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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000099-MR

JAMES JACKSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 05-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: James Jackson appeals the denial of his motion to vacate, pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and Kentucky Rules of Criminal Procedure (RCr) 11.42 motions, his final judgment and sentencing by the McCracken Circuit Court. Jackson argues that he received ineffective assistance of counsel when his counsel failed to object to the district court that he was ineligible for transfer to the circuit court. Jackson also argues that the district

court's decision to transfer him to circuit court as a youthful offender was in error as the circuit court lacked jurisdiction over Jackson's case, and therefore violated his constitutional rights. Finding error in the standard used to review Jackson's guilty plea, we vacate and remand to the trial court for further proceedings consistent with this opinion.

The facts of the case are relatively undisputed. On October 15, 2004, Jackson was arrested and charged with one felony - first degree trafficking in a controlled substance, cocaine - and three misdemeanors: possession of marijuana; use/possession of drug paraphernalia; and possession, manufacture, or transportation of a handgun by a minor.

On October 19, 2004, Jackson appeared at the detention hearing, at which point there was a discussion about whether the charges against Jackson should be firearm-enhanced pursuant to Kentucky Revised Statutes (KRS) 218A.992 and, thus, whether Jackson should be transferred to circuit court to be tried as a youthful offender pursuant to KRS 635.020(2). Jackson was fifteen years old at the time.

The Commonwealth indicated that a motion to transfer would be forthcoming, and the district court set a transfer hearing for November 10, 2004. At the transfer hearing, the court determined that Jackson should be transferred to circuit court.

Following the transfer to circuit court, the grand jury indicted Jackson on four counts: (1) "enhanced" first-degree trafficking in a controlled substance,

cocaine, (2) possession of marijuana, (3) use/possession of drug paraphernalia, and (4) possession, manufacture, or transportation of a handgun by a minor. Jackson entered an unconditional guilty plea and was sentenced to ten years in prison. However, because Jackson was only sixteen years old at the time of sentencing, his first two years would be served in a juvenile detention center. At no point, either at the detention hearing, the transfer hearing, or the sentencing hearing, did counsel for Jackson object to his certification as a youthful offender and subsequent transfer to circuit court.

When Jackson turned eighteen years old, he appeared before the circuit court for resentencing as an adult. Jackson, represented by new counsel, filed a motion to vacate the final judgment and sentence, asserting that the judgment should be vacated pursuant to RCr 11.42 and CR 60.02(e), in that the circuit court lacked jurisdiction because he was wrongfully transferred to the circuit court. Secondly, Jackson argued ineffective assistance of counsel. In response to the motion, the Commonwealth argued that Jackson was properly transferred to circuit court. The court summarily overruled Jackson's motion.

On appeal, Jackson essentially asserts the same arguments as he previously presented to the trial court. The Commonwealth argues that Jackson's guilty plea waived any claim to ineffective assistance of counsel and that Jackson should not be allowed to denigrate the plea process by reaping the benefit from the plea bargain and also challenging his transfer as a youthful offender.

First, we note that a valid guilty plea is often said to waive all defenses other than that the indictment charges no offense. *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970). The plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986) citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). “There must be an affirmative showing in the record that the plea was intelligently and voluntarily made.” *Sparks* at 727 citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). “[T]he validity of the guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances.” *Sparks* at 727 citing *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

Jackson relies on the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for assessing ineffective assistance of counsel. This is the correct standard for evaluating ineffective assistance of counsel claims but falls short of the full analysis required when assessing ineffective assistance of counsel claims when a guilty plea has been entered. The second prong of *Strickland*, i.e., prejudice, was refined in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985) to require a defendant 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.”

Our Court in *Sparks* at 727-728, set forth the proper standard to be used when a defendant challenges the effectiveness of his counsel's advice after a guilty plea has been entered as:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty [and such showing] 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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 *sic* [88] L.Ed.2d 203 (1985). *Cf.*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Id. at 727-728. “Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases.’” *Hill* at 56 citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The voluntariness of an unconditional guilty plea is important and competent advice from counsel is necessary for a defendant to enter such a plea because the entry of such a plea waives almost all of a defendant's rights.

In dismissing Jackson's motion, the trial court failed to undertake an analysis as to whether the guilty plea entered by Jackson was voluntary. This Court must refrain from a *de novo* determination that the plea was entered

voluntarily. *Lynch v. Commonwealth*, 610 S.W.2d 902 (Ky.App. 1980). To further confuse matters, the record neither indicates if the standard adopted in *Sparks* was ever argued to the trial court, nor whether the trial court applied it as the proper standard.

Accordingly, we remand back to the trial court to determine if Jackson's guilty plea was voluntary. Upon remand, the trial court will need to determine if a hearing is required under *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), or if the record conclusively resolves the issues. Whether or not a hearing is necessary, the *Strickland* standard as refined by *Hill* and adopted in *Sparks* must be applied to determine whether Jackson's guilty plea was entered voluntarily.

We do not agree with Jackson's remaining argument, namely, that the circuit court lacked jurisdiction when he was improperly transferred, thereby rendering the judgment void. A circuit court has general jurisdiction over felony cases and properly transferred juvenile cases. *Schooley v. Commonwealth*, 556 S.W.2d 912 (Ky.App. 1977). Therefore, the circuit court had general subject matter jurisdiction over transferred cases; the issue remaining is whether the circuit court had jurisdiction over Jackson's particular case.

This issue "is one of policy rather than power. The policy consideration is one of due process." *Schooley* at 916. In *Schooley* we concluded that, in order to succeed with a subject matter jurisdiction claim on an RCr 11.42 appeal, there:

[M]ust be an error of such magnitude as to render the judgment of conviction so fundamentally unfair that the defendant can be said to have been denied due process of law. The interest of the public in the finality of criminal judgments of long standing [sic] weighs heavily in the determination when the error is relatively minor. When the trial court has general subject matter jurisdiction, an erroneous finding of the existence of a jurisdictional fact necessary to the court's jurisdiction in the particular case does not necessarily render the judgment subject to collateral attack.

Id. at 917.

It is quite apparent that Jackson was represented by counsel during the proceedings. The record indicates that the court-designated worker checked the appropriate boxes for classification as a youthful offender and that the district court made the required findings for Jackson to be certified as a youthful offender. Jackson argues that the circuit court was without jurisdiction because of erroneous evidentiary findings in that Jackson was not properly certifiable as a youthful offender because the charges could not be enhanced under KRS 218A.992,¹ with the “enhancement” then providing the basis for transfer under KRS 635.020(2).

Nevertheless, evidentiary challenges to the basis for certification should have been raised on direct appeal, especially since Jackson may no longer benefit from an adjudication in a juvenile proceeding. Any evidentiary error that counsel failed to bring to the attention of the district court is not now a due process issue but instead an ineffective assistance of counsel issue. The unconditional guilty plea entered by Jackson complicated the review of his dilemma, as it served

¹ Without the sentence enhancement Jackson could not meet the felony level required for transfer to the circuit court under KRS 635.020.

to waive his evidentiary defenses and subsequent claims of error. *See Quarles*. Accordingly, we do not believe that the judgment is void or that the evidentiary error rises to the level of a due process violation.

In light of the posture of this case, the proper procedure is to vacate the trial court's ruling on the RCr 11.42 motion and remand for reconsideration under *Sparks* as to the voluntariness of Jackson's guilty plea.

For the aforementioned reasons, we vacate and remand to the trial court for determination of whether Jackson's guilty plea was voluntary.

THOMPSON, JUDGE, CONCURS.

LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Rebecca Hobbs
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky