

RENDERED: JANUARY 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001032-MR

CHARLES MILLER

APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT
v. HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NOS. 04-CR-00216; 04-CR-00217; 04-CR-00218; 04-CR-00219

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Appellant, Charles Miller (Miller), pled guilty on March 10, 2005, to ten counts of trafficking in a controlled substance, first-degree. Miller filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 action on August 23, 2006, which the Harlan Circuit Court denied without an evidentiary hearing. Miller now appeals that denial.

BACKGROUND INFORMATION

Miller was arrested and indicted after making sales of oxycodone to police informants in Harlan County, Kentucky, between January 12, 2004, and March 17, 2004. On May 10, 2004, Miller changed his plea of not guilty to guilty, which was accepted by the Harlan Circuit Court. The guilty plea was the result of negotiated plea agreement between Miller's counsel and the Commonwealth's Attorney.

As a result of the plea, Miller was sentenced to thirty years in prison. On August 23, 2006, Miller filed a pro se RCr 11.42 motion in which he set forth the following arguments:

- (1) Defense counsel misadvised him that he would be eligible for parole in two and a half years if he accepted a thirty-year sentence when in fact he would not be eligible for over seven years;
- (2) Defense counsel failed to explain the law in relation to the facts of his case or the potential defenses available at trial so that, in addition to the misleading parole information, his guilty plea was not knowing, intelligent and voluntary;
- (3) Defense counsel failed to interview potentially exculpatory witnesses or move to suppress any of the evidence against him; and
- (4) Defense counsel failed to challenge the multitude of charges arising out of single drug sales.

The court allowed Miller to proceed *in forma pauperis*, however, he did not receive counsel or an evidentiary hearing. In the opinion denying Miller's motion, the Harlan Circuit Court held that "[a] knowing, voluntary and intelligent

waiver does not necessarily include a requirement that the Defendant be informed of every possible consequence and aspect of a guilty plea.” Circuit Court Opinion entered April 25, 2007. The trial court cited the case of *Jewell v. Commonwealth*, 725 S.W.2d 593, 594 (Ky. 1987) in support of this conclusion. The court went on to find that “parole eligibility is not a constitutionally mandated right[]” and that misinformation on it was “not sufficient grounds to set aside a guilty plea.” *Id.*

The court continued to find that Miller’s sworn testimony regarding the performance of his attorney refuted any allegations he might be making in the RCr 11.42. Miller appeals the decision of the trial court.

LEGAL ANALYSIS

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel’s performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). With respect to a guilty plea, there is also a requirement that the movant show that counsel’s performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 54, USLW 4006 (1985). Courts must also examine counsel’s conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we will examine the trial court’s decision.

Miller argues that the court erred to his prejudice and denied him due process of law by overruling his RCr 11.42 motion without holding an evidentiary hearing in order to resolve issues that could not be adjudicated by reference to the record. Specifically, Miller first contends that he would not have accepted the guilty plea had he known the trial judge could only have sentenced him to twenty years on his charges.

The Commonwealth, however, argues that had it chosen to prosecute Miller for each of the charges individually, he could have faced up to eighty years in prison. This would have been twenty years for each of the four indictments.

It is clear that if a movant's allegations in an RCr 11.42 motion can be refuted by the record, there is no requirement that an evidentiary hearing be held. *Sparks v. Com.*, 721 S.W.2d 726, 727 (Ky. App. 1985). An evidentiary hearing is required, however, "if the answer raises a material issue of fact that cannot be determined on the face of the record." *Stanford v. Com.*, 854 S.W.2d 742, 743 (Ky. 1993).

KRS 532.110(1)(c) provides that:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

- (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any

of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]

This “statute benefits the offender by shielding him or her from an endless accumulation of consecutive sentences.” *Myers v. Com.*, 42 S.W.3d 594, 597 (Ky. 2001). *Myers* involved a defendant who pled guilty to second-degree manslaughter, wanton endangerment and driving under the influence and attempting to elude police. Set forth in his plea agreement with the Commonwealth was the following: “[t]he defendant agrees to waive the provisions of KRS 532.110(1c)(sic)”. *Id.* at 595. The Kentucky Supreme Court found that “the maximum aggregate sentence limitation contained in KRS 532.110(1)(c) can be the subject of a knowing and voluntary waiver by a person in whose favor the limitation operates[.]” *Id.* at 598. The Court went on to remand the case to the trial court, however, for an evidentiary opinion on the appellant’s RCr 11.42 motion.

We, too, find that Miller could have knowingly and voluntarily waived the maximum aggregate sentence limitation; however, the trial court erred when it failed to conduct an evidentiary hearing. The record does not set forth with specificity what Miller’s counsel may have said to him to induce him to plead guilty and accept the sentence which was beyond the statutory cap set forth in KRS 532.110(1)(c). Thus, an evidentiary hearing must be held to make that determination.

As to the remainder of Miller's issues on appeal, namely that the trial court erred in making a determination without holding an evidentiary hearing in order to resolve questions regarding investigation and misadvised by his counsel on parole eligibility, these, too, may be determined at the evidentiary hearing.

For the foregoing reasons, this case is reversed and remanded to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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