RENDERED: DECEMBER 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000733-MR

JAMES NOEL — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 81-CR-00058

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, AND TACKETT, JUDGES.

BARBER, JUDGE: James Noel ("Noel") appeals from an order of the Floyd Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. After reviewing the record, we affirm.

On October 14, 1980, the charred body of a male was discovered in the burned residence of Edna Patrick. The body initially was believed to be that of Noel, who is Edna Patrick's brother-in-law, but an autopsy indicated it was a young male later identified as James Neimi. An investigation revealed that six days prior to the fire, Noel procured a $100,000 life

insurance policy naming Denver Patrick, Edna's husband, beneficiary. During an interview with Noel and Denver Patrick, they admitted to conspiring to kill Neimi to collect the insurance, but each accused the other of committing the murder.

On January 28, 1982, Noel pled guilty to murder (KRS 507.020) and first-degree arson (KRS 513.020) pursuant to a plea agreement with the Commonwealth, which recommended sentences of life imprisonment for murder and twenty years for arson to run consecutively. On February 12, 1982, the trial court rejected Noel's request for concurrent sentencing and sentenced him to consecutive sentences of life and twenty years in prison for the two offenses.

On September 6, 1994, Noel filed an RCr 11.42 motion alleging that he was not advised of his constitutional rights prior to the guilty plea, that his guilty plea was involuntary, and that he received ineffective assistance of counsel. On August 14, 1998, the trial court entered an order denying the motion, holding that the record indicated Noel's guilty plea was entered intelligently, knowingly, and voluntarily, and that he had received effective assistance of counsel. This appeal followed.

Noel argues on appeal that his plea was not entered knowingly, intelligently and voluntarily, that he received ineffective assistance of counsel, and that his sentence is void because it exceeds the allowable time. He contends that his guilty plea was invalid because it was coerced. Noel asserts that the jail condition was so deplorable that he agreed to plead

guilty to facilitate transport to the state penitentiary, which had better conditions. He also claims he felt coerced by a statement from his attorney that he would be convicted and receive the death penalty at a trial.

In order to be valid, a guilty plea must be voluntary, knowing and intelligent. Boybin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). The validity of a guilty plea, however, is determined from the totality of the circumstances surrounding it rather than from reference to some specific key words recited at the time it was taken. Kotas v. Commonwealth, Ky. App., 565 S.W.2d 445, 447 (1978); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986). A defendant's statements made at the guilty plea hearing are solemn declarations that carry a strong presumption of verity and should not be lightly cast aside. Blackledge v. Allison, 431 U.S. 63, 73, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1976); Zilch v. Reid, 36 F.3d 317, 320 (3rd Cir. 1994). Any claims that conflict with the statements made during the guilty plea hearing face a formidable barrier in a collateral proceeding challenging the voluntariness of the plea. Blackledge, supra; Lasiter v. Thomas, 89 F.3d 699, 702-03 (10th Cir.), cert. denied, 519 U.S. 998, 117 S.Ct. 493, 136 L.Ed.2d 386 (1996).

A review of the guilty plea colloquy refutes Noel's claims of coercion. He denied that any threats had been made to entice him to plead guilty. He responded affirmatively when asked if he was pleading guilty "willingly, freely, voluntarily,

and without any threats or force or promises or pressure from any person or persons to cause you to so plead?" Moreover, defense counsel's statement that he would receive a death sentence at trial does not constitute coercion but rather was a legal assessment by counsel of the case given the evidence including Noel's confession. Noel's complaint about jail conditions could and should have been raised prior to the guilty plea. Viewing the totality of the circumstances, he has not shown the guilty plea was coerced or involuntary. See, e.g., Camillo v. Wyrick, 640 F.2d 931 (8th cir. 1981) (treatment and threats in jail did not support claim of coercion for guilty plea.)

Noel also asserts that his attorney rendered ineffective assistance. In order to establish ineffective assistance of counsel, a person must satisfy a two-prong test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860 (1998). 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 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 would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, Ky. App., 992 S.W.2d

871 (1999). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999). An attorney has the "duty to make reasonable investigation or make a reasonable decision that makes particular investigations unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 446 (2001). See also Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000), cert. denied, _____ U.S. _____, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001).

Noel alleges that his attorney did not interview prospective witnesses, conduct a sufficient investigation, or spend sufficient time discussing the case with him. These claims fail because they lack any specificity. He provides no facts on what information counsel could or should have uncovered. He does not identify the witnesses counsel did not interview or the information they could have conveyed. Defense counsel had been provided extensive discovery including police, forensic, and autopsy reports. We note that during the guilty plea hearing, Noel stated that he had consulted with his attorney, that he had had all the time he desired to confer privately with his attorney that he felt was necessary before entering the plea, and that he was satisfied with the services his attorney had provided for him. Again, Noel has not identified how any lack of consultation with his attorney prejudiced him. Noel has not shown either deficient performance or actual prejudice sufficient to

constitute ineffective assistance of counsel. See Baze, 23 S.W.3d at 625.

The final issue concerns the validity of Noel's sentence. He contends that the sentence is void because it exceeds statutory limitations. Relying on Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1995), Noel maintains this issue involves subject matter jurisdiction and can be raised at any time.

We agree with Noel that following his conviction, the Kentucky Supreme Court established in Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993), that the maximum cumulative sentence for multiple offenses under KRS 532.110 (1)(c) life imprisonment. See also Hallowman v. Commonwealth, Ky., 37 S.W.3d 764, 770 (2001); Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994). Therefore, Noel's sentence of consecutive terms of life plus twenty years exceeded the statutory limitations.

However, as the Kentucky Supreme Court indicated in the recent case of Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001), the imposition of an unauthorized sentence does not necessarily implicate subject matter jurisdiction. Proper jurisdiction is not lost merely because the court makes a factual or legal error. The Supreme Court stated, "It is simply incorrect to say that a court is without jurisdiction to impose an unauthorized sentence. Rather, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02." Id. at 596. An excessive sentence is not entirely void but rather that portion within the statutory limits

is valid and that portion in excess is voidable and subject to attack. Id. at 596-97 (citing Dep't. of Public Welfare v. Polsgrove, 245 Ky. 159, 53 S.W.2d 341 (1932) and Neace v. Commonwealth, Ky., 978 S.W.2d 319 (1998)).

In this case, Noel did not raise the issue of re-sentencing based on excessiveness in his RCr 11.42 motion. Moreover, counsel appointed to represent Noel on the motion in circuit court did not attempt to raise this issue in a document supplementing the initial motion. As an appellate court, our role is to review errors by the trial court. Consequently, we generally will not review issues not presented to the trial court and that are raised for the first time on appeal. See, e.g., Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989)("[T]he Court of Appeals is without authority to review issues not raised in or decided by the trial court."); Commonwealth v. Lavitt, Ky., 882 S.W.2d 678, 680 (1994). Noel erroneously classifies this issue as jurisdictional and thus, subject to being raised at any time. We believe that his failure to present this issue to the trial court effectively waived it for consideration by this Court.

The order of the Floyd Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: My comments refer solely to the attack upon the imposition

of the excessive sentence. Myers v. Commonwealth, supra, holds that the issue of subject matter jurisdiction does not underlie the imposition of an unauthorized sentence. Therefore, that issue could not properly be raised before this court at this juncture in light of the failure to raise it before the trial court in the original RCr 11.42 proceeding.

However, the appellant is entitled to rely on Bedell v. Commonwealth, supra, which held that life imprisonment is indeed the maximum cumulative sentence that may be imposed for multiple offenses subject to KRS 532.110(1)(c), a case decided subsequent to his conviction. Myers held that regardless of the issue of whether subject matter jurisdiction is the proper procedural means of attacking an unauthorized sentence, that portion of a sentence that exceeds statutory limits is indeed voidable and susceptible of attack. Although he failed to raise this issue in his RCr 11.42 motion below, the severability of the excessive portion of the sentence would appear to be palpable error that we could nonetheless address at this juncture in the interest of judicial economy pursuant to RCr 10.26:

> A palpable error which affects the substantial rights of a party may be considered by the court on a motion for a new trial or 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. (Emphasis added).

The trial court committed no error since Bedell superseded the sentencing. However, the sentence is voidable under the Bedell holding with the excessive portion severable

under Myers. I would simply remand this part of the judgment to the trial court for correction pursuant to the joint directives of Bedell and Myers: that that portion of the sentence exceeding life imprisonment be excised.

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