RENDERED: MAY 23, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001376-MR

BOBBY NATION — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CR-00312

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Bobby Nation appeals from an order of the Laurel Circuit Court denying his motion to vacate his conviction and sentence, pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, for first-degree robbery. We vacate and remand for an evidentiary hearing.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A Laurel County grand jury indicted Nation on three counts of first-degree robbery in connection with the robbery of a drugstore. Nation was represented by a court-appointed attorney.[2] He entered into a plea agreement with the Commonwealth and pleaded guilty to one count of first-degree robbery. In accordance with the plea agreement, the court sentenced Nation to 16 years' imprisonment on the charge and dismissed the other two charges. The final judgment was entered on April 18, 2005.

On April 2, 2007, Nation filed a motion to proceed in forma pauperis, a motion for appointment of counsel, a motion for an evidentiary hearing, and a motion to vacate the final judgment pursuant to RCr 11.42. In an order entered on June 18, 2007, the court denied the motions without appointing counsel and without granting an evidentiary hearing. This appeal by Nation followed.

Nation claims in his motion that his agreement with the Commonwealth was that he would plead guilty to one count of first-degree robbery and would receive a 16-year sentence with 20% parole eligibility. He further states that his attorney told him that if the judge asked him if he had been offered any promise in exchange for his guilty plea, he was to say "no". In addition, Nation also claims that his attorney rendered ineffective assistance of counsel by

[2] The person who actually advised Nation had a law license in another state, was awaiting her bar examination results in Kentucky, and was practicing pursuant to Rules of Supreme Court (SCR) 2.112.. An attorney licensed in Kentucky did stand with Nation when he entered his guilty plea, however.

incorrectly advising him that he would be eligible for parole after serving 20% of his sentence.

Because Nation pleaded guilty to first-degree robbery, he was classified under the statute as a violent offender. *See* Kentucky Revised Statutes (KRS) 439.3401(1)(l).[3] Therefore, he is not eligible for parole until he serves 85% of his sentence. *See* KRS 439.3401(3).

Nation asserts that after he pleaded guilty and was sentenced, he later learned that his parole eligibility was actually 85% of his sentence rather than 20% of his sentence. He argues that 85% parole eligibility is contrary to his plea agreement with the Commonwealth and also was the direct result of incorrect advice given to him by his court-appointed attorney. Nation states that he would not have pleaded guilty but would have gone to trial had he been correctly advised.

Nation's first argument is that the Commonwealth failed to honor its plea agreement to allow him to plead guilty and receive a 16-year sentence with 20% parole eligibility. Although nothing was mentioned about parole eligibility in the written plea agreement, Nation states that the Commonwealth had assured his attorney that Nation would be eligible for parole after serving 20%, not 85%, of his sentence. Thus, Nation contends that the oral agreement should be enforced and his sentence should be amended to reflect 20% parole eligibility.

[3] The definition of "violent offender" was extended to persons convicted of first-degree robbery by an amendment to KRS 439.3401 that became effective on July 15, 2002. This amendment applies only to persons who committed the crime of first-degree robbery after that date. The first-degree robbery in this case occurred on December 2, 2004.

Nation cites *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), to support his argument. In *Fraser*, the defendant claimed in his RCr 11.42 motion that he pleaded guilty only because his attorney told him that she was not prepared for trial, that he would surely be convicted if he went to trial, and that the Commonwealth had agreed that he would receive the minimum sentence of 20 years' imprisonment if he pleaded guilty. There was no written plea agreement. After the defendant pleaded guilty, the court sentenced him to the maximum sentence of life in prison.

After the trial court in *Fraser* denied the defendant's RCr 11.42 motion without an evidentiary hearing and the Court of Appeals affirmed, the Kentucky Supreme Court heard the case on discretionary review. In vacating the trial court's order and remanding the case for an evidentiary hearing, the court held as follows:

> We have held under the facts of a particular case that admissions made during a *Boykin* hearing can conclusively resolve a claim that a plea was involuntarily obtained. However, part of this alleged agreement supposedly required Appellant to deny its existence. Proof of even a secret agreement has been held foreclosed on the basis of statements made in a *Boykin* hearing 'absent extraordinary circumstances, *or some explanation* of why defendant did not reveal other terms.' Nevertheless, while the representations of a defendant, his attorney, and the prosecutor at a *Boykin* hearing, as well as any findings by the judge accepting the plea, 'constitute a formidable barrier in any subsequent collateral proceedings,' that barrier is not insurmountable if there is proof that the representations 'were so much the product of such factors as misunderstanding, duress, or *misrepresentation by others* as to make the guilty plea a

> constitutionally inadequate basis for imprisonment.' Here, the appellant explains that his representations at the *Boykin* hearing were the product of his oral agreement. If so, the issue of whether there was, in fact, an agreement could not be 'conclusively resolved' on the face of the record of the *Boykin* hearing. An evidentiary hearing on Appellant's RCr 11.42 motion is required. (citations omitted) (emphasis in original)

Id. at 457-458.

In *Fraser*, there was no written plea agreement; here, there was. The agreement here made no mention of parole eligibility. Further, Nation signed a Motion to Enter Guilty Plea form that stated in part that the plea agreement contained the entire agreement and that he had not been promised anything else.

Nevertheless, Nation alleged that there was also an oral agreement wherein the Commonwealth had promised him he would receive 20% parole eligibility if he pleaded guilty and that his attorney told him to remain silent if the judge asked him about any promises.[4] Whether or not such an oral agreement existed cannot be determined from the face of the record. Therefore, in accordance with *Fraser*, we conclude that Nation was entitled to an evidentiary hearing on this issue.[5] [6]

---

[4] Of course, any promise by the Commonwealth to Nation that he would receive 20% parole eligibility would be a promise it could not keep since 85% parole eligibility is required for a conviction of first-degree robbery. *See* KRS 439.3401(1)(l) and (3).

[5] However, *see Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986), which was decided under a specific federal rule.

[6] If, following an evidentiary hearing, the trial court determines that such an oral agreement existed, and if the court further determines that Nation is entitled to relief, then Nation would not be entitled to enforcement of the alleged oral agreement of a 16-year sentence with 20% parole eligibility for first-degree robbery as he desires since such a sentence is contrary to KRS 439.3401(1)(l) and (3). Rather, Nation's conviction should merely be vacated, the plea

Nation's second argument is a claim that counsel incorrectly advised him that he could be convicted of all three counts of first-degree robbery rather than only one count. The trial court rejected this argument on the ground that Morgan v. Commonwealth, 730 S.W.2d 935 (Ky. 1987), "clearly contradicts Movant's assertion." In Morgan, the Supreme Court affirmed a two count conviction of robbery because two people were present in the home during the robbery yet neither owned any of the property that was stolen. As with Nation's convictions, multiple victims resulted in multiple convictions.

Nation's contention that he would not have accepted the plea agreement and pleaded guilty to one count and accepted a 16-year sentence because 16 years "is not much less than the maximum sentence of 20 years" is based on a misunderstanding of the law. There was no double jeopardy violation and counsel correctly advised him of the potential of three convictions based on the three victims at the scene. *See also Stark v. Commonwealth*, 828 S.W.2d 603, 608-09 (Ky. 1991), *overruled on other grounds by Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996). Therefore, we agree with the trial court. There was no ineffective assistance of counsel in this regard.

Nation's third argument is that he is entitled to have his conviction and sentence vacated because his attorney incorrectly advised him as to his eligibility for parole. He asserts that he specifically asked his attorney about the statute concerning 85% eligibility for violent offenders and that his attorney

---

agreement set aside, and further proceedings conducted.

advised him that if he would accept the Commonwealth's plea offer of 16 years' imprisonment for one count of first-degree robbery, he would not be subjected to the violent offender statute because the use of the statute was in the discretion of the prosecutor and the prosecutor had agreed to 20% parole eligibility. Nation contends that "[a]ppellant's counsel was either not familiar with the consequences of the plea agreement or outright deceived him as to the consequences and thus, provided him with ineffective assistance." He cites *Sparks v. Sowder*, 852 F.2d 882 (6th Cir. 1988), to support his argument.

In *Sparks*, the defendant claimed in a habeas corpus action that he was denied the effective assistance of counsel because he was induced by his attorney to plead guilty to murder because he was facing a sentence of life without parole, when in fact the maximum sentence he could have received was life with the possibility of parole. The Sixth Circuit remanded the case to the trial court for an evidentiary hearing. *Id*. at 885. The court reasoned that "[w]e now hold that gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." *Id*.

The *Sparks* court relied in part on *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979). *Sparks*, 852 F.2d at 885. In *Strader*, the Fourth Circuit stated that "[o]rdinarily, parole eligibility is such an indirect and collateral consequence, of which a defendant need not be specifically advised by the court or counsel before entering a guilty plea." *Id*. at 63. The *Strader* court further elaborated, however, as follows:

> Here, though parole eligibility dates are collateral consequences of the entry 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 information, he is deprived of his constitutional right to counsel.

Id. at 65.

Similarly, in *Pitt v. U.S.*, 763 F.2d 197 (6th Cir. 1985), the Sixth Circuit held that the defendant was entitled to have his sentence vacated where the trial court and his attorney advised him before he entered a guilty plea that his maximum possible sentence was more than it actually was. The court stated:

> We stress that this case does not involve a mere failure to give a defendant some information which he later claims would have affected his pleading decision. Instead, it involves affirmative misstatements of the maximum possible sentence. Numerous cases have held that misunderstandings of this nature invalidate a guilty plea. (citations omitted)

Id. at 201.

The Commonwealth cites *Jewell v. Commonwealth*, 725 S.W.2d 593 (Ky. 1987), and *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky.App. 1982), to support its argument that parole eligibility is a collateral consequence of a guilty plea that has no bearing on Nation's guilty plea. In *Jewell*, the Kentucky Supreme Court held that a defendant need not be informed of the range of sentences that may be imposed in order for the guilty plea to withstand constitutional scrutiny. *Id*. at 594. In *Turner*, the defendant was not informed that his guilty plea to being a first-degree persistent felony offender required that he serve at least 10 years in

prison before being eligible for parole. In rejecting the appellant's constitutional argument, this court held that:

> We do not feel that the failure of a trial court to inform a defendant before accepting a guilty plea of mandatory service of sentence before eligibility for parole is a violation of constitutional due process or that such failure is a ground to vacate a judgment under RCr 11.42.

Id. at 502.

When the trial court in Nation's case considered the *Sparks* case, it held that "our Kentucky courts have not found a similar situation to *Sparks* and have declined to follow it. The facts in this case also do not move this court to follow *Sparks*." Thus, the trial court rejected Nation's argument.

We agree that Kentucky courts have not addressed a fact situation exactly like this. However, we disagree that Kentucky courts have declined to follow *Sparks*. It appears that there are no published cases in Kentucky involving facts like these and those in *Sparks*.[7]

Although the parties have not cited it, we believe that *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005), is significant. In *Fuartado*, the appellant, an immigrant, alleged ineffective assistance of counsel in that his counsel failed to inform him that his guilty plea to trafficking in marijuana could have potential deportation consequences. The court rejected that argument and

[7] We are aware of *Groves v. Commonwealth*, 2007 WL 2343767 (Ky.App. 2007), an unpublished case of this court's, where a panel of this court's judges considered the same argument and rejected it. However, the facts therein were different. In *Groves*, an evidentiary hearing was held by the trial court and the trial court found that, although counsel had incorrectly advised the appellant, there was no reasonable likelihood that the appellant would not have pleaded guilty even if his attorney had properly advised him.

stated that deportation consequences are collateral consequences and that counsel was not required to advise the defendant accordingly. *Id*. at 386. Specifically, the Kentucky Supreme Court stated as follows:

> Because the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment, failure of defense counsel to advise Appellee of potential deportation consequences was not cognizable as a claim for ineffective assistance of counsel.

Id.

We begin by noting that the *Jewell* and *Turner* cases cited by the Commonwealth are distinguishable from the facts in this case and in both *Sparks* and *Strader*. In both *Jewell* and *Turner*, the appellants had not been advised of certain consequences of their guilty pleas. In both *Sparks* and *Strader*, the appellants had been advised of the consequences of their guilty pleas but had been advised incorrectly. Further, the *Strader court* acknowledged that while parole eligibility is a collateral consequence of which a defendant need not be specifically advised, gross misadvice to a defendant by his lawyer concerning parole eligibility deprives a defendant of his constitutional right to counsel in violation of the Sixth Amendment to the U.S. Constitution. *See Strader*, 611 F.2d at 65.

In Nation's case, we conclude that the advice by his attorney, if such advice was given, constitutes gross misadvice. On a 16-year sentence, if Nation could be eligible for parole after serving 20% of the sentence, he would be eligible for parole consideration after 3.2 years. If, however, Nation is not eligible for

parole consideration until serving 85% of his sentence, he would not be eligible for parole consideration until he had served 13.6 years. The difference in time before parole eligibility exceeds ten years. Thus, we believe that whether Nation would be eligible for parole after 3.2 years or after 13.6 years could be a significant factor in his determination of whether to plead guilty or not guilty. We conclude this amounts to gross misadvice, if it occurred.

Having concluded that such advice, if it occurred, is gross misadvice, the question remains whether such misadvice may constitute ineffective assistance of counsel so as to afford relief under an RCr 11.42 motion. The Sixth Circuit in the *Sparks* case held that "gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." *Id*. at 885. Nevertheless, the Kentucky Supreme Court has held that the failure of a trial court to inform a defendant of mandatory service of sentence before accepting a guilty plea is not a violation of constitutional due process or a ground for relief from a judgment under RCr 11.42. *See Turner*, 647 S.W.2d at 502. Our supreme court has also held that "the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment of the U.S. Constitution." *See Fuartado*, 170 S.W.3d at 386.[8]

[8] In *Fuartado*, the appellant's counsel did not advise him of the deportation consequences of his guilty plea. That case is distinguishable in that regard from this case because here Nation's attorney did not just fail to give advice; rather, his attorney gave him gross misadvice.

It is apparent that our supreme court has impliedly rejected the Sixth Circuit's decision in the *Sparks* case.[9] Parole eligibility is a collateral consequence, and failure to advise or to even give gross advice concerning collateral consequences are not within the scope of a defendant's Sixth Amendment rights. *See Turner, supra; Fuartado, supra*. Thus, we conclude that under Kentucky law, Nation is not entitled to relief from his guilty plea even though his attorney grossly misadvised him that he would be eligible for parole after serving only 20% of his sentence when, in fact, he won't be eligible until he serves 85% of his sentence.[10] The trial court correctly denied Nation an evidentiary hearing on this issue.

The order of the Laurel Circuit Court denying Nation's RCr 11.42 motion without an evidentiary hearing is vacated and remanded on the single issue concerning whether the Commonwealth promised Nation 20% parole eligibility as an oral part of the plea agreement.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby Nation, pro se
Northpoint Training Center
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Henry Flores

[9] In fact, our supreme court said as much in *Commonwealth v. Padilla*, __ S.W.3d __ (Ky. 2008) (2008 WL 199818, rendered on January 24, 2008, but not yet final). In *Padilla*, our supreme court held that a defendant who received misadvice concerning deportation consequences was without remedy because collateral consequences are not within the scope of the Sixth Amendment right to counsel.

[10] The author of this opinion personally believes that the holding of the 6th Circuit in the *Sparks* case should be adopted by our supreme court. However, such a position is contrary to precedent. As the Court of Appeals, we are bound by the precedence of the supreme court. *See* Rules of Supreme Court (SCR) 1.030(8)(a).

Assistant Attorney General
Frankfort, Kentucky