RENDERED: November 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003000-MR

EARL BRYNA PEEL, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CR-00679

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, MCANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. This is the second appeal of Earl Bryna Peel, Jr. (Peel) concerning the Fayette Circuit Court's denial of his RCr 11.42 motion to vacate judgment. In his original appeal, this Court (in a not-to-be-published opinion rendered February 6, 1999 (1999-CA-001621-MR)) vacated the trial court's denial and remanded the matter for an evidentiary hearing. On remand, the trial court held an evidentiary hearing and then entered an order again denying Peel's RCr 11.42 motion. Having thoroughly reviewed the record, including the video-taped evidentiary hearing, we affirm.

In that this Court's first opinion succinctly and thoroughly sets forth the facts and issues relative to Peel's guilty plea and arguments of ineffective assistance of counsel, we adopt the following portions of that opinion:

> 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) 509.050, 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 argument 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.
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> On June 23, 1995, Peel was arrested at his residence pursuant to arrest warrants and charged with 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 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 this 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 32, 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 590.040(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.
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> 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 acknowledge 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.

After reviewing the record and arguments in the first appeal, the Court, in a split decision, determined that an evidentiary hearing was necessary. The majority believed that the record demonstrated a "lack of communication between counsel and Peel as well as Peel's lack of understanding of his rights and 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 fact, does not establish this element." (Opinion 1997-CA-001621-MR, p. 5).

Thereafter, on November 22, 1999, the circuit court conducted an evidentiary hearing in this matter. Peel was represented by counsel and testified on his behalf and the Commonwealth called Peel's ex-wife and victim of the alleged kidnapping, Diana Jeffries, as a witness. Having thoroughly reviewed the testimony of the witnesses, the arguments of counsel (both at the hearing and in the appellate briefs), and the statutory and case law applicable thereto, we believe Peel has failed to establish his ineffective assistance claim.

It is apparent to this Court that Peel was properly advised by his counsel and that he entered his plea knowingly and voluntarily. Peel was facing a maximum sentence of 85 years in prison. Considering the seriousness of the allegations, the fact that he was already serving time for domestic violence against his wife, that his wife and two young children (ages 6 and 7) were involved, that he readily admits to the escape and robbery charges, and the fact that both he and the victim agree that he forced her into the car, caused her physical injury, and in essence terrorized her and the children, we believe he could easily have been convicted of all charges and sentenced to up to 85 years. The record reflects that counsel consulted with Peel, explained the elements of each charge and possible lesser included offenses.

At the evidentiary hearing Ms. Jeffries stated, in part, the following facts had occurred on the day of the

kidnapping: that she called the police because (Peel) was supposed to be in jail; that (Peel) grabbed the phone off the wall and ripped it off wall; he ranted and raved around the house for awhile; he decided he was going to take me with him and he attempted to put me in the car: I resisted...he hit my head alongside the car door frame and then he punched me in the ribs to get me to go on in the car; she was afraid he would knock her out; she hollered to several people to call the police; he gathered up the girls, they were scared; she asked him not to do this in front of the kids but he wasn't listening; he wasn't coherent; this went on for 15 to 20 minutes; he pulled the car keys out of her hand, she didn't want her hand to get cut; he was hateful and threatening; that day was very traumatic; he assaulted me; he had become too scary to be around; he threatened to break my neck; he insinuated that he intended to shoot me and then shoot himself; he had expressed that he was going to kill me; he was running around the house yelling, "where's the gun?"; he grabbed me and ripped my nightgown; he grabbed the back of my neck; he picked me up and carried me to the car and tried to put me into it; when he left he almost ran over the two girls; he went to the kitchen and got a knife; she was afraid; she had bruises and cuts; she and kids had to go to counseling; she is so afraid a lot of the time, she feels she cannot trust anyone to keep Peel away from her; she has been depressed and must take anti-depression drugs and continue counseling; he tore the drawers up in the dresser; he was pulling drawers out and throwing clothes around and trying to find the gun. She also

responded affirmatively to each of the following questions: Were you held against your will?; Were you frightened?; (Did) you receive bodily injury? Finally, even Peel admitted, during the evidentiary hearing, that his actions might terrorize someone and that a jury might believe that based upon the stated facts he intended to terrorize or to cause bodily harm to his family.

McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 466 (1986), held that criminal intent can be inferred from the circumstances. The McClellan case cited by Peel stands for the proposition that a jury should be instructed on all lesser included offenses. There is no question that had this case proceeded to a trial, that the court would have had to instruct the jury on unlawful imprisonment. However, that is not the issue before the Court. Rather, the question is whether Peel's counsel was ineffective by recommending Peel plea guilty to kidnapping. We think not.

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. 311, 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).

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 his 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). 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., 892 S.W.2d 432, 434 (1992).

Based upon the admission of Peel that his actions could be viewed as terrorizing his victims, that a jury might easily find that he intended to terrorize his victims, the horrendous facts as detailed by Ms. Jeffries, and statutory and case law applicable to these facts, we believe counsel for Peel acted professionally and responsibly in his representation of Peel and in pursuing a plea agreement that saved Peel up to 65 years of

imprisonment. Therefore, we affirm the Fayette Circuit Court's denial of Peel's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Thomas Ruff
Assistant Public Advocate
LaGrange, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Kathryn H. Dunnigan
Assistant Attorney General
Frankfort, KY