

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

Supreme Court of Kentucky **FINAL**

2018-SC-000223-MR

DATE 7/5/19 Kim Redmon, DC

JAMES WYATT

APPELLANT

V. ON APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE PAUL KENTON WINCHESTER, JUDGE  
NO. 12-CR-00184-001

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART, VACATING IN PART, AND REMANDING**

James Madison Wyatt appeals as a matter of right<sup>1</sup> from the Knox Circuit Court's order imposing a sentence of life in prison plus five years for his convictions of murder, tampering with physical evidence, unlawful imprisonment in the first degree, and possession of a defaced firearm. On appeal, Wyatt raises three unpreserved claims. The only meritorious claim of error concerns Wyatt's sentence: the trial court improperly imposed a term of years on top of a life sentence. For that reason alone, we vacate and remand with directions for the trial court to enter a new judgment in accordance with this opinion. In all other respects, we affirm.

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<sup>1</sup> Ky. Const. § 110(2)(b).

## **I. Background.**

The victim in this case, Jonathan Foley, used to cook and get high on methamphetamine with Wyatt and some other individuals in a garage in Knox County. Wyatt became paranoid that Foley was a confidential police informant and eventually strangled him to death with a leather belt in that garage. Wyatt then transported Foley's body to a remote location in Knox County where it remained for five days while Foley's parents frantically searched for him. During the third police interview of Wyatt in connection with Foley's disappearance, Wyatt offered to take the police to Foley's body.

Thereafter, a Knox County grand jury indicted Wyatt, along with three co-defendants, for multiple charges in connection with Foley's death. All defendants pled guilty except Wyatt, who proceeded to trial. Wyatt's defense strategy at trial was to admit to tampering with Foley's body, but to deny murdering him. Wyatt did not testify at trial. Two of his three former co-defendants testified against him. Ultimately, the jury convicted Wyatt of murder, tampering with physical evidence, unlawful imprisonment in the first degree, and possession of a defaced firearm. The jury recommended life in prison plus five years, which the trial court imposed. Wyatt now raises three claims of errors on appeal.

## II. Standard of Review.

Unpreserved claims of error are subject to palpable error review under RCr<sup>2</sup> 10.26 which provides, in relevant part: “A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” This Court has noted

Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial.

*Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

## III. Analysis.

### A. KRE<sup>3</sup> 410(4).

Wyatt contends that the police detective who interviewed him, Det. Steve Owens, improperly testified under KRE 410(4) which prohibits the admission at trial “[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” Further, “a conversation constitutes ‘plea discussions’ when (1) the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion and (2) the accused’s expectation is reasonable given the totality of the objective

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

<sup>3</sup> Kentucky Rules of Evidence.

circumstances.” *Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012) (citing *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978)); *Roberts v. Commonwealth*, 896 S.W.2d 4, 5–6 (Ky. 1995)). “[P]lea discussions ‘with an attorney for the prosecuting authority’ include discussions with the prosecutor as well as discussions with law enforcement officials who are either acting with the express authority of the prosecutor or who state they are acting with such authority.” *Clutter*, 364 S.W.3d at 138 (citing *Roberts*, 896 S.W.2d at 6).<sup>4</sup>

During the Commonwealth’s direct examination of Det. Owens, he testified that while interviewing Wyatt before charges were filed, Wyatt initially denied knowing Foley, but later changed his story and volunteered to take the officers to Foley’s body if he were offered a manslaughter charge. At that point, Det. Owens told Wyatt he was going to step out of the interview room to make a phone call. When he returned, he informed Wyatt that if he could take them to the location of Foley’s body, the death penalty would not be sought against him in any murder investigation. Det. Owens left the room again. When he returned the second time, Wyatt said that if they offered him manslaughter, he would take them to Foley’s body. Det. Owens did not respond. Shortly

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<sup>4</sup> Despite the Commonwealth’s assertion to the contrary, the *Roberts* holding makes clear that “KRE 410 applies even though formal charges have not yet been filed at the time the plea discussions took place. The intent of the Rule is to protect plea discussions when charges have been made or are about to be made.” 896 S.W.2d at 6.

thereafter; Wyatt took the police to the remote area where Foley's body was located.

On cross-examination, Wyatt's counsel did not ask who Det. Owens phoned when he stepped out of the room. Instead, counsel's questions were aimed at implying that the police investigation had not been thorough, emphasizing that two individuals of interest had not been asked for swabs by the police. Wyatt's counsel then clarified with Det. Owens that Wyatt had never told police that he had murdered Foley. During closing arguments, Wyatt's counsel presented an innocence defense to the charge of murder, arguing to the jury that another co-defendant who had pled out was the one who strangled Foley. Wyatt's counsel told the jury that it could not assume because Wyatt did the right thing and told the police where the body was that Wyatt was the one who murdered Foley. Counsel conceded that Wyatt disposed of Foley's body and asked the jury to find him guilty of tampering with physical evidence only, and not guilty of murder.

On appeal, Wyatt now claims that Det. Owens' testimony regarding Wyatt's offer to take the police to Foley's body in exchange for a manslaughter charge should have been excluded under KRE 410(4). As stated above, normally an unpreserved error is reviewed for palpable error only, but in this instance, the record reflects that Wyatt's failure to object to Det. Owens' testimony concerning the alleged plea discussions was purposeful trial strategy and thus places this issue beyond our review. Not only did Wyatt's counsel not object to Det. Owens' testimony, she appeared to acquiesce to its use by

clarifying on cross-examination that Wyatt never confessed to murdering Foley. Rather, he simply directed the police to the body. Wyatt's counsel again referred to the alleged plea discussions during closing arguments to proclaim Wyatt's innocence and to assert that just because he "did the right thing" and took the police to Foley's body did not mean he murdered Foley. Given that the strategy of Wyatt's counsel was to convince the jury that Wyatt merely directed the officers to find the body, without ever admitting that he participated in the murder, and that another person committed the murder, we find that counsel deliberately forewent objecting to a curable trial defect.

In a proper case, however, pursuant to RCr 10.26, an unpreserved error may be reviewed and appropriate relief granted providing the court determines that manifest injustice has resulted from the error. However, nothing contained in RCr 10.26 precludes the waiver of palpable error or even waiver of a constitutional right. . . . "Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive. There is a simple and easy procedural avenue for the enforcement and protection of every right and principle of substantive law at an appropriate time and point during the course of any litigation, civil or criminal."

*West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Furthermore,

"When a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications. In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior consultation with the defendant. The defendant's counsel cannot deliberately forego making an objection to a curable trial defect when he is aware of the basis for an objection."

*West*, 780 S.W.2d at 602 (quoting *Salisbury v. Commonwealth*, 556 S.W.2d 922, 927 (Ky. App. 1977)).

The admissibility of Det. Owens' testimony concerning alleged plea discussions was a curable trial defect of which any competent counsel would have been aware.<sup>5</sup> By declining to object to Det. Owens' testimony, and instead using his testimony to pursue a strategy of actual innocence to the murder charge, Wyatt's counsel waived his right to claim error in the admission of this testimony.<sup>6</sup> RCr 10.26 is not a substitute for the contemporaneous objection requirement of RCr 9.22. To allow Wyatt to circumvent the contemporaneous

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<sup>5</sup> As noted in *Salisbury*, "[i]f the defendant's attorney is completely unaware that there may be an objection which clearly affects the substantial rights of his client, a serious question may be raised whether the defendant was denied effective assistance of counsel." 556 S.W.2d at 927.

<sup>6</sup> This case is factually distinguishable from those in which a defendant's objection to the admission of evidence was overruled and the defendant thereafter tried to salvage the situation on cross-examination. In that situation, a defendant's subsequent cross-examination of the witness would not waive his prior objection. Compare *Boston v. Commonwealth*, No. 2004-SC-0469-MR, 2006 WL 1045064, at \*5 (Ky. Apr. 20, 2006) (trial court's improper denial of defendant's motion to suppress audiotape resulting from plea negotiations, despite defendant's subsequent admission to the burglary charge, did not make admission of the inadmissible evidence harmless); *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 754 (Ky. 2005) (defendant's attempt on surrebuttal to attribute an innocent meaning to a letter that was improperly admitted against him in violation of the hearsay rule, KRE 802, did not waive or cure the trial court's error in overruling defendant's objection to admission of the letter); *Salinas v. Commonwealth*, 84 S.W.3d 913, 919 (Ky. 2002) (defense counsel's cross-examination of witness concerning contents of an exhibit did not constitute a waiver of his previous hearsay objection to that exhibit and that witness's testimony), with *Asher v. Commonwealth*, 275 S.W.2d 416, 418-19 (Ky. 1955) (defendant waived objection to evidence by subsequently presenting the same evidence to which he had previously objected during cross-examination of other witnesses who had not previously testified to that same evidence). Further, in *Salinas*, we explained that if a defendant's cross-examination of a witness following the defendant's objection waived a defendant's right to challenge the objectionable testimony on appeal, then "any party against whom evidence was improperly admitted would be required to forego cross-examination and enhance the risk of losing at trial, or attempt to cross-examine in an effort to mitigate the prejudicial effect of the evidence and thereby be deemed to have acquiesced in the error." 84 S.W.3d at 919.



objection rule embodied in RCr 9.22 via a claim of palpable error under RCr 10.26, after his counsel failed to object and instead attempted to use the testimony to benefit Wyatt, would ignore well-established trial processes and preservation requirements. Accordingly, we hold that Wyatt has waived his right to allege a KRE 410(4) violation on appeal.<sup>7</sup>

*B. Probation and Parole Officer's Testimony.*

Wyatt asserts that during the penalty phase of trial, Probation and Parole Officer Steve Davidson testified to incorrect information regarding the possibility of parole. Wyatt argues that a substantial probability exists that this false or misleading testimony regarding his future parole eligibility caused the jury to recommend a harsher sentence. Wyatt did not preserve this issue below and thus requests palpable error review under RCr 10.26.

The penalty phase of trial was relatively brief, lasting about a half an hour. The Commonwealth called two witnesses: Off. Davidson and Foley's mother. Wyatt did not question either witness and did not call any witnesses of his own.

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<sup>7</sup> The undeveloped record leaves open the question of whether Det. Owens was acting with authority from a prosecuting authority to offer a plea deal and whether Wyatt's subjective belief was reasonable under the circumstances. No one asked who Det. Owens phoned when he stepped out of the investigation room, and Wyatt did not testify at trial so we are unable to discern his subjective expectation. When Det. Owens returned to the interview room after making a phone call, Wyatt reiterated that he would take the police to Foley's body if they offered him manslaughter. Det. Owens did not respond to Wyatt and did not expressly agree to charge Wyatt with manslaughter, or express that he had authority to make a plea deal. Thus, even if Wyatt had not waived his right to allege error, the record is insufficient to determine whether the two-part test for plea negotiations set forth in *Clutter* was met.

The first witness called by the Commonwealth was Off. Davidson, who testified for about ten minutes. He covered parole eligibility, taking into consideration whether Wyatt would receive the minimum sentence of twenty years, another term of years, or the maximum sentence of life in prison. Off. Davidson explained to the jury that the Parole Board has three options for inmates: grant parole, give a deferment, or order a serve-out. Off. Davidson testified that if Wyatt received a life sentence and later was placed on parole, he would be supervised for the rest of his life. By contrast, if Wyatt received a term of years and later was paroled, he would serve-out the remainder of his term of years supervised. The following exchange is the portion of Off.

Davidson's testimony to which Wyatt now objects:

**Commonwealth:** Well, let me ask you about a serve-out. Is a serve-out exactly day-for-day service?

**Off. Davidson:** No. It could be a serve-out to where they'll put him back in, and he's still going to get his time while he's in prison, and maybe can be eligible for another type of supervision, such as, well, not of these charges, but they can serve him out, and he'll still be eligible for another parole date.

Wyatt's counsel did not object to this testimony and declined to cross-examine Off. Davidson at all. Wyatt now argues that based on Off. Davidson's testimony, it would be reasonable for a jury to believe that even if the Parole Board ordered Wyatt to serve-out his life sentence, he would still be eligible for another parole date automatically and one day would be released. In other words, Wyatt contends that Off. Davidson's testimony implied that a serve-out might function like a long deferment. Wyatt claims this testimony was incorrect and contrary to the administrative regulations which define "serve-

out” as “a decision of the board that an inmate shall serve until the completion of his sentence.” 501 KAR<sup>8</sup> 1:030(10). Wyatt maintains that Off. Davidson’s testimony “but they can serve him out and he’ll still be eligible for another parole date” misled the jury into thinking that if it gave him the maximum sentence of life in prison, he would remain parole eligible and would one day be released, no matter what.

In response, the Commonwealth points out that if an inmate receives a life sentence and if the Parole Board at some point orders a serve-out of that sentence, two avenues exist by which an inmate still may become eligible for parole. Thus, Off. Davidson’s testimony technically was not incorrect. The Commonwealth directs us to KRS<sup>9</sup> 439.3405, which provides for early medical parole, and the Policies and Procedures of the Kentucky Parole Board, which permit the Board Chairperson to request reconsideration of any case before the Parole Board. See KYPB<sup>10</sup> 10-01(P), 10-00(E). The Commonwealth argues that a serve-out does not necessarily mean that a Kentucky inmate will never again appear before the Parole Board and that had Wyatt taken the opportunity to explore Off. Davidson’s testimony on cross-examination, the issue could have been clarified.

We concur with the Commonwealth. Regardless of whether either of those two avenues might be available to Wyatt, Off. Davidson’s testimony was

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<sup>8</sup> Kentucky Administrative Regulations.

<sup>9</sup> Kentucky Revised Statutes.

<sup>10</sup> Kentucky Parole Board Policies and Procedures.

not false, as an inmate still may become parole eligible even after ordered to serve-out a sentence of life imprisonment. Considering Off. Davidson's testimony as a whole, and not isolating the portion Wyatt now challenges, the record reveals that Off. Davidson accurately testified to Kentucky's parole eligibility scheme and explained to the jury that no inmate is guaranteed parole. He explained that when an inmate appears before the Parole Board, the Board will consider a number of factors, the primary of which being the inmate's behavior while incarcerated. Furthermore, the mechanisms of parole eligibility with respect to the various sentencing options were again explained to the jury by the Commonwealth in its closing argument.

Not only was the jury presented with its sentencing options and how they interplay with parole eligibility, it was also informed of Wyatt's criminal history. Off. Davidson testified that at the time of Foley's murder, Wyatt was on conditional discharge on a theft charge; he had previously pled guilty to a fourth-degree assault domestic violence charge, for which he served thirteen days in jail; and he had two prior felony convictions: one for theft by unlawful taking and the other for receiving stolen property. In its closing argument, the Commonwealth emphasized that Wyatt was a convicted felon and even had time over his head for the theft charge when he committed murder. The Commonwealth asked the jury to sentence Wyatt so that he would be supervised for the rest of his life if released on parole.

Lastly, the jury heard the heart-wrenching testimony of Foley's mother on the loss of her youngest son. The defense called no penalty phase

witnesses. Considering the horrific act of violence for which the jury found Wyatt guilty, and the penalty phase evidence presented, we do not believe a substantial probability exists that the jury would have recommended a lighter sentence had Off. Davidson's testimony about serve-outs been omitted or clarified. As a result, Wyatt has failed to show any palpable error occurred or that reversal on this claim of error is warranted.

C. Sentence of imprisonment.

Wyatt contends, and the Commonwealth agrees, that the judgment of conviction contains an error to the extent that the trial court sentenced Wyatt to life imprisonment plus five years. Wyatt failed to object at the time of sentencing or file a motion to correct the sentence shortly after its entry so as to allow the trial court to amend it. Still, the law is clear that a sentence for a term of years cannot be ordered to run consecutively with a life sentence when both sentences arise out of the same action. *Bedell v. Commonwealth*, 870 S.W.2d 779, 783 (Ky. 1993); *see also Higgins v. Commonwealth*, No. 2014-SC-000466-MR, 2016 WL 671150, at \*7-8 (Ky. February 18, 2016) (applying same reasoning as *Clay*); *Clay v. Commonwealth*, No. 2009-SC-000012-MR, 2010 WL 2471862, at \*4 (Ky. June 17, 2010) (when read together, KRS 532.110 and 532.080 apply to sentences rendered in the same action for separate offenses).<sup>11</sup> Accordingly, we vacate Wyatt's sentence to the extent it imposed a

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<sup>11</sup> Kentucky Rule of Civil Procedure 76.28(4)(c) permits citation of unpublished Kentucky appellate decisions, rendered after January 1, 2003, "if there is no published opinion that would adequately address the issue before the court."

term of years in addition to the life sentence. We remand to the trial court with instructions to enter a corrected judgment in conformance with this opinion such that Wyatt's five-year sentence is to run concurrent with his sentence of life imprisonment.

**C. Conclusion.**

Wyatt's sentence is vacated and this case is remanded with instructions for the trial court to enter a new judgment consistent with this opinion. In all other respects, the judgment of the Knox Circuit Court is affirmed.

All sitting. All concur.

**COUNSEL FOR APPELLANT:**

Molly Mattingly  
Adam Meyer  
Assistant Public Advocate  
Department of Public Advocacy

**COUNSEL FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

Perry Thomas Ryan  
Assistant Attorney General