

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000373-MR

JOSE VASQUEZ, JR.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 04-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: ACREE, VANMETER AND WINE, JUDGES.

ACREE, JUDGE: Jose Vasquez appeals from an order of the McCracken Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. He claims trial counsel failed to investigate his case and failed to inform him of potential defenses, gave him incorrect advice about his eligibility for probation, and failed to represent him after he filed a motion to withdraw his guilty plea. We have reviewed all of these matters and conclude that Vasquez's claims regarding counsel's advice during plea negotiations presented a material issue of fact that could not be resolved conclusively by examination of the

record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The remaining issues were correctly decided. Therefore, we affirm in part, vacate in part, and remand for an evidentiary hearing.

Vasquez was charged by indictment with first-degree robbery and tampering with physical evidence. He retained counsel; however, his first attorney withdrew from representation due to a conflict of interest. The Department of Public Advocacy was then appointed, and DPA contracted with an attorney to represent Vasquez again, due to a conflict of interest. Vasquez's attorney obtained funds for a private investigator who billed for forty hours spent investigating witnesses. This investigation ceased only when Vasquez decided to accept a plea agreement.

The Commonwealth offered to recommend the minimum sentence of ten years in exchange for Vasquez's guilty plea. His trial counsel allegedly told him that he would be a good candidate for probation or shock probation and, thus, be quickly reunited with his seven year-old son. After pleading guilty, Vasquez was released on bail to await his final sentencing. He claims that during this time he spoke to several witnesses who were prepared to offer testimony exonerating him. Thus, on the day of sentencing Vasquez attempted to withdraw his guilty plea. The motion was denied. Further, Vasquez apparently learned, for the first time, during his sentencing hearing that he was not eligible for any kind of probation due to the nature of his offense. The trial court sentenced Vasquez to ten years' imprisonment, as the Commonwealth recommended, and he is ineligible for probation until he has served eighty-five percent of his sentence.

Vasquez subsequently filed an RCr 11.42 motion, with a supporting memorandum, and requested appointment of counsel and an evidentiary hearing. After

receiving the Commonwealth's response, the trial court entered an order summarily denying his request without a hearing. This appeal followed.

Vasquez claims the trial court erred by denying him an evidentiary hearing despite his having raised specific grounds for relief that could not be refuted by the record alone. In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test, proving first that counsel made errors outside the norm of professionally recognized assistance and, second, that counsel's errors caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, because he entered a guilty plea, Vasquez is required to show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Our state courts have also recognized this standard for attacking legal representation leading to a guilty plea. *Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky.App. 1986).

Vasquez claims that trial counsel told him he would be a good candidate for probation or shock probation. However, Vasquez was pleading guilty to first-degree robbery, defined by Kentucky Revised Statute (KRS) 439.3401(1) (l) as a violent offense. KRS 439.3401(3) restricts parole eligibility for violent offenders to those who have completed eighty-five percent of their sentence. Violent offenders are also ineligible for probation or shock probation. Vasquez contends that he pleaded guilty believing there was a probability that he would soon be released on probation and could return to his young son. He argues that, had he known there was no way for him to be released from prison until he had served a minimum of eighty-five percent of his sentence, he would not have pleaded guilty, but would have maintained his innocence and faced trial by jury.

The Commonwealth claims the record refutes Vasquez's claims that he was relying on the possibility of a probated sentence when he entered his guilty plea. As proof, the Commonwealth points to the language in the plea colloquy requiring a defendant to expressly deny that he has been promised anything other than the sentencing recommendation by the Commonwealth's Attorney. However, Vasquez does not claim that he was in fact promised probation and falsely denied it when he entered his guilty plea. Rather, he claims that he was misinformed about his eligibility for probation and was motivated by that misinformation to enter a plea where he would otherwise have elected a jury trial.

This Court has previously held that misinformation as to parole eligibility can rise to the level of ineffective assistance when trial counsel advises a defendant to plead guilty. *Dees v. Commonwealth*, 2004 WL 2201243 (Ky.App. Oct. 01, 2004)(NO. 2003-CA-001883-MR)(page 3). (Unpublished case cited in accordance with Kentucky Rules of Civil Procedure (CR) 76.28(4)(c)). We see no reason why the same rationale should not apply to incorrect information as to eligibility for probation. Vasquez claims that he received misinformation regarding his eligibility for probation and, further, that this misinformation caused him to plead guilty. The record does not refute this claim. Thus, under *Fraser*, he is entitled to an evidentiary hearing to establish whether or not he received incorrect information from trial counsel regarding his eligibility for probation.

We have examined Vasquez's remaining claims regarding counsel's alleged failure to investigate and counsel's lack of participation in Vasquez's efforts to withdraw his guilty plea, and we perceive no violation of the standard set forth in *Strickland*. Thus, we affirm the trial court's decision on the remaining issues, vacate on the issue of whether or not Vasquez's counsel informed him that he would be eligible for probation or shock probation, and remand for an evidentiary hearing.

ALL CONCUR.

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