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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001538-MR

LLOYD BLACKMAN

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 18-CR-00189

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Lloyd Blackman appeals the Henderson Circuit Court's judgment of conviction and sentence on the grounds he suffered ineffective assistance of trial counsel. After careful review, we conclude Blackman's claim for ineffective assistance of counsel is premature. Hence, we affirm.

Blackman was pulled over by Henderson County Deputy Sheriff Stephen Douglas for driving 74 miles per hour in a 55 mile per hour zone. Upon stopping Blackman, Deputy Douglas detected a faint odor of marijuana. He then searched Blackman's vehicle without a warrant and discovered marijuana in a large plastic baggie inside a cooler in the backseat. Blackman was subsequently indicted for trafficking in marijuana and with being a second-degree persistent felony offender (PFO). At trial, Blackman's defense was that the marijuana belonged to his sister, who had borrowed his car earlier that day and used marijuana for medical purposes. The jury was unconvinced and found Blackman guilty of trafficking in marijuana, more than eight ounces but less than five pounds. The jury recommended a PFO-enhanced sentence of eight years' imprisonment, and the trial court sentenced him accordingly.

Blackman then retained new counsel to litigate his direct appeal. On appeal, Blackman argues this Court must reverse his conviction due to ineffective assistance of trial counsel "so egregious that it rises to the level of palpable error as described in Civil Rule¹ 10.26." Trial counsel's alleged errors were: failure to file a suppression motion as a result of the traffic stop, conducting deficient *voir dire*, not moving to strike certain jurors for cause, failing to object to certain portions of

¹ Blackman presumably intended to cite Kentucky Rule of Criminal Procedure (RCr) 10.26. Kentucky Rule of Civil Procedure (CR) 61.02 addresses palpable error in civil cases.

Deputy Douglas's trial testimony, conducting deficient examination of defense witnesses, failing to object during certain portions of the Commonwealth's cross-examination of those witnesses, failing to obtain documented evidence of Blackman's sister's use of medical marijuana, failing to move for a directed verdict, failing to offer proper jury instructions, arguing jury instructions while Blackman was not in the courtroom, making a deficient closing statement, failing to object to the admission of certified records of Blackman's previous convictions, and failing to offer mitigating evidence at the sentencing phase of trial. The Commonwealth responds that Blackman has raised ineffective assistance of counsel prematurely. We agree.

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 of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S. Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

might be considered sound trial strategy.” *Id.* at 689, 104 S. Ct. at 2065 (internal quotation marks omitted).

Ineffective assistance of counsel claims are best suited to collateral attack proceedings under RCr 11.42 after the direct appeal is final. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998). “As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court’s judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered.” *Id.* An appellate court can review an ineffective assistance of counsel claim on direct appeal only if there is a trial record, or an evidentiary hearing is held on a motion for a new trial, and the trial court rules on the issue. *Id.* at 872-73.

There has been no evidentiary hearing and no testimony from Blackman or trial counsel regarding trial counsel’s conduct. Accordingly, Blackman’s claim for ineffective assistance of counsel cannot be reviewed on direct appeal. However, he still has a right to raise such a claim in a future RCr 11.42 motion. *Caraway v. Commonwealth*, 459 S.W.3d 849, 853 n.4 (Ky. 2015).

Some of the errors Blackman alleges could, conceivably, be reviewed for palpable error under rule RCr 10.26. However, he does not provide an argument explaining why these errors create a “substantial possibility that the result in the case would have been different without the error.” *Brewer v.*

Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotation marks omitted). Blackman merely uses the term “palpable error” in relation to trial counsel’s conduct in a few instances in his brief and argues that these errors demonstrate counsel’s ineffectiveness. This is problematic because “in most instances a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error.” *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009). It would be unfair to the Commonwealth to reverse on grounds the Commonwealth did not have an opportunity to address in its brief. Moreover, “[i]t is not our function as an appellate court to research and construct a party’s legal arguments, and we decline to do so here.” *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). Thus, we must hold that any claim for palpable error is not properly before the Court. To the extent Blackman had potential palpable error arguments warranting relief, they may be raised in a future RCr 11.42 motion alleging ineffective assistance of trial and *appellate* counsel.

Accordingly, the Henderson Circuit Court’s judgment of conviction and sentence is affirmed. Our holding does not preclude Blackman from bringing his claim for ineffective assistance of counsel in the proper course at a later time. Nothing in this opinion should be construed as expressing any opinion on the merits of such a claim.

ALL CONCUR.

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