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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000325-MR

MICHAEL A. BELK — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 06-CR-00977

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING

** ** ** ** **

BEFORE: MAZE, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Michael Belk appeals from an order of the Warren Circuit Court denying his motion pursuant to RCr[1] 11.42 alleging ineffective assistance of counsel. Belk sets forth three claims of ineffective assistance of counsel. We find that one of these claims has merit; therefore, we vacate Belk's conviction.

[1] Kentucky Rules of Criminal Procedure.

On October 25, 2006, Belk was indicted for first-degree sexual abuse and first-degree unlawful transaction with a minor. The alleged victim was a three-year-old child of the family with whom Belk was staying. The child described to her mother behavior which potentially constituted sexual abuse. A Bowling Green Police detective interviewed Belk at his high school. At the time, Belk was 18 years of age. Belk denied the reported acts, but stated he may have inadvertently touched the child's vagina while changing her diaper.

On February 5, 2007, Belk rejected the Commonwealth's offer of 10 years, opposed to probation. Eventually, Belk agreed to a plea offer of 5 years, which would be probated for 5 years. On October 24, 2007, Belk entered a plea of guilty to the charge of first-degree sexual abuse pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).[2] On November 28, 2007, orders were entered sentencing Belk to 5 years imprisonment, probated for 5 years. As part of his probation, Belk was ordered to complete the Kentucky Sex Offender Treatment Program (SOTP).

Belk's probation was ultimately revoked for failing to complete SOTP. Belk had been terminated from the SOTP program for missing two out of four therapy sessions. After being taken into custody, he learned that he would have to serve another 5 years on conditional discharge after being released from prison pursuant to KRS[3] 532.043. KRS 532.043 states:

[2] This plea allows a defendant to plead guilty without admitting to the underlying crime, but admitting there is sufficient evidence for a jury to find him guilty at trial.
[3] Kentucky Revised Statutes.

(1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, or 531.320 shall be subject to a period of postincarceration supervision following release from:

(a) Incarceration upon expiration of sentence; or

(b) Completion of parole.

(2) The period of postincarceration supervision shall be five (5) years.

(3) During the period of postincarceration supervision, the defendant shall:

(a) Be subject to all orders specified by the Department of Corrections; and

(b) Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.

(4) Persons under postincarceration supervision pursuant to this section shall be subject to the supervision of the Division of Probation and Parole and under the authority of the Parole Board.

(5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing by the Division of Probation and Parole. Notice of the violation shall be sent to the Parole Board to determine whether probable cause exists to revoke the defendant's postincarceration supervision and reincarcerate the defendant as set forth in KRS 532.060.

(6) The provisions of this section shall apply only to persons convicted, pleading guilty, or entering an Alford plea after July 15, 1998.

KRS 532.060(3) states:

> For any felony specified in KRS Chapter 510, KRS 530.020, 530.064(1)(a), or 531.310, the sentence shall include an additional five (5) year period of postincarceration supervision which shall be added to the maximum sentence rendered for the offense. During this period of postincarceration supervision, if a defendant violates the provisions of postincarceration supervision, the defendant may be reincarcerated for:
>
> (a) The remaining period of his initial sentence, if any is remaining; and
>
> (b) The entire period of postincarceration supervision, or if the initial sentence has been served, for the remaining period of postincarceration supervision.

These two statutes require that Belk be given a 5-year conditional discharge after the completion of his 5-year sentence. If he violates the terms of this supervised release, he will then be subject to further incarceration, up to 5 more years.

On April 5, 2010, Belk filed a *pro se* motion for relief pursuant to RCr 11.42 alleging ineffective assistance of counsel. The circuit court appointed counsel to represent Belk in the motion. On February 23, 2011, an evidentiary hearing was held where Belk and his trial counsel testified. Three issues were presented: 1) whether it was ineffective assistance of counsel to fail to advise Belk that he would be subject to the 5-year conditional discharge; 2) whether it was ineffective assistance of counsel to advise Belk to enter an *Alford* plea when he would ultimately have to admit to his crimes during his SOTP therapy sessions; and 3) whether it was ineffective assistance of counsel to not move to suppress Belk's statements made to the police during his questioning at school. After the hearing, the court ordered further briefing regarding the conditional discharge issue. The

court was concerned about whether Belk would be subject to the conditional discharge period since the court did not order it and it was not referenced during the plea hearing, sentencing hearing, or on the offer of plea agreement. On January 31, 2010, the trial court entered an order denying Belk's RCr 11.42 motion. This appeal followed.

Belk raises the same three arguments on appeal as he did to the trial court. Since the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), collateral consequences of guilty pleas have entered the legal landscape as issues ripe for adjudication in regards to RCr 11.42 ineffective assistance of counsel claims. *See Padilla*, *supra* (incorrect advice regarding the federal deportation issues of a guilty plea were found to be ineffective assistance of counsel); *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012) (parole consequences of a guilty plea can lead to ineffective assistance of counsel claims). We find that the issue of the conditional discharge is dispositive of this case and vacate Belk's conviction.

At the RCr 11.42 hearing, Belk testified that he was not aware of the 5-year conditional discharge when he pled guilty. He testified that it was not until he was sent to prison that he learned of its existence. Belk's trial counsel testified that he did not remember whether he informed Belk of the conditional discharge requirement, but that he could have. The trial court did not make any findings indicating whether it believed defense counsel informed Belk of the conditional discharge period. As to this issue, the trial court concluded that had Belk known

about the conditional discharge period, he would have still taken advantage of the plea agreement. We disagree with the trial court as to its conclusion on this issue.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-487 (Ky. 2001) (*citing Sparks v. Commonwealth*, 721 S.W.2d 726, 727, 728 (Ky. App. 1987).

During the RCr 11.42 hearing, Belk testified that he did not know about the conditional discharge period until he was imprisoned. He further testified that had he known about it he would have insisted on going to trial. He also testified that he did not commit sexual abuse against the minor child, but took the plea agreement because it gave him probation and kept him from having to admit to the facts of the charges. Finally, Belk stated that he stopped going to the SOTP therapy sessions because his counselor informed him he would be required to admit to the crime of sexual abuse in order to complete the program.

Belk's trial counsel testified that Belk adamantly refused to admit his guilt to the underlying crime and knew that he would never do so. Defense counsel also stated that Belk declined a prior 10-year plea offer and insisted on going to trial until the 5-year probated agreement was offered. Counsel also testified that in

order to complete the 5-year conditional discharge, Belk would have to complete an SOTP program, which would include admitting his guilt to the underlying crime.

> In *Padilla*, the Supreme Court stated that "to obtain relief [on an ineffective assistance claim] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." As noted . . . at the pleading stage it is movant's burden to allege specific facts which, if true, would demonstrate prejudice. A conclusory allegation to the effect that absent the error the movant would have insisted upon a trial is not enough. The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, *e.g.,* valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence.

Stiger at 237 (citations omitted).

We believe Belk has proven that his trial counsel made a serious error in not informing him about the conditional discharge and that had he known about it, he would have gone to trial. KRS 532.043 has been in effect since 1998 in some form. Trial counsel testified that he had litigated cases involving sexual abuse allegations before. This period of conditional discharge is so intertwined with the underlying crime and sentence that counsel should have informed his client of its existence. Trial counsel's error in not informing Belk of the conditional discharge period is a serious error because at the time of sentencing, Belk was unaware that this conditional discharge period effectively adds an additional 5-year probationary term. If it is violated, Belk could be subject to an additional 5-year sentence of

imprisonment; an additional sentence he did not bargain for and was never informed of.

In addition, had defense counsel informed Belk of this additional 5-year term, it is probable Belk would have insisted on going to trial. The case against Belk was weak. The only evidence against Belk was his statement that he might have touched the child's vagina while changing her diaper and the statements from the child to her mother that "Michael" had sexually abused her. Belk informed his defense counsel that there was a possible alternative perpetrator, another family friend named Michael. Additionally, the child had stated that Michael had also abused the neighbors, but a police investigation determined these allegations were false. Further, a rape kit was performed on the child which revealed no evidence of any kind of assault. Finally, a motion to suppress could have been brought in order to suppress the statements Belk made to the police officer at the high school. Belk was not read his *Miranda*[4] rights during the questioning and an argument could have been made that it was a custodial interrogation.

Belk had also declined a preliminary plea offer of 10-years imprisonment from the Commonwealth. He bargained for a 5-year probated sentence, but was never informed of the 5-year period of conditional discharge that could potentially lead to 10-years' imprisonment. As part of his conditional discharge, Belk will have to admit to the sexual abuse, which he refuses to do. If Belk refuses to admit guilt during his conditional discharge, as he has previously, his conditional

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

discharge will be revoked and he will be imprisoned for the amount of time left on his conditional discharge period. In essence, his guilty plea will have given him a 10-year sentence rather than the 5 years bargained for.

Belk has proven that his trial counsel made a serious error. He has also demonstrated that he would have gone to trial had he been informed of the period of conditional discharge. Further, given his adamant assertions of innocence as testified to by trial counsel and his rejection of earlier offers of a plea that called for a ten-year sentence, it is clear that he considered whether to accept or reject his plea on a rational basis. The consequences of revocation of agreed to probation have been held to be an obvious disadvantage to a defendant's acceptance of a particular plea. *Purvis v. Commonwealth*, 14 S.W.3d 21 (Ky. 2000). For the foregoing reasons we vacate Belk's conviction and remand for a new trial.

MAZE, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, J., DISSENTING: I respectfully dissent. The standard for reviewing a claim of ineffective assistance of counsel involving a guilty plea is that the defendant must prove "(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." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985)).

Belk's testimony, as adduced at the evidentiary hearing, was that he agreed to plead guilty because he would receive a probated sentence. The trial court noted:

> the Court is unconvinced that, had the defendant known about the five-year conditional discharge period, he would not have taken the plea agreement. The defendant took the plea agreement because it resulted in a recommendation of probation for him. It is doubtful that he would have foregone such a deal and recommendation from the Commonwealth if he had known of the operation of law as set forth in KRS 532.043, as he now claims he did not.
>
> For the reasons stated above, this Court cannot conclude that trial counsel's efforts on behalf of [Belk] were constitutionally ineffective. In fact, he procured a beneficial plea arrangement for [Belk] with a recommendation of a minimal sentence of five years and probation on a case in which [Belk] was facing a potential sentence, if convicted, of 25 years. This appears to be a simple case of [Belk] receiving a favorable plea offer and sentence, about which he did not complain until he failed to comply with the simple requirements of his probation, resulting in his revocation and imprisonment, at which time he has discovered the natural and known consequences of his failure to comply with the terms of his probation. Such does not constitute ineffective assistance of counsel.

As found by the trial court, which was, of course, in the best position to listen to and judge the credibility of Belk and his trial counsel, Belk took the plea offer because he was facing the possibility of a 25-year sentence and the plea

offer provided a minimal sentence with a recommendation of probation.[5] Belk's probation was revoked because he missed some of the therapy sessions that were mandated in order to complete the Sexual Offender Treatment Program. His claim that he only became aware of the provisions of KRS 532.043 upon revocation of his probation does not dispel of the fact that he violated the terms of his probation because he failed to show up. Had he complied with the terms of his probation, KRS 532.043 would never have come into play and he would not have been incarcerated at all for this charge. The potential benefit of not serving prison time was conditioned upon Belk's compliance with the terms of his probation, and Belk knew this when he pled guilty. In my view, Belk has failed to prove "a reasonable probability that [he] would not have pleaded guilty, but would have insisted on going to trial" had he known of the provisions of KRS 532.043. *See Sparks*, 721 S.W.2d at 728.

I would affirm the Warren Circuit Court's Order.

[5] As noted by the Commonwealth, Belk was facing a Class B felony (first-degree unlawful transaction with a minor, three-year-old victim) and a Class C felony (first-degree sexual abuse, three-year-old victim), with possible consecutive terms sentences of fifteen to thirty years, and a possible violent offender mandatory sentence of 85% under KRS 439.3401. In return for the plea bargain, the unlawful transaction charge was dismissed, the sexual abuse charge was not enhanced, Belk did not have to admit the factual basis of the charge, was not subject to violent offender restrictions, received a five-year sentence with a probation recommendation, and, upon compliance with the probation requirements, would not have to spend a day in prison.

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