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SEPTEMBER 10, 2008
(FILE NO. 2007-SC-0809-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001422-MR

MICHAEL DEAN — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 93-CR-00125

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND WINE; JUDGES; KNOPF,[1] SENIOR JUDGE.

ACREE, JUDGE: Michael Dean appeals from an order of the Wayne Circuit Court denying his motion for a new trial, filed pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. He argues that the trial court erroneously denied his motion despite obvious ineffective assistance of counsel. Defense counsel failed to request a

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

mistrial or an admonition after the prosecutor made comments of a testamentary nature and further failed to object to improper comments during the prosecutor's closing argument. These issues were previously considered on direct appeal but failed to rise to the level of palpable error. RCr 10.26. Nevertheless, it is clear that counsel's complained of conduct entitles Dean to a new trial under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Consequently, the decision of the trial court is reversed and remanded for further proceedings consistent with this opinion.

Dean was charged with three counts of criminal possession of a forged instrument in the second degree and being a persistent felony offender in the second degree after allegedly passing checks at two stores in Monticello. The checks were stolen from Arthur Tewell by his neighbor Felicia Hicks. While the case was under investigation, Hicks was questioned by Deputy Sheriff Ralph Miniard. She told Miniard that Dean had cashed two checks at Shopwise and Dean and a friend had cashed a third check at K & P Market. The grand jury returned an indictment and Dean was tried. Before jury selection, the Commonwealth moved to dismiss the count relating to the check cashed at K & P. Tewell, Hicks and Miniard all testified for the Commonwealth, along with Robert Taylor, the store manager at Shopwise. The jury found Dean guilty of both counts and recommended a sentence of five years on each, with one count being enhanced to ten years due to Dean's status as a persistent felony offender. The trial court imposed the recommended sentences, but ignored the jury's recommendation that the sentences should be run concurrently, imposing instead a sentence of fifteen years' imprisonment.

On direct appeal, Dean argued that the prosecutor's improper remarks deprived him of a fair trial. The first incident occurred during Hicks' testimony when she attempted to partially exonerate Dean by stating that he had cashed only one check. Hicks acknowledged that her trial testimony contradicted the statement she had made to Miniard, but claimed she was mad at Dean at the time and was protecting the individual who had cashed the second check. According to her trial testimony, Hicks stole the checks from Tewell's house while she was using his telephone, filled them out and gave one to Dean and the others to Doug McGuire. She told the jury that McGuire cashed the second check at Shopwise by pretending to be Dean.

During Hicks' testimony, the prosecutor asked whether she had ever mentioned McGuire's involvement prior to trial, and she responded that she had. She answered in the negative when asked whether she had told anyone in law enforcement, but answered affirmatively when questioned about telling anyone in the Commonwealth's Attorney's office. Hicks informed the jury that she had told the prosecutor about McGuire on Thursday, to which he responded, “Thursday of last week? You never told me about a Doug McGuire.” Hicks persisted that she had told the prosecutor and that he had written it down. The prosecutor denied writing down McGuire's name. At this point, Dean's trial counsel made an objection which the trial court sustained. On cross-examination, Hicks testified that McGuire had also cashed the third stolen check at K & P.

At the conclusion of Hicks' testimony, a bench conference was held. The prosecutor proposed putting himself under oath to contradict Hicks' assertion that she had given him McGuire's name prior to trial. Dean's trial counsel objected, and the trial court

ruled that the jury had already heard enough on the subject. At no time did Dean's trial counsel request a mistrial or an admonition to disregard the prosecutor's statement. We found on direct appeal that palpable error did not occur.

The second incident Dean cited in his direct appeal occurred during the prosecutor's closing argument. While attempting to explain to the jury his decision to drop one of the charges against Dean, the prosecutor made statements to the effect that he would not waste their time by presenting a charge unless he could prove it. The prosecutor further stated that he would not ruin his own credibility by prosecuting unsubstantiated charges and that, if he presented a case, he believed in the accusations made. Dean's counsel failed to object to these improper statements, and we declined to find palpable error. Nevertheless, in our unpublished opinion 2004-CA-002124-MR, we did state

> "[I]t is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted." *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979) (citations omitted). "[T]he personal opinion of counsel has no place at trial." *Id*. "[E]xpressions of personal belief of the innocence or guilt of an accused are error[.]" *Id*. at 755. We agree that the prosecutor's comments were improper. *Bess*, 593 F.2d 749. However, as the error was unpreserved, our review becomes one for manifest injustice. RCr 10.26.

In determining that manifest injustice had not occurred, we focused on the fact that the prosecutor was explaining his decision to drop one count of the indictment, rather than specifically addressing his belief regarding the remaining charges.

The Commonwealth argues that these issues are not properly before this Court on appeal from the denial of Dean's RCr 11.42 motion. "RCr 11.42 cannot be used to relitigate issues decided on direct appeal, or to raise issues that could have been presented on direct appeal." *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000). "An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming it amounts to ineffective assistance of counsel." *Sanders v. Commonwealth,* 89 S.W.3d 380, 385 (Ky. 2002). (Citations omitted.) This argument ignores the controlling case law on the issue. In *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Kentucky Supreme Court was asked to determine whether unsuccessfully litigating a claim of palpable error on direct appeal precluded a successful RCr 11.42 claim on the same issue. The Court's analysis focused on the difference in the standards of proof required under RCr 10.26 and *Strickland*, and concluded that RCr 11.42 relief may still be required, even where there is no palpable error.

> 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.

Martin, 207 S.W.3d at 5 (Ky. 2006). Consequently, the Commonwealth's contention--that Dean cannot raise the same claims of error related to the prosecutor's improper statements during trial—is incorrect.

In order to successfully claim ineffective assistance of counsel, Dean must meet a two-prong test, showing first that his trial counsel was deficient and, second, that trial counsel's errors prejudiced his defense. *Strickland*, 466 U.S. at 687 (1984). "On collaterally attacking his conviction or sentence, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* , 466 U.S. at 694.

> In reviewing an ineffectiveness claim, the court must consider the totality of the evidence before the judge or jury at trial and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonably professional assistance.

Sanborn, 975 S.W.2d at 911. (Citation omitted.)

We turn now to an examination of the evidence supporting each of the two charges of criminal possession of a forged instrument presented to the jury. Hicks testified at trial that she had given one of the stolen checks to Dean and the others to McGuire. She claimed McGuire had cashed the second check at Shopwise by impersonating Dean. However, she did admit that her trial testimony about McGuire's role was different from the statement she first gave the deputy sheriff after the theft was

discovered. In our previous opinion on direct appeal, we summarized the testimony of Commonwealth's witness Taylor as follows:

> Taylor, the co-owner and manager of the Shopwise, personally knew Dean, and identified him as the person having presented Check No. 1663 (Count 1) to him. Taylor testified that the cashier who had accepted Check No. 1669 (Count 3) was deceased. Dean's driver's license and social security numbers were written on Check No. 1669. Taylor testified that it was standard procedure for a cashier to write the driver's license number on a check if the cashier does not know the customer.

With the unfortunate death of one of the cashiers, there was no one to identify Dean as the person who brought the second check into the Shopwise, and one witness claiming personal knowledge that McGuire had that check.

What might have been grounds for reasonable doubt on the part of the jury was juxtaposed with the prosecutor's personal statements that he had never been told about McGuire and that he would not pursue charges against a defendant he believed could be innocent. In the face of these improper statements, counsel's inaction does not appear to be part of any recognizable trial strategy. During Hicks' examination, counsel objected to the prosecutor's statement, but requested neither an admonition nor a mistrial. The prosecutor's improper remarks during closing argument passed unchallenged. Dean argues persuasively that counsel's failure to address these comments was sufficient to undermine confidence in the outcome of his trial. Consequently, we must reverse this case and remand it to the trial court for further proceedings.

For the forgoing reasons, the judgment of the Wayne Circuit Court is reversed, and this case is remanded for further proceedings consistent with this opinion.

WINE, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, DISSENTS.

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