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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001559-MR

CHARLES MILLER — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NOS. 04-CR-00216, 04-CR-00217,
04-CR-00218 AND 04-CR-00219

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal of the denial of a motion to vacate judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. This Court remanded the appellant, Charles Miller's, case to the Harlan Circuit Court for an evidentiary hearing. The court held an evidentiary hearing and denied Miller's RCr 11.42 motion. Miller now appeals that decision. For the foregoing

reasons, we reverse the decision of the trial court and remand this case to the trial court for re-sentencing.

FACTUAL BACKGROUND

Miller was indicted by a Harlan County Grand Jury on June 29, 2004. The Grand Jury handed down five separate indictments, four of which are the subject of Miller's RCr 11.42 motion. The four indictments included ten counts of Trafficking in a Controlled Substance in the First Degree ("TICS I"), which are Class C Felonies. As Class C Felonies, thus the maximum length of aggregate sentences as a result of these felonies is twenty years based upon the language in Kentucky Revised Statutes (KRS) 532.080 which provides that 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.

Miller pled guilty to the ten counts in the four indictments in an agreement with the Commonwealth where he would accept a thirty (30) year prison sentence. As set forth above, this was ten (10) years more than the longest term he could have received.

On August 23, 2006, Miller, pro se, filed an RCr 11.42 motion asserting that:

> 1. Defense counsel misadvised him that he would be eligible for parole in two and a half years if he accepted a thirty-year sentence when in fact he would not be eligible for over seven years;
>
> 2. Defense counsel failed to explain the law in relation to the facts of his case or the potential defenses available at trial so that, in addition to the misleading parole

> information, his guilty plea was not knowing, intelligent and voluntary;
>
> 3. Defense counsel failed to interview potentially exculpatory witnesses or move to suppress any of the evidence against him; and
>
> 4. Defense counsel failed to challenge a multitude of charges arising out of single drug sales.

The trial court denied Miller's motion without appointing counsel or having an evidentiary hearing. Miller appealed that decision to this Court. We held that while Miller could have knowingly and intelligently waived the maximum aggregate sentence limitation, the trial court erred in failing to conduct an evidentiary hearing. *Miller v. Com.,* 2009 WL 102853 (Ky. App. 2009) (2007-CA-0010032-MR). We based this on the dictates of *Myers v. Com.*, 42 S.W.3d 594, 597 (Ky. 2001), and the fact that the record did not set forth with specificity why Miller chose to waive the sentence limitation. We remanded the case for an evidentiary hearing.

The trial court held an evidentiary hearing and in the order entered August 3, 2009, found as follows:

> After having heard the testimony of Robert Thomas and review the exhibits filed in the record it became apparent to this judge that the Defendant made a knowing, intelligent and voluntarily [sic] waiver of the statutory cap found in KRS 532.110 and in exchange for the waiver the Defendant received the Class B Felony Indictment being dismissed. It was clear to this Court upon the testimony of defense attorney, Mr. Robert Thomast hat [sic] he in fact did an excellent job in enabling his client to escape the more serious Class B Felony charge in exchange for receiving Class C Felony charges. If the Class B Felony charge had remained and

> the Defendant were convicted of said charge he could have received substantially more time than the thirty years that he did receive.

Miller now appeals the decision of the trial court to deny his RCr 11.42 motion.

STANDARD OF REVIEW

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). With respect to a guilty plea, there is also a requirement that the movant show that counsel's performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 54 USLW 4006 (1985). Courts must also examine counsel's conduct in light of professional norms based on as standard of reasonableness. *Fraser v. Com*., 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we examine the trial court's decision.

DISCUSSION

Miller asserts that his counsel was ineffective in advising him to waive the statutory aggregate maximum limitation. KRS 532.110 provides that:

> (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or

> consecutively as the court shall determine at the time of sentence, except that:
>
> > (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length 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. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]

In *Myers*, 42 S.W.3d at 597, the Kentucky Supreme Court found that KRS 532.110 "benefits the offender by shielding him or her from an endless accumulation of consecutive sentences." In *Myers*, the defendant pled guilty to Manslaughter II, Wanton Endangerment and Driving Under the Influence while attempting to Elude Police. The Court found that "the maximum aggregate sentence limitation contained in KRS 532.110(1)(c) can be the subject of a knowing and voluntary waiver by a person in whose favor the limitation operates[.]" *Id*. at 598.

The Supreme Court recently decided that its reasoning in *Myers* was flawed. In *McClanahan v. Com.*, 308 S.W.3d 694 (Ky. 2010), the Court found that "whether agreed upon or not, the trial court's imposition of such a sentence is a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion." *Id.* at 698. The Court went on to hold that:

> Under *Myers*, the parties and the trial court may completely disregard KRS 532.110(1)(c) by accepting plea agreements to the contrary. Yet we see nothing in the language of the statute to suggest that the General Assembly intended to excuse plea agreements from the

> mandatory provisions contained in the statute. Whether recommended by an errant jury or by the parties through a plea agreement, a sentence that is outside the limits established by the statutes is still an illegal sentence. We do not see how an illegal sentence set by a jury . . . does any more to "nullify the sentencing laws" than an illegal sentence imposed by a judge pursuant to a plea agreement. There is no sound rationale by which we should condemn the one as we condone the other. Under our Constitution, it is the legislative branch that by statute establishes the ranges of punishments for criminal conduct. It is error for a trial jury to disregard the sentencing limits established by the legislature, and no less erroneous for a trial judge to do so by the acceptance of a plea agreement that disregards those statutes.
>
> Because it is the trial judge, and not the jury or the prosecutor or the defendant, that actually imposes a sentence by signing his or her name to the final judgment, it is to the judiciary that the legislative commandments of KRS 532.080(6)(b) and KRS 532.110(1)(c) are directed. A sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion. Our conviction in this regard is not swayed by the argument that Appellant consented to the illegal punishment. . . . the statutory limitations restrain only the authority of a judge to impose an unlawful sentence; they do not restrain a party's ability to agree to one. We would not compel the executive branch to carry out a sentence of corporal punishment, . . . simply because the defendant consented. Our courts must not be complicit in the violation of the public policy embedded in our sentencing statutes by turning a blind eye to an unlawful sentence, regardless of a defendant's consent. To the extent they hold otherwise, *Myers*, 42 S.W.3d 594, and *Johnson*, 90 S.W.3d 39, are overruled along with any other decisions so holding.

Id. at 701.

The Commonwealth, however, argues that this change in the interpretation of the law cannot be retroactively applied to Miller's case. Citing

Reed v. Reed, 484 S.W.2d 844, 847 (Ky. 1972), the Commonwealth argues that a change in the law is not grounds for relief, post-conviction, unless there are aggravating circumstances where strong equities exist. It argues that such does not exist in Miller's case. We disagree.

The Kentucky Supreme Court has made clear in *McClanahan* that a sentence which exceeds the maximum aggregate sentence is an unlawful one, regardless of a defendant's consent to it. Furthermore, the ruling in *McClanahan* may be retroactively applied in this case. Pursuant to *Leonard v. Com*., 279 S.W.3d 151, 160 (Ky. 2009), when the order denying the RCr 11.42 motion is final, a new rule could not be retroactively applied. However, the motion in this case was still pending before this Court when the new rule in *McClanahan* was announced. As set forth above, the Court has opined that such a sentence is void in that it violates the separation of powers doctrine. Clearly strong equities exist in such a case. Thus, we must remand this case to the Harlan Circuit Court for resentencing.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Rachelle N. Howell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David B. Abner
Frankfort, Kentucky