RENDERED: February 26, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001621-MR

EARL BRYNA PEEL, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CR-679

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: DYCHE, EMBERTON and JOHNSON, Judges.

JOHNSON, JUDGE: Earl Bryna Peel, Jr. (Peel) appeals from an order of the Fayette Circuit Court entered on June 19, 1997, that denied his RCr 11.42 motion to vacate judgment. Pursuant to a plea agreement with the Commonwealth, Peel pled guilty to one count of kidnapping, Kentucky Revised Statutes (KRS) 509.040, one count of escape in the second degree, KRS 520.030, and one count of robbery in the second degree, KRS 515.030. The trial court sentenced Peel to ten years for the kidnapping conviction, five

years for the escape conviction to be served concurrently, and ten years for the robbery conviction to be served consecutively for a total of twenty years. Peel argued in his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion that he was prejudiced by his counsel's ineffective assistance in the entry of his guilty plea to the kidnapping charge. The trial court denied the motion without a hearing. After reviewing the record, the RCr 11.42 motion, the briefs, and the applicable law, we vacate the order of the Fayette Circuit Court and remand for an evidentiary hearing.

On June 23, 1995, Peel was arrested at his residence pursuant to arrest warrants and charged with several crimes as a result of his actions the previous day. On June 22, 1995, while en route to a community service project during a period of incarceration, Peel forced the driver of the van out of the vehicle, took the van, and proceeded to his wife's home. At one point, Peel threatened the driver with a rock. According to Peel, he had recently learned that his wife had apparently been involved in an extramarital affair and that she had begun divorce proceedings against him seeking custody of their two children. He said that he went to the residence to discuss saving the marriage. Once there, Peel attempted to force his wife, his six-year-old daughter, and her visiting friend into a vehicle, with little success. As he would get one person into the car, the others would get out. Peel then drove his wife's car to his mother-in-law's residence and talked to her and to another person

on the telephone. He took a shotgun from his mother-in-law's house, and later returned to his home. He stated that he planned to use the shotgun to commit suicide. The next morning, before he was able to accomplish this, police arrived and arrested him.

The police charged Peel with escape in the second degree, robbery in the second degree, two counts of wanton endangerment in the first degree, assault in the fourth degree, theft by unlawful taking, three counts of kidnapping, burglary in the first degree, and unlawful imprisonment in the first degree. Peel's court-appointed counsel moved the trial court for a competency evaluation, which was granted. According to the evaluation report dated October 4, 1995, Peel was competent to stand trial. The grand jury returned an indictment on July 31, 1995, charging Peel with three counts of kidnapping, one count of escape in the second degree, and one count of robbery in the first degree for taking the van. On December 1, 1995, and on advice of counsel, Peel pled guilty pursuant to a plea agreement with the Commonwealth to one count of kidnapping, one count of escape, and one count of the reduced charge of robbery in the second degree. The proposed penalties for the charges to which he pled guilty were ten, five, and ten years, respectively. The trial judge accepted Peel's guilty plea after questioning him as to the events underlying the charged offenses, his understanding of the charges and his plea, and his representation. Peel then signed a guilty plea form waiving various constitutional rights. On January 2, 1996, the trial judge sentenced Peel to ten years

on each of the kidnapping and robbery convictions, to be served consecutively, and to five years on the escape conviction, to be served concurrently, for a total of twenty years.

Peel filed a motion for shock probation on April 29, 1996, stating that he intended to remarry his ex-wife. The motion was denied on May 6, 1996. On March 21, 1997, Peel, through appointed counsel, filed an RCr 11.42 motion to vacate judgment alleging that his counsel had failed to provide effective assistance in the guilty plea. In his motion, Peel argued that his counsel had failed to adequately investigate his offenses and to consider the defenses available to him on the kidnapping charges. More specifically, he contended that the intent to terrorize element of KRS 509.040(1)(c) was absent, and that a jury probably would only have convicted him of unlawful imprisonment in the second degree. Alternatively, he argued that even if the element of intent could have been established, that the charged offense was never completed.

In its response, the Commonwealth argued that Peel's motion should be denied because he never stated what was wrong with his counsel's advice. Additionally, the Commonwealth argued that Peel acknowledged at the guilty plea hearing that he had no complaints about his attorney, that he had gone over the guilty plea form with his attorney, and that they had discussed the elements of the charges and that Peel had signed the form. In response, Peel argued that the record did not contain the complete factual circumstances surrounding the plea, and that at

a minimum an evidentiary hearing should be held. The trial court denied Peel's RCr 11.42 motion without a hearing on June 19, 1997, finding that the plea had been entered voluntarily, intelligently, and knowingly, and that there was no indication that counsel was ineffective. This appeal followed.

Peel contends that his counsel rendered ineffective assistance in advising him to plead guilty to the kidnapping charge, and that the guilty plea was not entered knowingly, voluntarily and intelligently. Additionally, he contends that the record does not refute the allegations in his RCr 11.42 motion that his counsel failed to adequately investigate the circumstances surrounding the charged offenses or to advise him as to the defenses available to the kidnapping charge.

Having reviewed the guilty plea hearing, we conclude that it clearly demonstrates the lack of communication between counsel and Peel as well as Peel's lack of understanding of his rights and the defenses. Specifically, Peel never admitted the intent to terrorize which is an element necessary for a jury to convict him of kidnapping, and furthermore, the record on its face does not establish this element.

In order to establish an ineffective assistance of counsel claim, a movant must meet the requirements of a two-prong test. A movant must establish (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702

S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to Strickland, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective standard of reasonableness, or under the prevailing professional norms. The movant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879-880 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 878 (1969). An evidentiary hearing on the merits of allegations raised in an RCr 11.42 motion is not required if the allegations can be refuted on the face of the record. Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727 (1986).

To challenge a guilty plea based upon ineffective assistance of counsel, the appellant must establish that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty. This test has two parts: (1) that counsel's errors were so serious that his performance fell outside the range of professionally competent service, and (2) that this deficient performance so seriously affected the guilty plea process that there is a reasonable probability that the appellant would not have pled guilty and would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 203 (1985); accord, Sparks, supra. In order to be valid, a guilty plea must represent a voluntary and intelligent choice among alternative courses of action open to the movant. North Carolina v. Alford,

400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992).

Peel has argued that his counsel did not render effective assistance of counsel in advising him to plead guilty to the one count of kidnapping. Kidnapping, a Class B Felony, is defined in KRS 509.040(1)(c) (emphasis added) in pertinent part as follows: "A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is: . . . (c) To inflict bodily injury or to terrorize the victim or another[.]" It is Peel's position that a jury would not have convicted him of any of the three counts of kidnapping because the charged offenses were never completed, and because his conduct did not rise to the level addressed by the statute since the Commonwealth could not have established the necessary element of intent to terrorize. At most, Peel argued, he could have been convicted of unlawful imprisonment, second or first degree. "A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury." KRS 509.020(1). Unlawful imprisonment in the first degree is a Class D felony, which provides for a term of imprisonment of one to five years. KRS 532.020(1)(c). The only elements necessary to establish unlawful imprisonment in the second degree, a Class A misdemeanor, are that a person "knowingly and unlawfully restrains another person." KRS

509.030(1). A Class A misdemeanor has a term of imprisonment of ninety days to twelve months. KRS 532.020(2).

The record contains varying accounts of what transpired on June 22, 1995. In addition, Peel's statements at the guilty plea hearing as to whether he intended to terrorize his wife, his daughter, and her friend muddled the situation. Because the trial court did not hold an evidentiary hearing, there is not enough evidence in the record to refute what Peel claims in his RCr 11.42 motion. With the record before us, we cannot find the evidence necessary to establish the element of intent to terrorize for a conviction on the kidnapping charge. It appears that Peel most likely would have been convicted of unlawful imprisonment in the second degree. Additionally, based upon the little evidence of record, Peel's counsel may very well have been ineffective in advising him to plead guilty to kidnapping without having advised Peel of the defenses that existed. Because of this colorable failure to properly advise his client as to the defenses available to the charge of kidnapping, counsel's performance may very well have fallen outside of the range of professionally competent representation. As Peel's allegations cannot be refuted on the face of the record, we must remand for an evidentiary hearing to allow the development of the factual circumstances surrounding the plea to be made a part of the record. Sparks, supra.

Therefore, we vacate the judgment of the trial court and remand for an evidentiary hearing in accordance with this Opinion.

DYCHE, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Hon. Brian Thomas Ruff
LaGrange, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
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