RENDERED: March 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000384-MR

COREY L. JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NOS. 99-CR-001999 AND 99-CR-002220

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN PART,

VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Corey L. Johnson appeals from a Jefferson Circuit Court opinion and order which denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct his thirteen-year sentence for assault, escape, resisting arrest, tampering with physical evidence and being a persistent felony offender.

On the morning of August 14, 1999, at approximately 4:27 a.m., Jefferson County Deputy Sheriff William Hutchison stopped Johnson on Interstate 65 allegedly for speeding and recklessly driving his motorcycle at approximately 110 m.p.h. During the encounter, a struggle ensued after Deputy Hutchison allegedly put one handcuff on Johnson while placing him under arrest. In the struggle, Johnson hit Deputy Hutchison in the face several times causing injuries to his face including several lacerations, bruising, swelling and a fractured nose. Johnson left the scene on his motorcycle, and Deputy Hutchison was taken semi-conscious to the hospital emergency room for treatment. Later in the day at approximately 3:30 p.m., the police went to a motel on a report of a hit and run involving a motorcycle and discovered Johnson's motorcycle with blood on it, the license plate removed, and a bloody shirt in the motel lobby. Two days later, Johnson turned himself in to the police and was treated for injuries to his left hand.

On August 17, 1999, a grand jury indicted Johnson in Case No. 99-CR-001999 for assault in the first degree (Assault I),[1] escape in the first degree (Escape I),[2] resisting arrest,[3]

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[1] Ky. Rev. Stat. (KRS) 508.010 (Class B felony).

[2] KRS 532.020 (Class C felony).

[3] KRS 520.090 (Class A misdemeanor).

and being a persistent felony offender in the second degree (PFO II).[4] On September 13, 1999, another grand jury returned a second indictment in Case No. 99-CR-002220 charging Johnson with assault in the third degree (Assault III)[5] and tampering with physical evidence[6] involving the same incident with Deputy Hutchison. The two indictments were consolidated for further proceedings.

On September 12, 2000, Johnson entered a guilty plea pursuant to North Carolina v. Alford[7] and a plea agreement with the Commonwealth to an amended charge of assault in the second degree (Assault II),[8] Escape I, Resisting Arrest, Tampering with Physical Evidence, and PFO II. Under the plea agreement the Commonwealth moved to dismiss the count of Assault III and recommended sentences of ten years on both the Assault II and Escape I offenses enhanced to thirteen years for being a PFO II, five years for Tampering with Physical Evidence enhanced to ten

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4 KRS 532.080.

5 KRS 508.025 (Class D felony).

6 KRS 524.100 (Class D felony).

7 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). A defendant pleading guilty under Alford declines to admit his guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction.

8 KRS 508.020 (Class C felony).

years for being a PFO II, and twelve months for Resisting Arrest, all to run concurrently for a total sentence of thirteen years.[9] Johnson waived preparation of a presentence investigation report and the circuit court immediately sentenced him to serve thirteen years consistent with the Commonwealth's recommendation.

On May 1, 2001, Johnson filed a pro se motion to vacate pursuant to RCr 11.42 based on ineffective assistance of counsel, lack of evidence and double jeopardy. He also filed associated motions for an evidentiary hearing and appointment of counsel. On May 7, 2001, the circuit court granted the motion to appoint counsel. On October 18, 2001, counsel filed a supplement to the RCr 11.42 motion alleging ineffective assistance for counsel's failure adequately to advise Johnson of a possible extreme emotional disturbance defense. On February 2, 2002, the circuit court rendered an opinion and signed an order denying the motion without a hearing stating that the guilty plea colloquy established that Johnson had not been prejudiced by counsel's representation. This appeal followed.

[9] As part of the plea agreement, Johnson also plead guilty to an unrelated offense of obtaining a controlled substance by fraud or deceit in Case No. 00-CR-001313 with a recommended sentence by the Commonwealth of one year to be served consecutively to the thirteen year sentence under Case No. 99-CR-001999 and No. 99-CR-002220 for a total sentence of fourteen years.

Johnson raises numerous issues involving his guilty plea, most of which are based on a charge of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair.[10] Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance[11] and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but rather would have insisted on going to trial.[12] The burden is on the defendant to overcome a strong presumption that

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[10] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

[11] McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970); Phon v. Commonwealth, Ky. App., 51 S.W.3d 456, 459 (2000).

[12] Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 360, 370, 88 L. Ed. 2d 203 (1985); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999).

counsel's assistance was constitutionally sufficient.[13] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[14] Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of law and fact.[15] While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to de novo review on appeal.[16]

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant is not automatically entitled to an evidentiary hearing on the motion.[17] However, an evidentiary hearing is required on an RCr 11.42 motion where the

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[13] Strickland, supra, n. 10, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

[14] Harper v. Commonwealth, 978 S.W.2d at 311, 315 (1998); Russell, supra, n. 12, 992 S.W.2d at 875.

[15] Strickland, supra, no. 10, 466 U.S. at 698, 104 S. Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997).

[16] See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996); Groseclose, id., 130 F.3d. at 1164.

[17] Harper, supra, n. 14, 978 S.W.2d at 314; Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998).

issues raised in the motion are not refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction.[18] "A judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them."[19]

Johnson attacks his escape conviction on numerous grounds. First, he alleges that his plea to this offense was based on his understanding that he was pleading guilty to escape in the second degree,[20] not escape in the first degree. While in one instance during the guilty plea hearing the trial judge did mistakenly refer to the charge as escape in the second degree, in all other instances, which were numerous, he correctly referred to it as escape in the first degree. Also, the Commonwealth's Offer on a Plea of Guilty document signed by Johnson clearly lists the offense as Escape I. Johnson's claim that he thought he was pleading guilty to escape in the second degree is unreasonable and clearly refuted by the record.

Johnson asserts that counsel was ineffective for not advising him that certain evidence concerning the events of the incident was inadmissible hearsay and failing to move to

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[18] Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001); Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

[19] Fraser, id., 59 S.W.3d at 453.

[20] KRS 520.030.

suppress such evidence prior to trial. This issue is based on Johnson's misunderstanding of legal procedure. The offensive so-called "hearsay evidence" is Johnson's characterization of "testimony" by Detective Jeffrey Whobrey, who investigated the case. Johnson states that counsel should have moved to suppress "testimony" by Detective Whobrey concerning statements made to him by Deputy Hutchison and other witnesses because the statements were inadmissible investigative hearsay. He further concludes that without Detective Whobrey's alleged hearsay testimony, the Commonwealth would have been unable to prove an element of escape, that being he was in custody prior to fleeing the scene.

This argument apparently is derived from statements made by the prosecutor at the guilty plea hearing during which he stated that the prosecution would present evidence that Johnson struck Deputy Hutchison just after the deputy had placed one of the two handcuffs on Johnson while making an arrest. The prosecutor also stated that Detective Whobrey would testify for the Commonwealth at trial. The prosecutor did not state that Detective Whobrey's testimony would be based on hearsay statements. The prosecutor mentioned that Detective Whobrey would testify that Deputy Hutchison's handcuffs were never recovered. Moreover, the prosecutor said Deputy Hutchison would

testify that Johnson attacked him while he was arresting him. In conclusion, there was sufficient evidence other than any hearsay statements made to Detective Whobrey to support the escape charge and Johnson has not established that the detective would have even attempted to testify at trial as to hearsay statements made to him. Consequently, defense counsel was not deficient in failing to move to suppress any alleged hearsay statements to Detective Whobrey prior to trial or not advising Johnson that such statements were inadmissible.

Johnson also contends that defense counsel was ineffective for allowing him to plead guilty to tampering with physical evidence because the indictment with respect to that offense had been improperly informally amended. He states that the indictment was originally based on his having fled the scene on his motorcycle, which had blood on it, but that the prosecutor stated at the guilty plea hearing that he would seek a conviction based on Johnson's removal from the scene of his blood-stained shirt and Deputy Hutchison's handcuffs.[21] This argument is without merit.

[21] Johnson implies that removal of the motorcycle no longer provided evidentiary support for the tampering charge because test results allegedly indicated only his blood was on it. The record does not contain the test results or the reason why the prosecution did not mention the motorcycle at the hearing.

First, there is nothing in the record to support Johnson's assertion that the indictment was based solely on the removal of the motorcycle. The indictment charged Johnson with:

> Tampering with Physical Evidence when, believing that an official proceeding may be pending or instituted against him, he destroyed, mutilated, concealed, removed or altered the physical evidence which he believed was about to be produced or used in such official proceeding, with the intent to impair its veracity or availability in an official proceeding.

The indictment did not limit or restrict this count to the motorcycle. Even so, the prosecution notified the defense shortly after arraignment through discovery of its intent to offer evidence on the handcuffs and bloody shirt at trial. An indictment may be amended at any time to conform to the proof at trial provided that no additional or different offense is charged and the substantial rights of the defendant are not prejudiced by undue surprise.[22] The Commonwealth obtained an

[22] See Schambon v. Commonwealth, Ky., 821 S.W.2d 804, 809-10 (1991); Anderson v. Commonwealth, Ky., 63 S.W.3d 135, 140-41 (2001); RCr 6.16. See also United States v. Prince, 214 F.3d 740, 756-59 (6th Cir. 2000) (discussing difference between amendment, constructive amendment, and variance with indictment).

order from the court requiring Johnson to provide a blood sample for, inter alia, comparison with the bloodstains on the shirt recovered from the motel. Johnson did not deny having fought with and injuring Deputy Hutchison, but rather raised a justification defense. As a result, utilization of evidence concerning the handcuffs and bloody shirt to establish the offense of tampering with physical evidence would not have constituted an improper constructive amendment of the indictment.[23] Defense counsel was not deficient for advising Johnson to plead guilty to tampering with physical evidence based on the evidence proffered by the Commonwealth.

Johnson challenges the guilty plea by alleging that counsel erroneously told him that he would receive less than the maximum sentence on all the offenses. He asserts that counsel's faulty performance is evidenced by the fact that he received the maximum sentence on the tampering with physical evidence charge. While Johnson did receive the maximum sentence for the tampering with physical evidence offense, he received less than the maximum sentence on the Assault II and Escape I offenses, which carried sentence up to twenty years as enhanced by the PFO II

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[23] See, e.g., Washington v. Commonwealth, Ky. App., 6 S.W.3d 384 (1999) (harmless error analysis applies to amendment of indictment); cf. Wolfrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997) (amendment to indictment changing named principals in murder from defendants to unknown persons held to be illegal).

offense. Moreover, the sentences for all the offenses involving Deputy Hutchison were run concurrently, rather than consecutively, so Johnson did not receive the maximum sentence. Even assuming counsel told Johnson he would receive less than the maximum sentence on all the charges, counsel was not deficient because this advice was not erroneous.

Johnson also attacks his guilty plea to the Assault II offense based on his contention that counsel failed to investigate the extent of Deputy Hutchison's injuries, failed to advise him of the potential defense of extreme emotional disturbance, and failed to advise him of and challenge the indictments on double jeopardy grounds. With respect to the officer's injuries, Johnson objects to the Commonwealth's characterization of Deputy Hutchison's injuries as "broken bones" in describing the evidence during the guilty plea hearing in support of the assault charge. He notes that the medical records refer to the deputy's nose injury as "comminuted bone fracture." While the extent of injury is a factor differentiating Assault I (requiring serious physical injury) and Assault II (requiring physical injury), Johnson has not shown that this issue renders his guilty plea suspect. The Commonwealth stated that if the case had gone to trial, it could produce testimony from a medical expert that Deputy Hutchison's

injuries constituted serious physical injury. The record indicates that defense counsel employed and received an opinion from a medical expert, but the exact content of that opinion is not revealed. Nevertheless, Deputy Hutchison clearly suffered physical injury. Deputy Hutchison's statements and the nature of his injuries also suggest that he was hit in the face with an instrument, presumably the handcuffs. Given the location and extent of the injuries, the handcuffs arguably would have constituted a "dangerous instrument."[24] There was sufficient evidence of the elements for Assault II. Accordingly, Johnson has not shown counsel's performance was deficient or that he suffered actual prejudice in that there was a reasonable probability he would not have been convicted of Assault II at trial.

Johnson asserts that counsel was ineffective for failing to inform him that he could not be convicted of both Assault I and Assault III under the prohibition against double jeopardy. He states counsel should have sought to dismiss one of the assault counts on double jeopardy grounds. The double jeopardy clause of the Fifth Amendment of the United States

[24] A dangerous instrument is any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article or substance which, under the circumstances in which it is used, . . . is readily capable of causing death or serious physical injury. KRS 500.080(3).

Constitution states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Section 13 of the Kentucky Constitution contains a similar provision. Double jeopardy prohibits: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[25] This case implicates the multiple punishments aspect of the double jeopardy protection involving multiple prosecutions within the same proceeding. In this type of situation, if double jeopardy applies to multiple offenses, the proper procedure is to tailor the instructions to require alternative findings of guilt, rather than dismissal of a charge prior to trial.[26] The double jeopardy clause does not preclude multiple convictions, only judgments imposing multiple punishments.[27] Thus, Johnson's assertion that counsel was

[25] United States v. Ursery, 518 U.S. 267, 271-74, 116 S. Ct. 2135, 2139-40, 135 L. Ed. 2d 549 (1996); Hourigan v. Commonwealth, Ky., 962 S.W.2d 860, 862 (1998).

[26] See Commonwealth v. Black, Ky., 907 S.W.2d 762 (1995).

[27] See Carter v. Commonwealth, Ky., 782 S.W.2d 597, 601 (1989); Walden v. Commonwealth, Ky., 805 S.W.2d 102, 106-07 (1991), overruled on other grounds by Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), cert. denied sub. nom., Effinger v. Kentucky, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997).

ineffective for not seeking dismissal of one of the assault charges prior to trial is incorrect.

In addition, Johnson's claim that double jeopardy would preclude punishment for both Assault I and Assault II appears to be erroneous. In Commonwealth v. Burge,[28] the Kentucky Supreme Court adopted the "same elements" test enunciated in Blockburger v. United States,[29] for determining when a single act or transaction may violate two distinct statutory provisions for purposes of double jeopardy. Under this test, "[d]ouble 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.'"[30] The Kentucky Supreme Court has stated the Blockburger analysis is the exclusive test for determining double jeopardy involving multiple statutes.[31] It focuses on the statutory elements and the indictment rather than

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[28] Supra, n. 27.

[29] 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

[30] Burge, supra, n. 27, 947 S.W.2d at 811 (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 2d 306 (1932)).

[31] See Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 358 (1999); Barth v. Commonwealth, Ky., 80 S.W.3d 390, 399 (2001). But see also KRS 505.020 (codifying Blockburger analysis).

the entire conduct of the defendant.[32] The Blockburger analysis requires proof of an additional fact or element for each offense not necessary to establish the other offense.[33]

In the current case, Johnson was indicted for Assault I under KRS 508.010, which involves intentionally causing serious physical injury to another person by mean of a deadly weapon or a dangerous instrument, and for Assault III under KRS 508.025(a)(1), which involves intentionally causing physical injury to a peace officer. In addition, Assault II under KRS 508.020(1)(b) involves intentionally causing physical injury to another person by means of a deadly weapon or dangerous instrument. Applying the same elements test, intentional Assault I or Assault II requires proof of use of a deadly weapon or dangerous instrument not necessary to establish Assault III. Similarly, intentional Assault III requires proof that the victim be a peace officer, which is not necessary to prove Assault I or Assault II. Accordingly, intentional assault of a peace officer would not constitute a lesser included offense of either Assault I or Assault II and punishment for Assault III and either Assault I or Assault II would not be barred by double

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[32] Id.

[33] Burge, supra, n. 27, 947 S.W.2d at 809.

jeopardy.[34] Assault II was intended to punish and prevent injurious behavior directed at law enforcement personnel, while Assault I and Assault II require use of a deadly weapon or dangerous instrument. The former targets a specific type of victim and the latter target an instrumentality. Thus, Johnson's counsel would not have been deficient for failing to advise him about a double jeopardy defense.

Even if a double jeopardy defense was available, Johnson has not shown that he suffered actual prejudice by counsel's failure to advise him of it. Under the plea agreement, Johnson pled guilty to the amended charge of Assault II and the Commonwealth moved to dismiss the Assault III charge. As stated earlier, there was sufficient evidence to submit instructions on Assault I, Assault II, and Assault III to the jury. While the issue of the extent of Deputy Hutchison's injuries was disputed, the evidence supporting Assault II was very strong. Therefore, there is not a reasonable probability that had he gone to trial, Johnson would have been acquitted of

[34] See, e.g., State v. Dunbar, 37 Conn. App. 338, 656 A.2d 672 (1995). We note that Assault III can also be established by proof the defendant recklessly with a deadly weapon or dangerous instrument caused physical injury to a peace officer. KRS 508.025(a)(1). Double jeopardy would bar punishment under this prong of the offense and either Assault I or Assault II because it does not require proof of a fact not contained in the latter offenses. See also KRS 505.020(2)(d) (extent of injury not differentiating element).

Assault II and his decision whether to plead guilty would have been different based on any double jeopardy bar.

Finally, Johnson contends counsel was ineffective for failing to advise him of a possible extreme emotional disturbance defense. In his affidavit accompanying the supplemental RCr 11.42 motion, Johnson alleges Deputy Hutchison made a racial comment and suggested he could afford such a nice motorcycle because he was a drug dealer. He states that the officer "without warning" sprayed him with Mace several times and then knocked him off his motorcycle. Johnson continues:

> By way of reaction to this unexpected attack and acting solely by instinct and in fear of my personal safety and wellbeing, I pushed Hutchinson [sic] away from me while attempting to block any more [M]ace being shot in my face. At this point Deputy Hutchinson [sic] plainly stated "Oh, we got us a nigger that likes to resist arrest . . . well I got something for you bitch." Hutchinson [sic] then struck affiant with a left hook thereby beginning a brief struggle wherein affiant was forced to protect himself from what was obviously a dangerous and volitable [sic] situation. Affiant, acting in fear of his own safety, if not his very life, broke away from

the Deputy, picked up his motorcycle and left the scene, leaving Hutchinson [sic] still on the ground constantly spraying [M]ace and cursing me.

Extreme emotional disturbance has been defined as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."[35] Extreme emotional disturbance requires provocation with a "triggering event" that is sudden and uninterrupted,[36] and involves viewing the circumstances subjectively from the defendant's point of view.[37] "Evidence of mere 'hurt' or 'anger' is insufficient to prove extreme emotional disturbance.[38] The existence of extreme emotional disturbance serves to mitigate punishment rather than

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[35] McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-69 (1986). See also Holbrook v. Commonwealth, Ky., 813 S.W.2d 811, 815 (1991), overruled on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998).

[36] Springer v. Commonwealth, Ky., 998 S.W.2d 439, 452 (1999); Foster v. Commonwealth, Ky., 827 S.W.2d 670 (1991); Baze v. Commonwealth, Ky., 965 S.W.2d 817, 823 (1997).

[37] Spears v. Commonwealth, Ky., 30 S.W.3d 152, 155 (2000); Fields v. Commonwealth, Ky., 44 S.W.3d 355, 358 (2001); Gall v. Commonwealth, Ky., 607 S.W.2d 97, 108 (1980); KRS 507.020(1)(a).

[38] Talbott v. Commonwealth, Ky. 968 S.W.2d 76, 85 (1998) (citing Thompson v. Commonwealth, Ky., 862 S.W.2d 871 (1993)).

provide total exoneration, and generally must be proven by the defendant.[39] Under KRS 508.040(1), extreme emotional disturbance is available as a defense to prosecution for an intentional assault in the first, second or fourth degree, but not assault in the third degree.[40] Conviction for assault under extreme emotional disturbance reduces the classification and resulting range of punishment for offenses that otherwise would constitute Assault I (Class B felony) and Assault II (Class C felony) to one to five years commensurate with a Class D felony.[41]

In the current case, Johnson asserts that defense counsel never advised him of the availability of an extreme emotional disturbance defense and that he would have decided to go to trial rather than plead guilty had he been so advised. The circuit court denied the RCr 11.42 motion and an evidentiary hearing primarily based on the guilty plea colloquy in which Johnson stated that he was satisfied with counsel's advice. While a defendant's representations at a Boyken[42] hearing

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[39] See Engler v. Commonwealth, Ky., 627 S.W.2d 582, 583 (1982).

[40] See also Wyatt v. Commonwealth, Ky. App., 738 S.W.2d 832 (1987).

[41] KRS 508.040(2)(a).

[42] Boyken v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 224 (1969).

constitute a formidable barrier in any subsequent proceeding, that barrier is not insurmountable.[43] A defendant's statements at the guilty plea hearing concerning his relationship with counsel must be evaluated in light of what the defendant knew or should have known and do not necessarily preclude him from subsequently raising issues of ineffective assistance. Representations in response to general questions do not conclusively refute specific allegations of ineffective assistance of counsel sufficient to justify denial of a hearing.[44] The availability of an extreme emotional disturbance defense was not specifically discussed at the Boyken hearing and neither Johnson's representations during that hearing nor anything else in the record clearly refute his claim that counsel did not advise him of that defense.

The circuit court also found that Johnson failed to establish he was prejudiced by counsel's representation, but it did not specifically analyze his extreme emotion disturbance claim. Instead, the court merely stated that Johnson received a sentence less severe than he could have received had he gone to

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[43] Fraser, supra, n. 18, 59 S.W.3d at 457.

[44] See, e.g., Fraser, supra; Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001)(hearing ordered on allegation attorney advised him that sentence under plea agreement was illegal and would be reduced at a later date).

trial. While the potential sentence facing a defendant is relevant, it is not the sole factor and must be balanced with other considerations relevant to a defendant's decision whether to go to trial or plead guilty. As the court stated in Hill v. Lockhart,[45] "where he [the defendant] alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."

Johnson has alleged sufficient facts to support an extreme emotional disturbance defense. Johnson and Deputy Hutchison were the only witnesses to the incident. Although the Commonwealth indicated it would call a medical expert and the investigative officer as witnesses at trial, the exact content of their testimony is not revealed. The current record contains insufficient information to evaluate the viability of an extreme emotional disturbance defense. Additionally, Johnson would have been subject to a maximum sentence of ten years on a conviction for either Assault I or Assault II under Extreme Emotional Disturbance as enhanced by the PFO II, which is less than the thirteen years he received under the guilty plea. As a result, we cannot say the record clearly refutes Johnson's claim of

[45] 474 U.S. at 59, 106 S. Ct. at 371.

actual prejudice provided he was not advised or aware of an extreme emotional disturbance defense. Consequently, an evidentiary hearing is necessary to provide further information on counsel's performance, i.e., whether he discussed a potential extreme emotional disturbance defense with Johnson and counsel's handling of this issue, and any actual prejudice should defense counsel's performance be deemed deficient. The circuit court's order denying Johnson's RCr 11.42 motion must be vacated with respect to his claim of ineffective assistance of counsel concerning a potential extreme emotional disturbance defense, and this case must be remanded for an evidentiary hearing on and reconsideration by the court of that issue.

The order denying Johnson' RCr 11.42 motion is affirmed in part and vacated in part, and this case is remanded to Jefferson Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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