RENDERED: February 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0961-MR

WILLIAM BAKER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 91-CR-00157

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: ABRAMSON, BUCKINGHAM, AND EMBERTON, JUDGES.

EMBERTON, JUDGE. William Baker appeals an order of the Kenton Circuit Court entered on April 9, 1997, denying his motion to vacate, alter, amend or correct a sentence brought pursuant to Rule of Criminal Procedure (RCr) 11.42. We affirm.

On July 12, 1991, Baker was indicted by the Kenton County Grand Jury on fifteen felony counts involving illegal sexual contact with three children under twelve years of age including one count of first-degree rape (KRS 510.040), six

counts of first-degree sexual abuse (KRS 510.110), and eight counts of first-degree sodomy (KRS 510.070). The first-degree rape and first-degree sodomy offenses carried sentences of twenty years to life, and the first-degree sexual abuse offenses were subject to sentences of one to five years in prison. On October 15, 1991, Baker entered a guilty plea to one count of first-degree rape, and two counts of first-degree sodomy pursuant to a plea agreement with the Commonwealth, which included the Commonwealth moving to dismiss the remaining twelve counts and recommended a sentence of twenty years on each count to run concurrently. After conducting guilty plea and sentencing hearings, the circuit court accepted the guilty plea and sentenced Baker to serve twenty years in prison on each of the three counts to run concurrently for a total of twenty years. On March 26, 1997, Baker, through counsel, filed an RCr 11.42 motion to vacate the judgment alleging the guilty plea was unfairly induced. The circuit court denied the motion without a hearing on April 9, 1997, finding the guilty plea was entered in a constitutionally satisfactory manner. This appeal followed.

Baker argues that his guilty plea was constitutionally infirm because it was not entered knowingly, intelligently and voluntarily as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). He contends that he had a misunderstanding of his potential parole eligibility, which caused him to plead guilty rather than go to trial. More

specifically, Baker posits that he believed and was advised by counsel that he would not be eligible for parole until having served fifty percent (50%) of his sentence as required by KRS 439.3401(3)[1] and Huff v. Commonwealth, Ky., 763 S.W.2d 106 (1989). He states that he was faced with the option of pleading guilty pursuant to the plea agreement with a twenty year total sentence or going to trial with a potential sentence, if convicted, of 205 years with no reasonable expectation of parole. Baker points out that the Kentucky Supreme Court in Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992), reinterpreted KRS

[1]KRS 439.3401 provides, in relevant part, as follows:

> (1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim.
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> (2) A violent offender who has been convicted of a capital offense and who has received a life sentence (and has not been sentenced to twenty-five (25) years without parole), or a Class A felony and receives a life sentence, or to death and his sentence is commuted to a life sentence shall not be released on parole until he has served at least twelve (12) years in the penitentiary.
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> (3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least fifty percent (50%) of the sentence imposed.

439.3401(3) to provide for parole eligibility within twelve years for all persons convicted of non-capital offenses. Baker maintains that had he believed at the time of the guilty plea that he would have been eligible for parole in twelve years, he would have gone to trial and not pled guilty. Baker argues that because his guilty plea was induced by an understanding of parole eligibility later declared erroneous, the guilty plea is invalid as a violation of due process, equal protection and fundamental unfairness under the federal and state constitutions. We disagree.

The primary factor affecting the analysis in this case is the fact that Baker pled guilty. In general, a valid guilty plea waives all defenses except that the indictment charged no offense. Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994); Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 163 (1970); Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992). The validity of a guilty plea is determined from the totality of the circumstances surrounding it, rather than reference to some magical incantation recited at the time it was taken. Kotas v. Commonwealth, Ky. App., 565 S.W.2d 445, 447

(1978); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1987).

More important, a plea of guilty and the ensuing conviction constitute all of the factual and legal elements necessary to sustain a binding final judgment of guilt and a lawful sentence. United Sates v. Broce, 488 U.S. 568, 569, 109 S. Ct. 757, 762, 102 L. Ed. 2d 927 (1989). Consequently, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative, then the conviction and the plea, as a general rule, foreclose the collateral attack." Id. A guilty plea represents a break in the chain of events that preceded it and a defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea. Tollett v. Henderson, 411 U.S. 266, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990).

At the time of Baker's guilty plea in October 1991, Huff v. Commonwealth, supra, represented the prevailing law interpreting KRS 439.3401. In Huff, the Court upheld the constitutionality of this statute despite the fact that a literal interpretation of KRS 439.3401(3) resulted in possible parole ineligibility for violent offenders sentenced to a term of years

in excess of twelve years. In Sanders v. Commonwealth, supra, which was decided after Baker's quilty plea, the Supreme Court reaffirmed the constitutionality of the statute, but it reinterpreted the statute to provide a twelve-year ceiling on parole ineligibility under subsection 3. The Court in Sanders, however, did not state that its opinion should be applied retroactively.

Baker's requested relief extends even beyond a pure retroactive application of Sanders because he seeks vacation of his entire conviction, rather than a mere re-adjustment of his parole eligibility. Baker's attempt to impose the legal interpretation of KRS 439.3401 rendered in 1992 on the situation as it existed at the time of the guilty plea in 1991 is contrary to established law and to the necessity for finality in guilty pleas. In Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the defendant was charged with kidnapping at a time when the existing law allowed a possible death penalty only upon conviction by a jury. Nine years after the defendant pled guilty, the Supreme Court in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), held the death penalty provision of the kidnapping statute unconstitutional. Brady filed a petition for writ of habeas corpus claiming his guilty plea was involuntary in part because it was based on the fear of the death penalty provision which was subsequently rendered unconstitutional. The Court rejected

Brady's challenge that his guilty plea was unconstitutional because of his understanding of potential punishment that changed due to subsequent case law.

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents (citation omitted), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.
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> The fact that Brady did not anticipate United States v. Jackson, supra, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

397 U.S. at 757, 90 S. Ct. at 1473-74. See also United States v. Muriel, 111 F.3d 975 (1st Cir. 1997)(guilty plea not invalid even though based on assumption about offense rendered improper by subsequent case law).

In the case sub judice, the record reveals that the guilty plea satisfied the requirements of Boykin. During the guilty plea proceeding, Baker explicitly waived his rights to a speedy trial, to a jury trial, to cross-examine witnesses, to call witnesses, to remain silent, to be represented by an attorney at trial, and to appeal a jury verdict. Baker was advised by the court that the maximum penalty was life and the minimum penalty was twenty years for each of the three counts of first-degree rape (one count), and first-degree sodomy (two counts). Baker affirmatively indicated to the trial court that he was pleading guilty because he committed the offenses and was abandoning any claim of innocence. Baker acknowledged signing the guilty plea document delineating his constitutional rights, the penalty range and the plea agreement. An appellant's guilty plea based in reliance on parole laws in effect at the time of his plea is not rendered invalid because of a change in the law. See McNeil v. Blackburn, 802 F.2d 830, 832 (5th Cir. 1986). As the court stated in Smith v. Blackburn, 785 F.2d 545, 548 (5th Cir. 1986), "[t]here is no implied warranty that state law will not change."

Furthermore, during the guilty plea proceeding, Baker stated that he had conferred with his attorney about the case and that he was satisfied with counsel's representation. Counsel told the judge that he had examined the prosecution's evidence thoroughly and had reviewed it with Baker. Counsel stated that he believed the guilty plea was in Baker's best interest given the incriminating evidence, including eyewitness testimony from three children and testimony from a physician. Baker admits that counsel's advice on parole eligibility was consistent with the law applicable at the time of the plea as expressed in Huff. Furthermore, failure to anticipate a change in existing law does not render counsel's assistance deficient under the Sixth Amendment. Ruff v. Armontrout, 77 F.3d 265, 268 (8th Cir. 1996)(failure to raise Batson challenge not ineffective assistance); Skaggs v. Commonwealth, Ky. App., 885 S.W.2d 318, 319 (1994)(failure to anticipate challenge to grand jury impaneling procedure was not ineffective assistance of counsel). Baker's claim that counsel's advice represented gross misadvice sufficient to constitute ineffective assistance of counsel is without merit. As discussed earlier, Baker cannot utilize the change in the law on interpretation of the parole eligibility statute to challenge the intelligent nature of the guilty plea.

Baker faced a trial on fifteen counts involving sexual molestation of three young children with significant incriminating evidence. He decided to accept the plea agreement

resulting in conviction on only three counts and the minimum sentence available for those offenses. Based on a review of the record and the totality of the circumstances, we believe that Baker's guilty plea was made knowingly, intelligently and voluntarily.

We affirm the Kenton Circuit Court order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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