

RENDERED: April 30, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-003236-MR

J. W. TURNER

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
INDICTMENT NO. 93-CR-033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. J. W. Turner appeals from an order denying his Ky. R. Crim. Proc. (RCr) 11.42 motion to vacate a 15-year sentence imposed following his plea of guilty to six counts of incest. In his motion, Turner claimed that his counsel provided ineffective assistance when she mistakenly informed him that if he was convicted by a jury of all charges pending against him he faced a possible 60-year sentence. This misinformation, Turner says, led him to plead guilty when would not otherwise have done so. Turner insists on appeal that the circuit court erred when it failed to conduct an evidentiary hearing to consider whether he received ineffective assistance of counsel before ruling on his motion.

On April 6, 1993, Turner was charged in an indictment with six counts of incest, in violation of Ky. Rev. Stat. (KRS) 530.020. The Commonwealth offered to recommend a maximum ten-year sentence in exchange for a guilty plea, but revoked its offer when Turner failed to enter a guilty plea at a pre-trial hearing. On November 1, 1993, Turner pleaded guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to six counts of incest. On December 6, 1993, the circuit court sentenced Turner to imprisonment for a term of 20 years.

On May 5, 1997, Turner filed a RCr 11.42 motion seeking vacation of his sentence or, in the alternative, specific performance of the plea agreement. Turner argued that his counsel was ineffective because she mistakenly informed him that he faced a maximum sentence of 60 years. Turner contended that he would not have pleaded guilty had counsel properly informed him that the maximum possible sentence was 20 years.

On September 29, 1997, the circuit court conducted an evidentiary hearing and determined that Turner had entered a plea without any recommendation as to sentence from the Commonwealth. The court also found that "at the time [Turner] was sentenced, the Court mistakenly advised him that he faced a maximum sentence on all six felony Counts of sixty years." On October 28, 1997, the court vacated Turner's 20-year sentence.

On November 3, 1997, Turner moved for further findings regarding his claim that his counsel had rendered ineffective assistance leading him to plead guilty when he would not otherwise

have done so. On December 2, 1997, the circuit court denied Turner's request and determined that his claim of ineffective assistance of counsel and failure to make a knowing, intelligent and voluntary plea of guilty was not supported by credible evidence. On December 3, 1997, the court entered an order sentencing Turner to 15 years' imprisonment. This appeal follows the circuit court's denial of Turner's motion for an evidentiary hearing to consider his claim that he received ineffective assistance of counsel and his claim that the court should have made specific findings of fact on this issue.

When a trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a RCr 11.42 motion, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). If the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985).

In Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986), this Court observed that:

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.¹

Following an evidentiary hearing, the circuit court found that at the time of the sentence it had mistakenly advised Turner that he faced a maximum sentence on all six felony counts of 60 years rather than a maximum sentence of but 20 years.² Turner has also attached as an exhibit to his RCr 11.42 motion correspondence from his attorney which he contends shows that his counsel mistakenly informed him that if he was convicted by a jury on all counts, he could face a possible 60-year sentence.

KRS 532.110(1)(c) limits the aggregate consecutive sentences a court may impose:

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.

¹ Citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Cf., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

² The court based its decision that the maximum sentence is 20 years on Ky. Rev. Stat. (KRS) 532.110(1)(c) and 532.080(6)(b). See also Dawson v. Commonwealth, Ky. App., 756 S.W.2d 935 (1988), and Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1987).

Thus, the circuit court correctly determined that the maximum sentence that it could impose was 20 years, not 60 years.

Turner insists that had he not been misinformed by his counsel and by the court that he was subject to a maximum sentence of 60 years he would not have pleaded guilty, but, instead, would have insisted on going to trial. Because his assertion raises a factual issue that cannot be resolved simply by reference to the transcript of the hearing at which he pleaded guilty and was sentenced, an evidentiary hearing is required.

Accordingly, the order denying Turner's RCr 11.42 motion is vacated and this case is remanded to Graves Circuit Court with directions to conduct an evidentiary hearing to consider whether Turner received ineffective assistance of counsel and whether, as a result, he pleaded guilty to six counts of incest when he would not otherwise have done so. Turner shall be permitted to testify at such hearing and may call witnesses on his behalf. The court shall make specific findings of fact regarding this issue.

ALL CONCUR.

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