under *Strickland* and is not entitled to relief.

For the foregoing reasons, the judgment of the Todd Circuit Court is affirmed.

ALL CONCUR.

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