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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001678-MR

TRAMPIS R. BARNES — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 04-CR-00211

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: On April 20, 2010, Trampis Ray Barnes appealed the denial of his motion in the McCracken Circuit Court which sought to vacate his twenty-two year sentence for several drug related offenses. Barnes alleges that the trial court improperly denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without a hearing. After careful review, and upon consideration of recent

caselaw, we agree with Barnes and therefore vacate the trial court's April 20, 2010, order denying the RCr 11.42 motion.

Barnes was indicted by the McCracken County grand jury, and on October 11, 2004, pled guilty to possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine first offense; manufacturing methamphetamine second or subsequent offense; use/possession of drug paraphernalia second or subsequent offense; first-degree possession of a controlled substance, methamphetamine; illegal possession of a legend drug first offense; and controlled substance prescription not in original container first offense. Pursuant to his plea agreement, the trial court sentenced Barnes to twenty-two years on November 10, 2004. A final judgment and a sentence of imprisonment were entered accordingly on November 12, 2004, and an amended final judgment/sentence of imprisonment was entered by the court on April 14, 2010, due to a clerical error in the original judgment.

On November 9, 2007, Barnes filed a motion to vacate, set aside, or correct the judgment pursuant to RCr 11.42, alleging several claims of ineffective assistance of counsel. Barnes' primary claim was that he received ineffective assistance of counsel when defense counsel advised him he would be eligible for parole after serving 20% of his sentence when actually he is not eligible for parole until after serving 85% of his sentence.

The trial court entered an order on November 21, 2007, staying Barnes' RCr 11.42 motion pending the disposition of his appeal of the denial of his

Kentucky Rules of Civil Procedure (CR) 60.02 motion. The trial court then entered various other orders continuing the matter from September 9, 2008, through March 12, 2010. On April 20, 2010, the trial court, without an evidentiary hearing, entered a final order denying Barnes' motion to vacate, set aside, or correct the judgment pursuant to RCr 11.42. Barnes now appeals the denial of this order.

Barnes' only argument on appeal is that the trial court erred in denying his RCr 11.42 motion without first conducting an evidentiary hearing. RCr 11.42 provides, in part, "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing." An evidentiary hearing is warranted only when "the [RCr 11.42] 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) (overruled on other grounds). Where, as here, an RCr 11.42 hearing is denied, appellate review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

In the instant case, we agree with Barnes that the allegations cannot be refuted by the record, as the Commonwealth attempts to argue in its brief to this Court. According to the Commonwealth, because Barnes participated in a plea colloquy before the trial court and pled guilty, he necessarily understood the nature

of his plea and knowingly and voluntarily waived his rights to a trial by jury. However, we agree with Barnes that if his counsel told him he would be eligible for parole earlier and if he thought by pleading guilty that he was lessening his term of imprisonment, Barnes did not in fact enter a knowing and voluntary guilty plea. Instead, his attorney gave him incorrect information, which could amount to ineffective assistance of counsel. Thus, an evidentiary hearing is warranted to determine whether defense counsel misinformed Barnes about the nature of his sentence and term of imprisonment.

The Commonwealth also urges this Court to affirm the trial court's denial of Barnes' motion as being a collateral attack. While the Commonwealth is correct that where a post-conviction motion merely raises grounds rejected in prior motions, a hearing is not necessary and the motion should be summarily denied, we do not agree, however, that the above is true in this case.

On August 1, 2007, Barnes filed a motion for clarification of order and final sentencing. Barnes was asking the court to specify whether he was or was not sentenced pursuant to Kentucky Revised Statutes (KRS) 439.3401. Barnes explained to the court that in April 2007, he was notified by the Department of Corrections (DOC) that his sentence would be calculated pursuant to KRS 439.3401, thereby requiring him to serve 85% of his sentence before being eligible for parole. Barnes believed it was the DOC making this mistake since the trial court never designated in its judgment that Barnes was being sentenced pursuant to KRS 439.3401.

On September 13, 2007, Barnes filed a motion for modification/ amendment of conviction and sentence pursuant to CR 60.02(b)(e)(f), alleging a double jeopardy violation. Therein, Barnes again asserted that the DOC was improperly calculating his sentence pursuant to KRS 439.3401. He reiterated that on April 18, 2007, the DOC advised him that his parole eligibility was going to be calculated at 85%. In support of this motion, Barnes submitted the letter he received from DOC dated April 18, 2007, which states, in relevant part, as follows:

> It has come to our attention that your sentence for the charge of Manufacturing Methamphetamine 2nd Offense, which is a Class A felony, was not calculated as a violent offense per KRS 439.3401. All Class A felonies are violent offenses per KRS 439.3401.
>
> Your sentence calculations have been corrected. Enclosed is a copy of your updated Resident Record Card which reflects the changes.

On September 21, 2007, the trial court entered an order denying the motion for clarification, stating, "[n]othing in Movant's sentence needs clarification." Then on November 5, 2007, the trial court entered an order denying Barnes' motion for modification of his sentence.

Barnes' other previous motions, those addressing the issue of his sentence being calculated by the provisions of KRS 439.3401, never addressed the allegedly erroneous advice from defense counsel that is the subject of this appeal. As can be seen from Barnes' previous post-conviction motions, Barnes clearly thought that the DOC was making a mistake with respect to his sentence. We do not believe that such motions constitute successive motions and, therefore, the RCr 11.42

motion before this court should not have been dismissed as collateral. Barnes was under the impression he was supposed to have been sentenced at 20% rather than 85%, and his claims that his trial counsel erroneously supplied him this information cannot be refuted by the record. Accordingly, we reverse and remand this matter to the trial court for a hearing to determine what information Barnes' defense counsel gave him prior to the entry of his guilty plea.

We note that it was once almost universally accepted that an attorney was not required to advise a defendant about the collateral consequences of his plea. However, the U.S. Supreme Court recently opined in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481, 176 L. Ed. 2d 284 (2011), that it had "never applied a distinction between direct and collateral consequence to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052." We encourage the trial court to consider *Padilla* in its analysis of Barnes' claims on remand.

For the foregoing reasons, we vacate the McCracken Circuit Court's April 20, 2010, order denying Barnes' motion for RCr 11.42 relief and remand this matter for further proceedings in accordance with this opinion.

MOORE, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING. I respectfully dissent. At a minimum, Barnes knew prior to August 1, 2007, that the Department of

Corrections believed he was not subject to parole eligibility until serving 85% of his sentence. Assuming he was misadvised, Barnes' thought had to be that trial counsel gave him bad advice. He then proceeded to file successive motions: the first on August 1, 2007, seeking clarification and the second on September 13, 2007, under CR 60.02. The motions were denied by order entered September 21, 2007. He did not appeal. Then, thirty-one days later, on October 22, 2007, Barnes filed another CR 60.02 motion, which was denied, appealed and affirmed. *Barnes v. Commonwealth*, 2009 WL 4882823 (Ky.App. 2009)(2007-CA-002424-MR). On November 9, 2007, he filed his **fourth** motion for post-conviction relief, the present RCr 11.42, alleging ineffective assistance of counsel.

Under this factual scenario, Barnes is not entitled to relief. As noted in *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), "[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02."

In *Gross*, the court further stated:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.
>
> Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any

> ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 857.

Here, when Barnes filed his CR 60.02 motion, he was then precluded from filing an RCr 11.42 motion on grounds of which he was aware or should have been aware. Otherwise, his post-conviction relief is haphazard and not organized and complete as required by *Gross*. The decision in *Gross* precludes the remedy sought by Barnes and granted by the majority opinion.

I would affirm the McCracken Circuit Court's order.

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