

RENDERED: May 6, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001729-MR

JASON WAYNE CAUDILL

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT  
v. HONORABLE MARY C. NOBLE, JUDGE  
ACTION NOS. 01-CR-01061; 01-CR-00307; 00-CR-01303

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Jason Wayne Caudill (Caudill) brings this appeal from an Order of the Fayette Circuit Court, entered August 4, 2004, summarily denying his "Motion for Relief," made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel in the entry of a guilty plea to ten felony offenses and five misdemeanor

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

offenses, resulting in a sentence of twenty-five years' imprisonment and \$21,025.00 in restitution. Before us, Caudill argues that the circuit court erred in not holding an evidentiary hearing to address his claim of ineffective assistance of counsel. Having reviewed the record, we conclude that Caudill is entitled to an evidentiary hearing on the sole issue of effective assistance of counsel pertaining to restitution; therefore we affirm in part, reverse in part, and remand.

During a ninety-day period in the fall of 2000, Caudill and a juvenile conducted a series of break-ins of five homes, a church, a school, and a business; each place was extensively vandalized and/or had property taken. According to Caudill's testimony at the guilty plea, they were looking for money and were also taking property to sell in order to buy drugs and get high on "coke and weed." He also admitted starting a fire in one home. Arrest slips in the record indicate that Caudill admitted to 1) entering four homes without permission; 2) setting a fire in and taking a firearm from one home; 3) using the stolen firearm to shoot out equipment windows at a business; 5) entering a church and a school without permission; and 6) taking two vans from a church and setting one on fire. Pictures filed in the record show the extent of

ransacking and damage which occurred in the homes, church and school.

As a result, Caudill was indicted on multiple counts of multiple degrees of burglary (Kentucky Revised Statutes (KRS) 511.020, .030, .040); second-degree arson (KRS 513.030); multiple counts of felony theft (KRS 514.030); multiple counts of multiple degrees of criminal mischief (KRS 512.020 and .040); multiple counts of multiple degrees of criminal trespass (KRS 511.060 and .070); and multiple counts of second-degree unlawful transaction with a minor (KRS 530.065).

Caudill, represented by counsel, was arraigned on the respective charges and entered not guilty pleas. On the date set for trial, he petitioned the court, with the assistance of counsel, to enter a guilty plea. According to the standard form signed that date by Caudill and counsel, he acknowledged that he was subject to a maximum of 155 years imprisonment and a fine of \$1,000.00 on all counts, and acknowledged waiver of constitutional rights and satisfaction with counsel. Based on the Commonwealth's recommendations, he asked the court to enter a guilty plea to 1) (on Indictment No. 00-CR-01303): first-degree burglary (fifteen years); second-degree arson (ten years); second-degree burglary (five years); two counts of first-degree criminal trespass (amended from second-degree burglary) (twelve months each); two counts of third-degree

burglary (one year each); felony theft (one year); third-degree (amended from first-degree) criminal mischief (ninety days);<sup>2</sup> second-degree unlawful transaction with a minor (one year); first-degree criminal trespass (twelve months); second-degree criminal trespass (thirty days); and third-degree criminal mischief (thirty days); 2) (on Indictment No. 01-CR-00307): second-degree burglary (five years); and 3) (on Indictment No. 01-CR-01061): third-degree (amended from first degree) burglary (one year).

Although not reflected on the guilty plea form, at the entry of the plea the Commonwealth indicated, without objection by Caudill, that the recommendation included forfeiture of any items seized and a reservation of the right to object to probation and to argue that the sentences run consecutively or concurrently. The court accepted the pleas after conducting a colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

On November 21, 2001,<sup>3</sup> final judgment was entered, sentencing Caudill pursuant to his plea. The first-degree burglary (fifteen years) and second-degree arson (ten years)

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<sup>2</sup> Although the Final Judgment reflects that the Commonwealth's recommendation on this one count was one year, during the plea colloquy the Commonwealth indicated that the offer was 90 days, and this is reflected on the guilty plea form signed by Caudill and counsel.

<sup>3</sup> An amended Final Judgment on Indictment No. 00-CR-01303 was entered November 30, 2001, to correct a clerical error.

charges were run consecutively for a total of twenty-five years' imprisonment, with the remaining charges to run concurrently. Twelve charges were dismissed. After the court had sentenced Caudill, the Commonwealth spoke for the first time to the issue of restitution, indicating that for all the property damage done the amount of restitution was \$21,025.00. The Commonwealth thereafter asked the Court to reflect that amount in the sentencing order for the purpose of a condition of parole, should that event occur.<sup>4</sup>

On April 28, 2003, Caudill, pro se, filed an RCr 11.42 motion and requested appointment of counsel and an evidentiary hearing. Court-appointed counsel filed a substitute RCr 11.42 motion on November 26, 2003. On August 4, 2004, the circuit court's order summarily denying the motion was entered, concluding that Caudill's arguments of ineffective assistance of counsel were not supported by the record.

Before us, Caudill contends that he was entitled to an evidentiary hearing on his RCr 11.42 motion, arguing that the record cannot resolve his claims of ineffective assistance of counsel, specifically denial of counsel during critical stages of the proceedings. Because the circuit court did not hold an evidentiary hearing, our review is limited to "whether the motion on its face states grounds that are not conclusively

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<sup>4</sup> Kentucky Revised Statutes 532.032.

refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). The record, most specifically Caudill's guilty plea, refutes his claims that counsel was ineffective during the pre-trial and guilty plea stages of the proceedings. Therefore, we are of the opinion that the trial court's summary denial of these issues was proper.

We can, however, agree with Caudill that the record fails on the issue of counsel's effectiveness at sentencing, specifically with regard to restitution. The Commonwealth asked the court to impose restitution of \$21,025.00 after the court had imposed the twenty-five year sentence. Our review of the record indicates that this was the only reference to restitution - it was not a part of the Commonwealth's recommendation on the guilty plea; it was not part of the guilty plea colloquy; and it was not discussed before sentence was pronounced. Additionally, there is no indication in the record as to how the restitution amount was determined. Although the pre-sentence investigation report was mentioned at sentencing and counsel indicated that it had been reviewed with Caudill and no corrections were necessary, it is not part of the record before us for our review as to whether restitution was addressed therein.

In Fields v. Commonwealth, 123 S.W.3d 914 (Ky.App. 2003), Fields pleaded guilty to burglary and receiving stolen

property. The payment of restitution was part of the recommendation on the guilty plea, but the amount was not provided to Fields until shortly before sentencing and the supporting documentation was not made part of the record. Field's objection at sentencing to the amount and validity of the restitution was overruled and the court ordered \$140,000.00 in restitution, despite the fact that only one of the many allegedly stolen or damaged items was identified and there was no evidence in the record of the value of any of the items. The appellate court agreed with Fields that he was entitled to a "less summary sentencing procedure," and while acknowledging that the "process due at sentencing is less . . . than that due at the culpability trial" the court found the trial court's "failure to give Fields adequate notice of the claims against him and any opportunity to controvert them plainly was an abuse of discretion. The record reflects no factual basis but mere allegations for the amount of restitution Fields has been ordered to pay." *Id.* at 917. "Simply put, even where there is a guilty plea, the record must establish an adequate factual predicate for a restitution order." *Id.* at 918. Therefore, Fields was remanded for a "hearing (that) will give rise in the circumstances to a record that satisfies the 'minimal indicium of reliability' standard and will afford the defendant a meaningful opportunity to be heard." *Id.*

In the case at bar, there is nothing in the record but the Commonwealth's bare assertion as to the amount of restitution. The record is also silent as to Caudill's knowledge of the potential for, amount of, or basis for restitution. Following from Fields, we therefore conclude that Caudill's RCr 11.42 motion on its face raised ineffective assistance of counsel claims (specifically pertaining to assistance at sentencing related to restitution) that are not conclusively refuted by the record, and thus meets the initial threshold for an evidentiary hearing under Lewis. Because Caudill also claimed that his plea was involuntary and that he would have gone to trial instead of entering the plea had he known of the restitution, he has also met the additional threshold for a hearing under Lewis which provides for a hearing if the unrefuted claims, if true, would invalidate the conviction. Thus, we are required to reverse on this sole issue and remand for an evidentiary hearing.

In summary, we affirm the Fayette Circuit Court as to all issues presented in this appeal with the exception of the issue of effective assistance of counsel at sentencing with regard to the assessment of restitution. We reverse on this sole issue and remand for additional proceedings consistent with this opinion. Because this matter is being remanded, we note that while the record reflects that there were two individuals

involved in these actions, the Commonwealth chose to indict Caudill as a principal, not a complicitor. Under these circumstances, upon remand, should restitution again be assessed against Caudill, a determination should be made not only of the amount of restitution owed but also the apportionment between Caudill and the other individual. We express no opinion on this.

ALL CONCUR.

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