RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001648-MR

JOSEPH WILSON — APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 04-CR-00046

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Joseph Wilson appeals from the Mercer Circuit Court's order denying his motion for relief pursuant to RCr[1] 11.42. Wilson argues that the circuit court erred by failing to hold an evidentiary hearing regarding his motion and by failing to strike his former trial counsel's response to his motion. For the following reasons, we vacate the circuit court's order and remand for an evidentiary hearing.

[1] Kentucky Rules of Criminal Procedure.

Wilson's indictment charged him with the following two counts: Count I: second-degree burglary and being a first-degree persistent felony offender (PFO); and Count II: theft by unlawful taking in excess of $300 and being a first-degree PFO. Both counts described the first-degree PFO as being supported by a March 27, 1991, conviction for second-degree burglary, as well as by a March 19, 1991, conviction for two counts of second-degree burglary and one count of receiving stolen property. However, as the two sentences ran concurrent, the two convictions counted as only one pursuant to KRS[2] 532.080(4). Thus Wilson in fact was eligible to be charged only with second-degree PFO rather than first-degree PFO. However, the parties operated under the mistaken belief that Wilson could be charged with first-degree PFO.

Wilson subsequently agreed to enter a guilty plea in exchange for the Commonwealth's offer to amend the two first-degree PFO counts to second-degree PFO, and to recommend consecutive sentences of ten years for second-degree burglary/second-degree PFO, and five years for theft by unlawful taking over $300/second-degree PFO, for a total of fifteen years' imprisonment. The circuit court accepted Wilson's guilty plea and sentenced him as recommended by the Commonwealth.

Thereafter, Wilson filed a *pro se* motion to withdraw

[2]Kentucky Revised Statutes.

his guilty plea, essentially indicating that he was unhappy with his counsel, he did not understand the plea agreement, and he had mental health issues. The circuit court denied Wilson's motion. His counsel, Susan McCollough, then filed a supplemental motion to withdraw his guilty plea, indicating that Wilson was incorrectly indicted on first-degree PFO. However, before the matter was heard, McCollough moved to withdraw as counsel and requested that the court appoint Wilson an attorney from outside of her office.

The circuit court appointed Wilson new counsel, who filed a motion seeking relief pursuant to RCr 11.42 due to ineffective assistance of counsel. When McCollough filed a response to this motion, Wilson moved to strike the response since McCollough no longer represented him. The circuit court denied both of Wilson's motions. This appeal followed.

Wilson argues that the circuit court erred by failing to hold an evidentiary hearing to address the issue of whether he was afforded ineffective assistance of counsel. As the circuit court denied Wilson's RCr 11.42 motion without a hearing, our review is limited to whether his motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

A valid guilty plea is one that "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986). When a defendant claims that his counsel's assistance was ineffective in enabling him to voluntarily and intelligently enter a guilty plea, he must show

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial.

Id. at 727-728 (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985)).

The court in *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), stated that when a defendant pleads guilty pursuant to a plea bargain, his "right to be fairly tried and justly convicted" extends to advice "on all aspects of the plea and the direct consequences thereof-such as . . . the punishment that may be imposed by the trial court." While this statement is dictum in an opinion holding that a defense counsel's failure to advise the defendant "of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel[,]" *id.*, the underlying principle is sound.

For example, in *Pitts v. United States*, 763 F.2d 197, 200-01 (6th Cir. 1985), the defendant argued that he would not have pled guilty except he was provided misinformation by his attorney and the trial court. The court agreed that there had been affirmative misstatements of the maximum possible sentence, rather than the failure to give any advice, and recognized that "[n]umerous cases have held that misunderstandings of this nature invalidate a guilty plea." *Id.* at 201. The court remanded the matter for an evidentiary hearing to determine whether the trial court and defense counsel had misadvised the defendant, and whether any such misadvice was material to the defendant's decision to plead guilty, i.e., whether the defendant "would not have pleaded guilty but for the misstatement." *Id.* at 201.

Here, Wilson's trial counsel advised him that he faced a possible sentence of twenty years to life imprisonment if convicted of the two charges and first-degree PFO. However, as set forth above, his prior convictions in fact could form the basis for only a second-degree PFO charge. When enhanced by second-degree PFO, the maximum possible terms of imprisonment for second-degree burglary (a class C felony per KRS 511.030) and theft by unlawful taking over $300 (a class D felony per KRS 514.030) are twenty and ten years, respectively. *See* KRS 532.080(5); KRS 532.060(2). Pursuant to KRS 532.110(1)(c), the

maximum aggregate length of these two sentences cannot exceed "the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." Thus, the maximum possible sentence Wilson faced was twenty years rather than twenty years to life imprisonment, as he was advised. *See* KRS 532.080(5); KRS 532.060(2). *See also Tabor v. Commonwealth*, 613 S.W.2d 133, 135 (Ky. 1981). As Wilson alleges both that his counsel misadvised him and that he would not have pleaded guilty had he been correctly advised, we believe he is entitled to an evidentiary hearing.

Jewell v. Commonwealth, 725 S.W.2d 593 (Ky. 1987), as cited by the Commonwealth, does not compel a different result. In *Jewell*, *id.* at 594, the court declined to allow the defendant to withdraw his guilty plea despite the fact that during his *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), hearing the trial court did not inform the defendant of the range of sentences which could be imposed. *Jewell* is distinguishable from the matter now before us, however, because it pertained to the requirements of a *Boykin* hearing and the failure to give any sentencing advice, rather than the affirmative misstatement of sentencing information. *See Pitts*, 763 F.2d at 201.

Because we are remanding this matter for an evidentiary hearing in which McCollough presumably will testify, Wilson's argument regarding the circuit court's failure to strike McCollough's response to his RCr 11.42 motion is rendered moot.

The Mercer Circuit Court's order is vacated, and this matter is remanded for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

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