RENDERED: August 27, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002691-MR

RALPH EDWARD PAYNE, SR. — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 89-CR-00125

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, GARDNER, and SCHRODER, JUDGES.

EMBERTON, JUDGE: Ralph Edward Payne, Sr. (Payne) appeals from an order of the Henderson Circuit Court entered on October 6, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Civil Procedure (RCr) 11.42. After review of the record, briefs and the applicable law, we affirm.

In September 1989, the Henderson County Grand Jury indicted Payne on six felony counts of first-degree sodomy (Sodomy I)(KRS 510,070), five felony counts of second-degree sodomy (Sodomy II) (KRS 510.080), one felony count of incest (KRS

530.020), two felony counts of first-degree criminal abuse (Criminal Abuse I)(KRS 508.100), one felony count of first-degree sexual abuse (Sexual Abuse I)(KRS 510.110), two misdemeanor counts of second-degree sexual abuse (Sexual Abuse II)(KRS 510.120), and one misdemeanor count of fourth-degree assault (Assault IV)(KRS 508.030). These charges involved physical assaults and deviate sexual acts between Payne and his three young minor stepdaughters between March 1988 and August 1989. In September 1989, Payne's attorney filed a motion to quash one count of the indictment, a motion for a bill of particulars, and a motion for discovery. The trial court granted the motions for discovery and a bill of particulars in large part, but denied the motion to quash.

On November 27, 1989, Payne entered a guilty plea to all counts of the indictment pursuant to a plea agreement with the Commonwealth. Under the plea agreement, the Commonwealth recommended sentences of twenty (20) years on each of the six counts of Sodomy I, ten (10) years on each of the five counts of Sodomy II, ten (10) years on the one count of Incest, ten (10) years on each of the two counts of Criminal Abuse I, five (5) years on the one count of Sexual Abuse I, twelve (12) months on each of the two counts of Sexual Abuse II and twelve (12) months on the one count of Assault IV. The Commonwealth also recommended that all of the sentences run concurrently for a total sentence of twenty (20) years in prison. In January 1990,

the trial court sentenced Payne consistent with the Commonwealth's recommendations to serve twenty years in prison.

In August 1997, Payne filed an RCr 11,.42 pro se motion seeking to set aside his conviction based on ineffective assistance of counsel. He also requested appointment of counsel and an evidentiary hearing on the motion. The trial judge ordered preparation of a transcript of the guilty plea hearing. Upon review of the guilty plea hearing, the trial court denied the motion in a written order because Payne did not establish ineffective assistance of counsel or a due process violation. This appeal followed.

RCr 11.42 allows persons in custody under sentence to raise a collateral attack on the judgment entered against them. A movant is not entitled under RCr 11.42 to a hearing if his motion on its face does not allege facts or state grounds, which if true, would render the judgment void. Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965); Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967); Skaggs v. Commonwealth, Ky. App., 803 S.W.2d 573, 576 (1990), cert. denied, 502 U.S. 844, 112 S. Ct. 140, 116 L. Ed. 2d 106 (1991). Similarly, the trial court is not required to appoint counsel on an RCr 11.42 motion where the substantive claim is refuted on the record or appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984); Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

Payne raises two issues on appeal. First, whether his guilty plea is invalid because he received ineffective assistance of counsel involving parole eligibility. Second, whether the twenty-year sentence without the possibility of parole until he had served fifty percent (50%) of the sentence violated due process.

In general, a valid guilty plea waives all defenses except jurisdictional defenses such as the indictment failed to state an offense. Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994); Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). However, a defendant may still collaterally challenge a guilty plea based on ineffective assistance of counsel and the voluntary nature of the plea. See United States v. Broce, 488 U.S. 568, 569, 109 S. Ct. 757, 762, 102 L. Ed. 2d 927 (1989).

A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel under the Sixth Amendment. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333 (1980); Shelton v. Commonwealth, 928 S.W.2d 817 (1996). "[A]n accused who has not received reasonably effective assistance of counsel in deciding to plead guilty cannot be bound by his plea." United States v. Fairchild, 803 F.2d 1121, 1123 (11th Cir. 1986)(quoting Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984)). A guilty plea influenced by ineffective assistance of counsel is not entered voluntarily. Fields v. Attorney General of State of Maryland, 956 F.2d 1290, 1296-97 (4th Cir.), cert. denied, 506

U.S. 885, 113 S. Ct. 243, 121 L. Ed. 2d 176 (1992); United States v. Carr, 80 F.3d 413, 416-17 (10th Cir. 1996).

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and the deficiency resulted in actual prejudice affecting the outcome. 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). Prejudice focuses on whether counsel's deficient performance renders the result of the proceeding unreliable or fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L. Ed. 2d 180 (1993). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970), and 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. Hill v. Lockhart, 474 U.S. at 58, 106 S. Ct. at 370; accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. 694, 104 S. Ct. at 2068. See also Miles v. Dorsey, 61 F.3d

1459, 1475 (10th Cir. 1995), cert. denied, 516 U.S. 1062, 116 S. Ct. 743, 133 L. Ed. 2d 692 (1996). Determining whether there is a reasonable probability that the defendant would have gone to trial is based on an objective analysis of the circumstances. See, e.g., Panuccio v. Kelly, 927 F.2d 106, 109 (2nd Cir. 1991); Shone v. Purkett, 15 F.3d 785, 790 (8th Cir. 1994).

Payne argues that his guilty plea is invalid because it was based on ineffective assistance of counsel. More specifically, he asserts that defense counsel provided erroneous advice on his potential parole eligibility. He states that counsel told him that he would be eligible for parole consideration after serving twenty percent (20%) of his sentence, or four years on the twenty-year sentence. Payne contends that counsel failed to properly investigate Kentucky law, which required persons convicted of sexual offenses such as first-degree sodomy to serve fifty percent (50%) of his sentence before becoming eligible for parole. See KRS 439.3401. Payne states that he relied to his detriment on the misadvice of counsel on parole eligibility and that he would not have pled guilty, but would have insisted on going to trial, if he had not been misinformed.

However, a review of the guilty plea hearing presents a different picture. During the hearing, the trial judge carefully reviewed with Payne the various constitutional and statutory rights he was waiving by pleading guilty. The judge also reviewed the possible sentences and the possibility of parole.

Judge: And have each of you read these indictments and discussed them fully with your attorney to the extent that you feel that you are fully informed and understand the nature of all charges made against you?

Payne. Yes, sir.

Judge. Mr. Payne, you understand that you're charged with one count of Incest which is a C felony punishable by not less than five, nor more than 10 years in prison?

Payne: Yes, sir.

Judge: That you're charged with various counts of Second-Degree Sodomy which is likewise a C felony punishable by not less than five, nor more than 10 years in prison?

Payne: Yes, sir.

Judge: That you're charged with various counts of First-Degree Sodomy which by the reason of the age of the child involved makes it an A felony punishable by not less than 20 years nor more than life. That you're charged with one count of First-Degree Sexual Abuse which is a D felony punishable by not less than one nor more than five years in imprisonment. That you're charged with two counts of Second-Degree Sexual Abuse which is an A misdemeanor punishable by not more than 12 months in jail or more than a $500.00 fine. That you're charged with one count of Fourth-Degree Assault which is likewise an A misdemeanor, and that you're charged with two counts of First-degree Criminal Abuse which is a C felony punishable by not less than five nor more than 10 years. You understand that?

Payne: Yes, sir.

* * * *

Judge: And do each[1] of you feel that you fully understand the consequences of entering a guilty plea here this morning?

Payne: Yes, sir.

Judge: Now have there been any promises, any pressure, any coercion been brought to bear upon either of you by any person on this earth to get you to enter a guilty plea against your voluntary act and deed?

Payne: No, sir.

Judge: Now, gentlemen, no one that I know of is in a position to be able to accurately advise you as to how much of your sentences you might have to serve in state prison before you would be able to make parole from prison in the event you're not granted probation or conditional discharge, nor do I know, for that matter, that you would ever make parole, that you might conceivably have to go to state prison and serve every single day of your sentence. Are each, and both of you, fully aware of this?

Payne: Yes, sir.

Judge: And I trust that neither of you are relying upon anything your attorney, or anyone else, has told you or failed to tell you about when, if ever, you might be eligible for parole. You're not relying on anybody's promises or assurances of this nature?

Payne: No, sir.

Several courts have recognized that gross misadvice on parole eligibility given a defendant by his attorney may invalidate a guilty plea because of ineffective assistance of counsel. See, e.g., Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988); O'Tuel v. Osborne, 706 F.2d 498, 500-01 (4th Cir. 1983);

[1] The trial judge sometimes uses plural references because he conducted the guilty plea hearing with two defendants.

Cepulonis v Ponte, 699 F.2d 573, 577 (1st Cir. 1983); Meyers v. Gillis, 93 F.3d 1147, 1153-54 (3rd Cir. 1996). However, a defendant must still establish that counsel rendered objectively unreasonable advice and that the erroneous advice was a major material causative factor in decision to plead guilty, rather than going to trial. See Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979)("though parole eligibility dates are collateral consequences of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel."); See also Hill v. Lockhart, supra (finding defendant did not establish ineffective assistance of counsel based on erroneous parole eligibility advice because absence of actual prejudice); Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989).

Although a defendant is not absolutely bound by every statement made at the guilty plea hearing, "solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1976). Any claim that conflicts with the statements made during the guilty plea hearing faces a formidable barrier in a collateral proceeding challenging the voluntariness of the plea. Id.; Lasiter v. Thomas, 89 F.3d 699, 702-03 (10th Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 493, 136 L. Ed. 2d 386 (1996). The guilty plea colloquy is designed to uncover hidden promises or representations about the consequences of a guilty plea.

Baker v. United States, 781 F.2d 85, 90 (6th Cir.), cert. denied, 479 U.S. 1017, 107 S. Ct. 667, 93 L. Ed. 2d 719 (1986). Absent extraordinary circumstances, declarations in open court under oath should not be lightly cast aside. Zilich v. Reid, 36 F.3d 317, 320 (3rd Cir. 1994). Moreover, a defendant's self-serving statement alone that he would have gone to trial rather than plead guilty is insufficient to establish actual prejudice. See Panuccio v. Kelly, 927 F.2d 106, 109 (2nd Cir. 1991); Parry v. Rosemeyer, 64 F.3d 110, 118 (3rd Cir. 1995), cert. denied, 516 U.S. 1058, 116 S. Ct. 734, 133 L. Ed. 2d 684 (1996); Armsted v. Scott, 37 F.3d 202, 210 (5th Cir. 1994), cert. denied, 514 U.S. 1071, 115 S. Ct. 1709, 131 L. 2d. 2d 570 (1995). The court must make an independent analysis based on the totality of the circumstances. Id.

In the case at bar, the trial judge explicitly addressed the issue of parole. The court reviewed the sentencing range for each offense. Although the judge did not specifically inform Payne that he could be eligible for parole after serving ten years, he did state that no one was in position to tell Payne when he might be paroled. Payne indicated that he understood that he might have to serve the entire sentence. The trial judge asked Payne if he was relying on "anything" his attorney had told him or failed to tell him about parole eligibility. Payne indicated that he was not relying on any promises or assurances about parole eligibility by his attorney.

Payne has presented no reason why his statements under oath at the guilty plea hearing should be discounted in favor of his claims made several years later in the RCr 11.42 motion. Payne not only did not inform the trial court at the guilty plea hearing that he was relying on any statements by his attorney that he would be eligible for parole in four years; he indicated just the opposite, that he was not relying on any representations by his attorney about parole eligibility. The trial judge specifically told Payne that he could not rely on any such statements by his attorney in deciding whether to plead guilty.

Where misadvice by an attorney is corrected by the trial court during the guilty plea hearing, the defendant cannot establish prejudice for purposes of ineffective assistance of counsel. For example, in Worthen v. Meachum, 842 F.2d 1179, 1184 (10th Cir. 1988), overruled on other grounds by Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the defendant challenged his guilty plea because his attorney told him that he would be paroled in five or six years. The court held that even if the attorney's advice was erroneous, Worthen could not demonstrate prejudice because the trial court had told him during the guilty plea hearing that neither the attorney nor the court had any authority over the Parole Board. Similarly, in United States v. Storey, 990 F.2d 1094 (8th Cir. 1993), the court held that the defendant had not established ineffective assistance of counsel where defendant's claim of reliance on attorney's alleged erroneous parole eligibility

advice conflicted with information about parole given the defendant at the guilty plea proceeding. See also United States v. Rice, 116 F.3d 267 (7th Cir. 1997) (defendant failed to show prejudice where trial court told defendant he could not rely on counsel's advice on sentence); United States v. Carr, 80 F.3d 413 (10th Cir. 1996)(defendant failed to establish prejudice because defendant was aware that attorney gave erroneous information on mandatory life sentence given defendant before plea entered).

Payne has failed to show that he relied on any misadvice from counsel. He has not challenged the fact that he committed the offenses in the indictment. Had he gone to trial, Payne was facing a potential sentence of twenty years to life on each of the six counts of first-degree sodomy (Class A felony), five to ten years on each of five counts of second-degree sodomy (Class C felony), five to ten years on the one count of incest (Class C felony), one to five years on the first-degree sexual abuse (Class D felony), and the various misdemeanor offenses. Under the plea agreement, Payne received the minimum sentence for just one count of first-degree sodomy with the remainder of the sentences running concurrently. Given the extent and nature of the offenses, Payne very likely could have received a much greater sentence after a jury trial. Where the defendant does not challenge the inevitability of conviction on the substantive offenses, he must explicitly explain how the collateral parole information influenced his decision. As the Court stated in Hill v. Lockhart,

> [Hill] alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

474 U.S. at 60, 106 S. Ct. at 371.

If Payne had been aware that he would have to serve 50% of his sentence before becoming eligible for parole, rather than 20%, the risk of going to trial would have appeared even greater. Given the relatively minimal sentence he received under the plea agreement compared with the ultimate potential sentence he could have received at trial and the absence of any challenge to the substantive charges, the correct information on parole eligibility would not have been a determinative factor in the choice between accepting the plea agreement and going to trial. As a result, even assuming that counsel provided erroneous parole eligibility information, Payne has not established that <u>but for</u> the misadvice of counsel, there is a reasonable probability he would have gone to trial rather than plead guilty or that the guilty plea proceeding was fundamentally unfair.

Payne's second argument involves the constitutional validity of the violent offender statute, KRS 439.3401. He contends that this statute violates due process because it is arbitrary and capricious and because the trial court made no

written findings of aggravating circumstances. Payne attempts to analogize KRS 439.3401 with the death penalty statute, KRS 532.025, in maintaining that an evidentiary sentencing hearing on mitigating and aggravating circumstances is required before the enhanced parole ineligibility provisions for violent offenders can be imposed. Payne also suggests that the Department of Corrections was usurping the power of the trial court by imposing the 50% minimum parole eligibility standard without a specific order by the court.

Payne's position has been rejected in earlier court opinions. First, there is no separation of powers problem. In Rudolph v. Commonwealth, Ky. App., 710 S.W.2d 235, 236 (1986), the court stated that "the classification of crimes and the length of stay in a state penitentiary is purely a matter of the prerogative of the legislature." In Mullins v. Commonwealth, Ky. App., 956 S.W.2d 222 (1997), the court stated that parole for felonies was purely a function of the executive branch of government, and the Department of Corrections has authority to carry out the statutory provisions of KRS 439.3401. Moreover, in Belcher v. Kentucky Parole Bd., Ky. App., 917 S.W.2d 584 (1996), the court held that neither Kentucky statutes nor prison regulations created a protected constitutional due process liberty interest in parole. Thus, the trial court has no role in determining parole eligibility. Similarly, there is no statutory requirement that a trial court make written findings relevant to a defendant's "violent offender" status under KRS 439.3401.

Payne's attempt to import the procedures in death penalty cases under KRS 532.025 and raise a procedural due process challenge to KRS 439.3401 is wholly without merit.

Second, in Huff v. Commonwealth, Ky., 763 S.W.2d 106 (1989), the Kentucky Supreme Court held that KRS 439.3401 did not violate the due process clause of the Fourteenth Amendment nor Section 2 of the Kentucky Constitution. The court also held that the statute did not violate equal protection and was not unconstitutionally vague. Although in Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992), the Supreme Court later modified the interpretation of KRS 439.3401(3) to place a twelve-year cap on parole ineligibility for non-capital offense violent offenders, the court reaffirmed the constitutionality of the statue for purposes of due process and equal protection. Therefore, Payne's substantive due process challenge based on the statute being arbitrary is without merit.

In conclusion, the issues raised by Payne in his RCr 11.42 motion are clearly refuted on the current record. An evidentiary hearing on the motion was not necessary. The trial court properly denied the motion without a hearing and without appointing counsel. See Maggard v. Commonwealth, supra; Hopewell v. Commonwealth, supra.

For the foregoing reasons, we affirm the order of the Henderson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wettle
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BRIEF FOR APPELLEE:

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