

Commonwealth of Kentucky

Court of Appeals

NOS. 2009-CA-001576-MR
AND
2010-CA-000949-MR

DANNY LEE MAY

APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 06-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND
REMANDING

** ** * ** * ** *

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert 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.

WINE, JUDGE: On February 9, 2006, a Henry County grand jury indicted Danny Lee May on two counts of first-degree rape, two counts of first-degree sodomy, and one count each of kidnapping, first-degree sexual assault, intimidating a witness in a legal process, and being a first-degree persistent felony offender (PFO I). May initially pleaded not guilty to the charges. During the course of the pre-trial proceedings, the Commonwealth gave notice of its intent to introduce evidence of other crimes, wrongs and acts committed by May, pursuant to Kentucky Rules of Evidence (KRE) 404(b). May objected to admission of the evidence. Following a hearing and briefing of the issues, the trial court granted the Commonwealth's motion to admit the evidence.

Thereafter, on August 29, 2006, May filed a motion to enter a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). In exchange for his guilty plea, the Commonwealth agreed to dismiss the kidnapping and PFO I charges, and to recommend a sentence of thirteen years on each of the rape and sodomy counts and five years on each of the sexual abuse and intimidating a witness counts, to be served concurrently for a total of thirteen years. May's guilty plea did not reserve any issues for appeal. In addition, the Commonwealth's offer specified that May would be subject to a period of conditional discharge for five years pursuant to KRS 532.043 upon completion of his incarceration or parole. The trial court accepted May's guilty plea and imposed the recommended sentence.

On September 29, 2009, May moved this Court for leave to file a belated appeal. This Court granted the motion and appointed counsel for May. (Appeal No. 2009-CA-001576-MR). In a separate proceeding before the trial court, May filed a motion to alter, amend or vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He also requested an evidentiary hearing on his motion. After considering the Commonwealth's response, the trial court entered an order on March 30, 2010 denying May's RCr 11.42 motion without an evidentiary hearing.² May appealed from this order, (Appeal No. 2010-CA-000949-MR), and this Court ordered his appeal from the denial of his RCr 11.42 motion consolidated with his belated direct appeal. Both matters now stand submitted to this Court.

In his direct appeal, May first argues that the trial court erred by imposing a five-year period of conditional discharge on him pursuant to KRS 532.043. The Commonwealth concedes that this issue survives his unconditional guilty plea. *Grigsby v. Com.*, 302 S.W.3d 52, 54 (Ky. 2010) and *Windsor v. Com.*, 250 S.W.3d 306, 307 (Ky. 2008). The Commonwealth also concedes that imposition of the five-year period of conditional discharge was unconstitutional because May committed the offenses prior to the July 12, 2006, effective date of KRS 532.043(2). *Purvis v. Com.*, 14 S.W.3d 21 (Ky. 2000). At the time May committed the offenses, KRS 532.043(2) required sex offenders such as May to be

² The trial court also denied May's motion for appointment of counsel, finding that he was not indigent. May is proceeding *pro se* in his appeal from the denial of his RCr 11.42 motion.

subject to a three-year period of conditional discharge upon completion of their incarceration or parole. Consequently, this Court must vacate the portion of the judgment which imposed a five-year period of conditional discharge and remand the matter with directions to enter a sentence of three years of conditional discharge.

May next argues that his guilty plea was not knowing and voluntary. The Commonwealth concedes that this issue may also be reviewed on direct appeal notwithstanding May's unconditional guilty plea. *Windsor*, 250 S.W.3d at 307. May also raises the issue as part of his RCr 11.42 motion, arguing that his guilty plea was not knowing and voluntary due to the ineffective assistance and gross misadvice from his counsel.

In order to be valid, a guilty plea must be made voluntarily and intelligently. *Centers v. Com.*, 799 S.W.2d 51, 54 (Ky. App. 1990). Before accepting a guilty plea, the trial court must consider the totality of the circumstances surrounding it. *Id. Edmonds v. Com.*, 189 S.W.3d 558, 565 (Ky. 2006) requires a court to engage the defendant in a *Boykin* colloquy. As required by *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969), the colloquy is "an affirmative showing that [the guilty plea] was intelligent and voluntary." The *Boykin* colloquy addresses the defendant's state of mind, whether he understands his options other than the guilty plea, if he is satisfied with the representation his counsel provided, and if the plea is his own

choice. We review the court's determination of voluntariness under the clearly erroneous standard. *Rigdon v. Com.*, 144 S.W.3d 283, 288 (Ky. App. 2004).

The trial court conducted a hearing on May's guilty plea on August 24, 2006. Prior to that hearing, May signed documents styled "Commonwealth's Offer on a Plea of Guilty" and "Motion to Enter Guilty Plea Pursuant to North Carolina v. Alford." (Form AOC-491.2) The latter form listed the rights guaranteed to criminal defendants by the Constitution, including "[t]he right to appeal my case to a higher court." That form also included a statement that "I understand that if I plead 'GUILTY,' I waive these rights." At the hearing, May acknowledged that he had read and signed both forms and had no questions about them.

Nevertheless, the trial court proceeded to go through the terms of the Commonwealth's offer with May, explaining the consequences of entering an *Alford* plea. The court also informed May that he would have to complete the sex offender treatment program, either during his incarceration or while on conditional discharge, and that he would likely have to admit to the offenses in order to successfully complete the program. The court also told May his failure to complete the program could be grounds to revoke his conditional discharge. Finally, the court informed May that he would be required to register as a sex offender.

May notes that the trial court did not specifically explain that he would be giving up his right to appeal. However, "*Boykin* 'does not require

separate enumeration of each right waived,’ . . . as long as a defendant has a ‘full understanding of what the plea connotes and its consequences[.]’” *Grigsby*, 302 S.W.3d at 56 (Citations omitted). At the hearing, May told the court that he felt coerced to plead guilty because of the trial court’s ruling on the KRE 404(b) issue. But an adverse ruling on an evidentiary issue frequently will motivate a defendant to accept a guilty plea rather than go to trial and risk a harsher sentence based on that evidence. Consequently, a guilty plea will not be considered involuntary simply because the defendant made the decision to plead guilty based on a balancing of the risks attendant with going to trial.

May further suggests that the trial court should have inquired further and determined whether he wanted to preserve this issue for appeal. However, the plea colloquy clearly establishes that May understood the rights he was giving up by pleading guilty. May indicated that he disagreed with the trial court’s ruling admitting the KRE 404(b) evidence, but never indicated that he wanted to reserve his right to appeal this issue. Furthermore, the written motion and the Commonwealth’s offer both contain handwritten language indicating that the plea was conditional pursuant to RCr 8.09, but this language was scratched out. The presence of the handwritten language and its deletion indicate that the issue was discussed prior to the plea hearing. Given these circumstances, we cannot find that the trial court was obliged to inquire further on this matter.

May next argues that his guilty plea was not knowing and voluntary because the trial court gave him incorrect information. He points out that the trial

court incorrectly told him that his conditional discharge would be unsupervised. But May does not allege that his guilty plea was based upon this information.

May also contends that the trial court incorrectly told him that he would be placed in the Carroll County Jail prior to his transfer to a prison. The record clearly refutes this allegation. The trial court made every effort to accommodate his request to be held in Carroll County, and he was in fact held there until sentencing. But following his sentencing, he was subject to transfer to the Department of Corrections. *See* KRS 532.100. May properly advised the court that he had not been transferred to the Department of Corrections within forty-five days of sentencing, as required by KRS 532.100(7). Other than this motion, May did not bring matter to the trial court's attention in a timely manner. Furthermore, the trial court had no control over where he was to be held after sentencing. Moreover, there is nothing in the record to indicate that May's placement at a particular institution prior to transfer was a condition of his guilty plea. Consequently, neither of these issues provides any basis to invalidate May's guilty plea.

In his RCr 11.42 motion, May argues that his trial counsel provided him with ineffective assistance. In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985).

The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Com. v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, "there is a reasonable probability that, [the movant] would not have pleaded guilty [but] 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); *Phon v. Com.*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

May first contends that his trial counsel was ineffective for failing to present evidence against the admission of the Commonwealth's KRE 404(b) evidence. The record clearly shows, however, that May's trial counsel opposed the Commonwealth's motion to introduce evidence of May's prior crimes, wrongs and bad acts. Counsel filed several briefs and requested a hearing on the matter. Following a hearing, the trial court found that the evidence was relevant and that its prejudicial effect did not outweigh its probative value. May asserts that counsel failed to present affidavits which refuted the victim's allegations that she had knowledge of the uncharged offenses. The trial court mentioned these affidavits in its order, but concluded that they went only to the credibility of the evidence and not to its admissibility. May does not identify any other deficiency in his trial counsel's handling of this matter.

May also argues that his trial counsel was ineffective for failing to advise him to plead guilty without preserving this issue for review pursuant to CR 8.09. However, counsel is not ineffective merely for advising a defendant to plead guilty, even if there are potentially meritorious issues for review. *Beecham v. Com.*, 657 S.W.2d 234, 236-237 (Ky. 1983). Moreover, even assuming that May's trial counsel failed to advise him that he could enter a conditional guilty plea pursuant to RCr 8.09, May does not allege that he would have insisted on entering such a plea. In fact, as noted above, it appears from the record that a conditional plea was discussed during the plea negotiations.

May next contends that his trial counsel misadvised him about the applicable period of conditional discharge. As discussed above, the five-year period of conditional discharge violated the Constitutional prohibitions on *ex post facto* application of the laws. Nevertheless, we have set aside the erroneous sentence and directed trial court to impose a three-year period of conditional discharge, which was in effect at the time May committed the offenses. We find no separate grounds to determine that the misadvice amounted to ineffective assistance of counsel or that May's guilty plea should be set aside as a result.

Along similar lines, May argues that his trial counsel was ineffective for misadvising him that the period of conditional discharge would be unsupervised. Affirmative acts of gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). Similarly, counsel's failure to properly advise a defendant about

the collateral consequences of pleading guilty may also amount to ineffective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). In this case, however, the misadvice concerned only the terms of May's conditional discharge – whether it will be supervised or unsupervised.³ May does not allege that the information influenced his decision to plead guilty. Consequently, we cannot find that May was prejudiced by the misadvice or that it affected the voluntariness of his plea.

Accordingly, in Appeal No. 2009-CA-001576-MR, the judgment of the Henry Circuit Court is reversed insofar as the court imposed a five-year period of conditional discharge on May following his release from incarceration. This matter is remanded for entry of an amended judgment imposing a three-year period of conditional charge as provided by the applicable version of KRS 532.043. In all other respects, the judgment of conviction is affirmed.

In Appeal No. 2010-CA-000949-MR, the order of the Henry Circuit Court denying May's RCr 11.42 motion is affirmed.

ALL CONCUR.

³ Under the 2000 version of KRS 532.043, a qualifying sex offender is subject to a three-year period of conditional discharge. The term “conditional discharge” typically refers to an unsupervised release, whereas “probation” and “parole” are typically supervised. *See* KRS 533.020. However, KRS 532.043(4) provides that “[p]ersons under conditional discharge pursuant to this section shall be subject to the supervision of the Division of Probation and Parole.” 2000 Ky Legis RS 345 § 9(4); *See also Jones v. Com.*, 319 S.W.3d 295, 298 (Ky. 2010), which explains that conditional discharge under KRS 532.043, unlike traditional conditional discharge, is supervised. The statute's use of the term “conditional discharge” in this context may explain the trial court's and counsel's confusion on the issue.

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