RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001201-MR

RALPH BRIAN HARBAUGH — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is a *pro se* appeal from an order of the Boyd Circuit Court denying a post-conviction motion made by Ralph Brian Harbaugh pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Harbaugh entered into a plea agreement pursuant to which he was to receive a sentence of five years.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The agreement was apparently based on the understanding that Harbaugh would serve a total sentence of ten years because his probation under an earlier conviction would be revoked. After Harbaugh entered the plea, however, it was discovered that the earlier conviction carried a sentence of only one year, not five, which would have resulted in a total sentence of only six years after his probation was revoked. The circuit court therefore altered his sentence from five years to nine years. Harbaugh argues that by altering his sentence, the circuit court improperly repudiated his original plea agreement. He further argues that his guilty plea was involuntary due to ineffective assistance of counsel. Finally, he argues that the circuit court erred in failing to grant him an evidentiary hearing.

On April 21, 2006, Harbaugh entered a plea of guilty to two counts of theft by deception over $300 and to being a persistent felony offender in the second degree under indictment 06-CR-00005. The plea agreement is not in the record.[2] The charges stemmed from two incidents in which Harbaugh accepted payment for home repairs but then failed to perform the work. His victims, Helen Cooksey and Kevin Gunderson, testified at his sentencing hearing. According to Cooksey, Harbaugh took her money but never completed the promised work, leaving part of her home gutted to the walls. Similarly, Gunderson paid Harbaugh $6,500 to rebuild his garage but the work was never done. Gunderson stated that

[2] The record in this appeal is incomplete. On January 23, 2009, the Commonwealth made a motion to supplement the record to include documents entered between January 12, 2006 (the date of Harbaugh's indictment) up through March 24, 2008. (The record contains no documents filed prior to March 24, 2008.) The motion was granted but the Boyd Circuit Clerk subsequently submitted an affidavit stating that there was no additional record, and that the record previously submitted to the Court of Appeals was the complete record in the case.

Harbaugh had been convicted of similar charges before and had been ordered to pay $11,000 in restitution; some of the money he obtained from Cooksey and Gunderson was used by him in partial payment of the restitution.

At Harbaugh's guilty plea hearing, which was held on April 21, 2007, the circuit court confirmed the terms of the plea agreement with Harbaugh in the following exchange:

> Court: It's five on each of the theft counts to run concurrent and then you plead guilty to second degree PFO, which it could be at that point enhanced to somewhere between five and ten but they're just leaving it at the five.
>
> Harbaugh: Yes sir.
>
> Court: Is that your understanding of the agreement?
>
> Harbaugh: Yes sir.
>
> Court: That's signed by Mr. Preston [Commonwealth attorney] and Mr. Hewlett [Harbough's defense counsel] and it appears to have been signed by you, did you sign this?
>
> Harbaugh: Yes sir.
>
> Court: And what I just explained to you, is that your understanding of the agreement?
>
> Harbaugh: Yes sir.

After conducting a colloquy in accordance with the principles of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the circuit court entered a judgment which reflected the terms of Harbaugh's plea agreement; it stated in pertinent part as follows:

> [T]he defendant is guilty of the crime(s) of COUNT I: THEFT BY DECEPTION OVER $300; COUNT II: THEFT BY DECEPTION OVER $300; COUNT III: SECOND DEGREE PERSISTENT FELONY OFFENDER and the Court fixes the punishment of the Defendant at confinement in the State Penitentiary for a maximum term of : Five (5) Years each on Count I and Count II, enhanced Five (5) Years on Count III, to run concurrent, for a total sentence of Five (5) Years but entry of the judgment imposing sentence(s) is hereby postponed and suspended pending a presentence investigation.

At the time he entered this plea, Harbaugh was on probation for a separate conviction under indictment 04-CR-00220. Under that indictment, Harbaugh had entered a plea of guilty to two counts of felony theft and had been sentenced to two concurrent one-year sentences, and had been placed on probation for a period of five years.[3]

According to Harbaugh, he entered the guilty plea in 06-CR-00005 on the advice of his attorney, who informed him that there was a possibility that he would be probated and ordered to pay restitution instead of having to serve time. Harbaugh also claims that his attorney visited him on May 10, 2006, after the entry of the guilty plea and prior to final sentencing, and informed him that probation and restitution were now no longer a possibility. He allegedly told Harbaugh that "he had five years on the shelf [an erroneous reference to the probated sentence under the earlier conviction] and with the new plea agreement for five years that

[3] There is no mention made of this prior conviction in the record. According to the order of the circuit court denying Harbaugh's RCr 11.42 motion, he received two concurrent one-year sentences; at the sentencing hearing, however, the circuit court referred to three concurrent sentences. The distinction is not critical for purposes of resolving this appeal.

the Commonwealth was going to sentence the appellant to ten years because the Commonwealth felt that paying restitution was too easy of a punishment." Harbaugh claims this meeting was the first time his attorney had ever stated what his "shelf time" was.

On May 12, 2006, at the sentencing hearing, defense counsel stipulated that Harbaugh was in violation of the terms of his probation on the earlier charges. He referenced an agreement to that effect, stating

> Judge, in regards to the probation revocation, part of our agreement is that we stipulate to that and we agree that based upon this new charge by operation of law that Mr. Harbaugh is in fact in violation of his probation.

Harbaugh agreed to this stipulation when questioned by the court.

The court then addressed the issue of Harbaugh's sentence. Apparently, when Harbaugh entered the guilty plea in 06-CR-00005, his defense counsel and the Commonwealth attorney mistakenly believed that he was serving a probated five-year sentence on the previous conviction. They had therefore proceeded under the assumption that the revocation of probation in the first case would result in a total sentence of ten years (five years under each conviction). However, because Harbaugh had only been sentenced to serve two concurrent one-year sentences under the first conviction, his sentence upon revocation would be only six years. It should be noted that there is nothing in the record to indicate that there was an understanding or agreement regarding the ten-year sentence. The plea agreement is not in the record, and no mention was made of probation revocation

or of its impact during the guilty plea hearing. We set forth the discussion that took place at the sentencing hearing when the error was discovered:

> Court: What was the recommendation of the Commonwealth?
>
> Commonwealth: I thought it was five plus five.
>
> Defense counsel: He had five probated previously Judge and then this one was five on PFO 2nd.
>
> Commonwealth: Yeah, five plus five concurrent, enhanced to five with admission of guilty and then he had five on the other, so ten years, less whatever time was there.
>
> Court: Well I'm looking at the '04 case and your all's recommendation in that was one year and that was what – the judgment followed your recommendation. In the '04 case you had three counts and here's you all's recommendation, it's one year on each . . . .
> Commonwealth: Both the defense and I thought it was five. If we've made a mistake we need to have a little minute to talk because our deal only works if it comes up to ten years.
>
> Court: See I'm looking at your recommendation in the '04 case and it's three ones, concurrent. And then your recommendation in the new case is five years on each count, concurrent, and enhanced to five.
>
> Commonwealth: Right. And the total deal and the intent of the parties is a ten year sentence. . . .
>
> Court: The way you've got it structured, it only comes out to six. Look here, here's what I'm wanting to talk about.
>
> Commonwealth: Well I believe you, it sounds like the defense and I both made a mistake as to the earlier one.

Defense counsel: I didn't represent him on the other one Judge that's just what I was told by the Commonwealth.

Commonwealth: Yeah, but nonetheless our deal is for a ten year sentence, anything less than that won't work.

Court: Well the only way to get there is enhance him to nine.

Commonwealth: And that's what I'm asking that we do.

Court: Was that your understanding that he was getting a ten?

Commonwealth: Yeah, he just stated it.

Defense counsel: Yeah, I mean we thought he was getting ten but we thought he had five already on the shelf because that's what I was told, that he was probated on five.
Court: Probably what I need to do is, I'll just enter an order that we had this discussion on the record and the parties acknowledge that the revocation plus the new sentence was to total ten and both parties were mistaken about the sentence in the '04 case and the intent of the parties and the true agreement was a total of ten.

Defense counsel: I need to talk to him though because this sort of changes the way . . .

Court: Um hum [indicates positive response] [addressing Harbaugh] What did you think you were getting sentenced to?

Harbaugh: Ten years. Five for the shelf time and five years for the new charge.

Commonwealth: So it was a mutual mistake all around.

Court: Yeah but the important thing is that the Defendant and both lawyers thought ten was the controlling number.

. . .

> Defense counsel: I still think I need to talk to him [Harbaugh] because, you know what I'm saying, I need to make a knowing statement of changes in circumstances because . . .
>
> Court: I understand that you do need to discuss it but I'm giving him ten years. I don't know how we wind up getting there but I guess probably you should talk to him because the record will be kind of – it won't make sense. Obviously you and Stewart both thought he got a five on the old case?
>
> Defense Counsel: Right.
>
> Court: And he acknowledges he was getting ten years so I mean it's not anything that can't be corrected. How do you want to handle it?

At this point, defense counsel conferred with Harbaugh. According to Harbaugh, his attorney told him that if he did not agree to the new deal that the prosecution would take him to trial and "give him the max." Harbaugh claims that at the time, he thought he could get a sixteen-year sentence if he went to trial (five years on each of the three charges plus the one-year sentence stemming from the probation revocation). A bench conference followed at which defense counsel made the following statement:

> Defense counsel: He wants to go through with it. I just want to put on the record that five years on this financial, non-violent offense, I've advised him is a pretty high sentence for him to accept through a plea and I guess, I don't want to say against my advice because I didn't particularly advise him I just told him that because of the nature of the crime that I thought nine years was a pretty good lick to take and after advising him of that he indicates that he wants to go forward with the agreement

and get the ten years as anticipated rather than proceed to trial.

The Court: Here's how we'll handle it. I'll state on the record that there was a misunderstanding by all three of you and that therefore I'm declining to follow the Commonwealth's written recommendation. Instead I'm going to enhance it to nine and I'll ask you if, does he still want to do it or does he want to withdraw his plea and then he'll say he still wants to do it and then we're done.

Defense counsel: Well I just came up here to say it because I don't want a bunch of victims thinking I'm up here telling him not to do it and then walk out of here mad at me.

The bench conference ended, and the trial court stated:

The Court: Okay . .. . it's clear to the Court that there was a three way mistake . . . . So therefore I'm going to reject the written plea offer and I'm going to enhance it to nine instead of five to accomplish what was all three of your intent to begin with. Is he wanting to go ahead with it?

Defense counsel: Yes.

The Court: He's not wanting to withdraw his plea.

Defense counsel: No he does not. I've advised him of what exactly has occurred legally. I advised him that I proceeded to advise him in the past based on both he and Mr. Schneider's [former counsel] discussions with me about there being five years on the shelf. I didn't represent him in that proceeding. . . . So I discussed that with him and after telling him that the Court would modify this and honor the spirit of our agreement while not actually honoring it as written, he indicates he wishes, if the Court would do that, to honor the agreement and have the Court enter the judgment to honor the spirit of our agreement.

Harbaugh acquiesced to the new arrangement and received a sentence of nine years. The circuit court entered an order stating:

> The court having been advised that there has been a mutual misunderstanding between counsel for the defendant, the defendant and counsel for the Commonwealth, and all parties were of the understanding the defendant would receive a 10 year sentence,
>
> Therefore, the court declines the Commonwealth's written recommendation to enhance the sentence for Count III to five (5) years and in order to accomplish the agreement that has been accepted by the parties, it is hereby ordered that the defendant is sentenced to five years on Count I and five years on Count II, to run concurrent with said sentences enhanced to nine (9) years under Count III[.]

Harbaugh filed a motion to vacate the judgment pursuant to RCr 11.42 which was denied without a hearing.[4] This appeal followed.

Harbaugh argues that the circuit court erred in not stopping the sentencing proceedings when it became clear that there had been a misunderstanding about the length of his sentence, that it further erred in allowing the Commonwealth to renege on the original terms of the plea deal, and that the trial court improperly involved itself in the plea negotiations. He also argues that his attorney was ineffective for failing to perform adequate pre-trial investigation and in failing to object to the violation of the terms of his plea agreement. These two arguments, which address the propriety of the trial court's conduct in altering the terms of his plea agreement and the performance of his counsel, overlap in that

[4] Harbaugh's motion is not in the record. The circuit court did schedule an evidentiary hearing on the motion, but it is unclear from the record whether it was held or not.

they required the trial court in its consideration of the RCr 11.42 motion "to consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel[.]" *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001) (citations omitted). We must consider whether Harbaugh's acquiescence to the revision of his plea agreement represented "a voluntary and intelligent choice among the alternative courses of action open to [him][,]" *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, 164, 27 L.Ed.2d 162 (1970)), or whether "errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." *Bronk*, 58 S.W.3d at 487.

As we have already noted, no mention was made at the plea hearing or in the written judgment of the court entered thereafter of the implications of the probation revocation in the earlier case. The judgment clearly states that the sentence was to be five years. "If a plea offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable." *Matheny v. Commonwealth*, 37 S.W.3d 756, 758 (Ky. 2001) (internal quotation marks and citations omitted). In this case, the circuit court deviated from the terms of the written judgment in order to bring the sentence into conformity with the purported agreement. Under these circumstances, "[t]he

language of RCr 8.10 is clearly mandatory and requires a court to permit a defendant to withdraw a guilty plea if the court rejects the plea agreement." *Kennedy v. Commonwealth*, 962 S.W.2d 880, 882 (Ky. App. 1997). At the sentencing hearing, Harbaugh stated without equivocation upon questioning by the court that his understanding of the plea agreement was that he would receive a total sentence of ten years. The trial court's comment to Harbaugh's counsel that "I understand that you do need to discuss it but I'm giving him ten years" is troubling because it implies that the court would not consider withdrawal of the plea. Nonetheless, the court permitted Harbaugh to confer with his attorney, and then asked in open court if Harbaugh wanted to withdraw the plea. Harbaugh acquiesced to the revision of his agreement in open court.

> For the representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity.

Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977).

Harbaugh states that his attorney told him that if he did not accept the ten-year sentence, the plea would be withdrawn, he would be tried and given "the max." The Commonwealth's attorney's remarks at the sentencing hearing did indicate that the plea offer would be withdrawn if Harbaugh did not accept the ten-year sentence. According to Harbaugh's account of the conference with his

attorney, he acquiesced in the revision of the plea agreement in the belief that he could receive a sentence of sixteen years (five years on each of the three charges he was facing plus one year from the revocation of probation in the earlier case, all running consecutively) if he went to trial. By our calculation, the longest sentence Harbaugh could have received had he gone to trial was actually twenty-one years: two consecutive five-year sentences on the two counts of theft by deception over $300, each enhanced to ten years by the PFO charge, plus the one year sentence in the earlier case.[5] Harbaugh's counsel's advice to accept the agreement was therefore well-founded. "It has remained the policy of this Commonwealth that where a plea of guilty may result in a lighter sentence than might, otherwise, be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper." *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App. 1998).

[5] Theft by deception over $300 is a class D felony (see KRS 514.040(8)) which carries a penalty of "not less than one (1) year nor more than five (5) years." KRS 532.060(2)(d). The sentences would be enhanced by the effect of the second-degree persistent felony offender charge (KRS 532.080(5)) to "not less than five (5) years nor more than ten (10) years[.]" KRS 532.060(2)(c). The two ten-year sentences could be run consecutively since the total sentence would not exceed "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." KRS 532.110(1)(c). Under KRS 532.080(6)(b), a persistent felony offender convicted of a Class C or D felony may receive a maximum sentence of twenty years. "KRS 532.110(1) requires that KRS 532.080 be used to establish the maximum aggregate sentence for a person convicted of multiple offenses, without regard to whether the penalties for those offenses have been enhanced. When KRS 532.080 is applied to determine the maximum aggregate penalty, as opposed to being used to enhance a penalty, the appropriate reference in a case where the underlying felonies are Class D or C felonies is to subsection (6)(b) rather than to subsection (5)." *Commonwealth v. Durham*, 908 S.W.2d 119, 121 (Ky. 1995). Finally, the one-year sentence from the prior conviction would run consecutively under KRS 533.060(2).

Furthermore, the record indicates that any misinformation that Harbaugh received about the potential length of his sentence if he chose to go to trial could not have improperly influenced him to plea guilty because he was consistently told that the maximum sentence he could receive was only ten years. Had Harbaugh known that he faced a possible sentence twenty-one years, he would have had an even greater incentive to accept the revised plea agreement. At his guilty plea hearing, the circuit court asked Harbaugh whether he understood the terms of his plea agreement, summarizing it thusly:

> It's five on each of the theft counts to run concurrent and then you plead guilty to second degree PFO, which it could be at that point enhanced to somewhere between five and ten but they're just leaving it at the five.

The court then asked Harbaugh if that was his understanding of the agreement, and Harbaugh replied, "Yes sir." The record also contains a transcript of the proceedings signed by Harbaugh in which he answered "Yes" to the following question: "Do you realize that under the offense(s) with which you are charged the Court could sentence you to as long as - 10 – years in the penitentiary . . . ?" In our view, Harbaugh's attorney's performance was possibly deficient during the negotiation of the initial plea agreement if, as Harbaugh states, he held out the promise of probation and restitution without ascertaining the effect of Harbaugh's earlier felony conviction, and for subsequently proceeding on the assumption that Harbaugh's sentence under the earlier conviction was five years - even stipulating to probation revocation without ascertaining the length of sentence

imposed in the earlier judgment. But Harbaugh has not shown how these earlier errors affected the voluntariness of his acceptance of the revised terms of the plea agreement.

Harbaugh also argues that his counsel provided inadequate pre-trial investigation for failing to determine whether his case could be treated as a civil matter. Harbaugh informed his attorney that the case was "all about money" and that he was facing criminal charges only because one of the victims was a police officer who had been injured in the line of duty and happened to be a County Commissioner. He contends that his attorney was so intent on making a plea deal for probation and restitution that he ignored this potential line of defense. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "It is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983). His attorney's decision to concentrate on negotiating a favorable plea agreement for Harbaugh rather than pursuing the highly unlikely possibility that the charges would be dropped in favor of a civil action was not deficient.

Finally, because the record refutes Harbaugh's allegations, the trial court did not err in refusing to grant an evidentiary hearing on his motion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998).

The order of the Boyd Circuit Court denying Harbaugh's RCr 11.42 motion is affirmed.

ALL CONCUR.

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