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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001380-MR

WILLIAM HODGE — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 00-CR-00045

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

KNOPF, JUDGE: William Hodge appeals from a May 20, 2004, order of the Hickman Circuit Court summarily denying his RCr 11.42 motion for post-conviction relief. Hodge asserts that, due to counsel's ineffective assistance, he pled guilty to a charge for which there was no factual basis. Because the record does not clearly refute Hodge's assertion, we vacate and remand for an evidentiary hearing.

In December 2000, the Hickman grand jury indicted Hodge for driving under the influence (second offense), a

misdemeanor;[1] operating a motor vehicle on a license suspended or revoked for DUI (third offense), a class-D felony;[2] and operating a vehicle without insurance, a violation.[3] In exchange for Hodge's guilty plea to all of these charges, the Commonwealth recommended that Hodge be sentenced to twelve-month's incarceration for the misdemeanor to be served concurrently with two year's imprisonment for the felony and a $50.00 fine for the insurance violation. By judgment entered April 5, 2001, the Hickman Circuit Court sentenced Hodge according to the Commonwealth's recommendation, and then in September 2001, granted Hodge's motion for shock probation.

In March 2004, Hodge brought the present motion seeking relief from his April 2001, conviction. He contends that his guilty plea should be deemed involuntary because it resulted from counsel's ineffective assistance. Counsel erred, he maintains, by advising him to plead guilty to a third-offense felony under KRS 189A.090, when there was no evidence that he had previously been convicted for violating that statute. Counsel also erred, Hodge asserts, by advising him to accept a

[1] KRS 189A.010(5)(b).

[2] KRS 189A.090(2)(c).

[3] KRS 304.39-080(5).

twelve-month sentence for the DUI misdemeanor for which the maximum legal sentence is six months.[4]

As Hodge notes, he is entitled to relief if he can establish both that trial counsel erred so egregiously that her assistance can be deemed outside the bounds of reasonably competent counsel, and that absent the error there is a reasonable probability that Hodge would not have pled guilty but would have insisted upon going to trial.[5] An RCr 11.42 movant whose facially meritorious allegations are neither refuted nor confirmed by the underlying record is entitled to an evidentiary hearing at which his allegations may be tried.[6] We believe that Hodge is entitled to a hearing.

KRS 189A.090 provides that "[n]o person shall operate a motor vehicle while his license is revoked or suspended for violation of KRS 189A.010 [the DUI statute]." A third violation of this statute is punished as a class-D felony.[7] KRS 186.620, on the other hand, provides that "[n]o person . . . whose operator's license has been . . . suspended or revoked . . . shall operate any motor vehicle upon the highways while the

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[4] KRS 189A.010(5)(b).

[5] Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

[6] *Id.*

[7] KRS 189.090(2)(c).

license is . . . suspended, or revoked." Any violation of this statute is punished as a class-B misdemeanor.[8]

Hodge concedes that prior to the incident giving rise to the December 2000 indictment for violating KRS 189A.090, he had been convicted several times for driving on a suspended license. He asserts, however, that the Commonwealth was not prepared to prove that his prior convictions were for violations of KRS 189A.090 as opposed to KRS 186.620. He maintains, therefore, that he should not have been charged with a third-offense felony under KRS 189A.090(2)(c), but rather with a first-offense misdemeanor under KRS 189A.090(2)(a). At a preliminary hearing, the prosecutor admitted that Hodge's record did not clearly establish the alleged prior convictions under KRS 189A.090 and that thus he probably had been mis-indicted. Nevertheless, the trial court summarily denied Hodge's motion, apparently reasoning that prior KRS 189A.090 convictions could be inferred from the fact that Hodge had prior DUI convictions. We disagree.

Counsel, of course, has a duty to conduct a reasonable investigation into the facts and the law bearing on her client's case.[9] We agree with Hodge that a reasonable investigation in

[8] KRS 186.990.

[9] Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

this case would have revealed that proof of Hodge's prior convictions was apparently lacking and that thus the felony charge was apt to be invalid. It would also have revealed that the Commonwealth was proposing a sentence for Hodge's DUI offense that was twice the legal maximum. Counsel erred, therefore, by failing to discover these irregularities and by advising Hodge to plead guilty before they had been addressed.

Whether the errors were prejudicial depends on whether the felony charge in fact lacked an evidentiary basis, and this we cannot determine from the record before us. Hodge is thus entitled to a hearing at which he may challenge the factual basis for the felony charge. We note that the Supreme Court has held that when an element of an offense or a status is a prior conviction, "the 'best evidence' of that conviction is a certified copy of the prior judgment."[10] We thus disagree with the Commonwealth's suggestion that Hodge's alleged prior convictions under KRS 189A.090 could be proved circumstantially by proof of prior DUI convictions. If on remand the Commonwealth can not prove Hodge's alleged prior convictions with copies of the judgments, then counsel's error in permitting Hodge to plead guilty to a felony for which there was no factual basis must be deemed prejudicial. Hodge's April 2001, conviction, in that case, should be vacated and Hodge should be

[10] Commonwealth v. Duncan, 939 S.W.2d 336, 337 (Ky. 1997).

allowed to withdraw his plea. Accordingly, we vacate the May 20, 2004, order of the Hickman Circuit Court and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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