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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000176-MR

DERRICK A. HARGROVE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NOS. 10-CR-000563, 10-CR-002186, AND 10-CR-002868

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant appeals from an order denying his RCr[1] 11.42 motion in which he alleged his trial counsel was ineffective. We reverse and remand for the trial court to hold an evidentiary hearing on the two issues raised on appeal.

[1] Kentucky Rule of Criminal Procedure.

Pursuant to a plea agreement on December 9, 2011, Appellant pled guilty to multiple charges from four different Jefferson Circuit Court cases. Of relevance to this opinion, in case 10-CR-000563, Appellant pled guilty to second-degree trafficking in a controlled substance, first offense[2] and illegal possession of drug paraphernalia. For this case, Appellant was sentenced to five-years' imprisonment. After Appellant pled guilty in all four cases, he was sentenced to a total of twenty-years' imprisonment.

Appellant then filed a timely RCr 11.42 motion in which he argued that his trial counsel was ineffective because he did not perform any pre-trial investigation into possible exculpatory witnesses and did not discuss the changes in the trafficking in the first-degree statute which occurred with the passage of House Bill (HB) 463.[3] Appellant claims that he informed his trial counsel of witnesses who would testify that the cocaine found in his residence was not his and that the changes HB 463 made to the trafficking statute would have made it impossible for him to be found guilty of that charge. Appellant argues that had his trial counsel not been ineffective, he would have insisted on going to trial. The trial court denied the motion without holding an evidentiary hearing. This appeal followed.

> 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

[2] The trafficking charge arose after police officers searched his home and recovered a digital scale, a prescription pill bottle without a label, two packets of cocaine, a knife, and baggies.

[3] Appellant raised other issues at the trial level, but they were not raised on appeal.

> 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.
>
> Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." While "[s]olemn declarations in open court carry a strong presumption of verity," "the validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken [.]" The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and "caused the defendant to lose what he otherwise would probably have won" and "whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Because "[a] multitude of events occur in the course of a criminal proceeding which might influence a defendant to plead guilty or stand trial," the trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001) (citations omitted). "[A] hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

Appellant's first argument is that he was entitled to a hearing on the issue of his counsel's lack of pre-trial investigation into exculpatory witnesses. We agree. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

In the case at hand, Appellant informed his trial counsel of two witnesses who were willing to testify that the cocaine found in Appellant's house was not his. In fact, one such witness would have testified that he was the one who left the cocaine in Appellant's house. This is supported by the record in this case. The record contains copies of correspondence Appellant sent to his trial counsel which informed him of these witnesses. The record also contains affidavits of these witnesses stating that the cocaine was not Appellant's. Appellant claims his counsel did not investigate these two witnesses. Whether or not Appellant's counsel investigated these witnesses cannot be determined from the face of the record; therefore, a hearing is required.

Appellant also argues that he was entitled to a hearing on his claim that his trial counsel was ineffective for not informing him of the changes to the law after the passage of HB 463. Again, we agree.

Appellant was originally charged with first-degree trafficking in a controlled substance, first offense. At the time Appellant was originally charged, that statute read:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.
> (2) Any person who violates the provisions of subsection (1) of this section shall:
> (a) For the first offense be guilty of a Class C felony.
> (b) For a second or subsequent offense be guilty of a Class B felony.

KRS[4] 218A.1412 (amended 2011). After Appellant was charged, but before he pled guilty, KRS 218A.1412 read:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:
> (a) Four (4) grams or more of cocaine;
> (b) Two (2) grams or more of heroin, fentanyl, or methamphetamine;
> (c) Ten (10) or more dosage units of a controlled substance that is classified in Schedules I or II and is a narcotic drug, or a controlled substance analogue;
> (d) Any quantity of lysergic acid diethylamide; phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers; or
> (e) Any quantity of a controlled substance specified in paragraph (a), (b), or (c) of this subsection in an amount less than the amounts specified in those paragraphs.
> (2) The amounts specified in subsection (1) of this section may occur in a single transaction or may occur in a series of transactions over a period of time not to

[4] Kentucky Revised Statute.

exceed ninety (90) days that cumulatively result in the quantities specified in this section.
(3) (a) Any person who violates the provisions of subsection (1)(a), (b), (c), or (d) of this section shall be guilty of a Class C felony for the first offense and a Class B felony for a second or subsequent offense.
(b) Any person who violates the provisions of subsection (1)(e) of this section:
1. Shall be guilty of a Class D felony for the first offense and a Class C felony for a second or subsequent offense; and
2. a. Except as provided in subdivision b. of this subparagraph, where the trafficked substance was heroin and the defendant committed the offense while possessing more than one (1) items of paraphernalia, including but not limited to scales, ledgers, instruments and material to cut, package, or mix the final product, excess cash, multiple subscriber identity modules in excess of the number of communication devices possessed by the person at the time of arrest, or weapons, which given the totality of the circumstances indicate the trafficking to have been a commercial activity, shall not be released on parole until he or she has served at least fifty percent (50%) of the sentence imposed.
b. This subparagraph shall not apply to a person who has been determined by a court to have had a substance use disorder relating to a controlled substance at the time of the offense. "Substance use disorder" shall have the same meaning as in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.
(c) Any person convicted of a Class C felony offense or higher under this section shall not be released on probation, shock probation, parole, conditional discharge, or other form of early release until he or she has served at least fifty percent (50%) of the sentence imposed in cases where the trafficked substance was heroin.

HB 463 drastically changed the trafficking in the first-degree statute. Of relevance to this case are the penalties. According to the record, police only recovered 0.490 grams of cocaine from Appellant's home. According to the old

version of the statute, Appellant would be guilty of a Class C felony as this was his first offense. A Class C felony is punishable by 5 to 10 years' imprisonment. KRS 532.060(2)(c). Under the new statute, Appellant's charge would fall under KRS 218A.1412(1)(e). A conviction under this subsection is a Class D Felony. KRS 218A.1412(3)(b)1. A Class D felony is punishable by 1 to 5 years' imprisonment. KRS 532.060(2)(d).

> No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

KRS 446.110.

Whether or not Appellant's counsel discussed these changes with Appellant cannot be determined from the face of the record. Considering Appellant was offered 5-years' imprisonment in the plea agreement for the trafficking charge,[5] the maximum for a Class D felony, we believe this could have prejudiced Appellant. A hearing is required to determine this issue.

Based on the foregoing, we reverse and remand for an evidentiary hearing on these two RCr 11.42 issues.

ALL CONCUR.

[5] The plea agreement amended the first-degree trafficking charge to second-degree trafficking.

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