

RENDERED: JULY 5, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001103-MR

DARIUS AUBREY LEAR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-00824

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Darius Aubrey Lear brings this appeal from a May 12, 2010, Order of the Fayette Circuit Court summarily denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for relief. We reverse and remand.

Appellant was indicted by the Fayette County Grand Jury upon two counts of trafficking in a controlled substance (first degree) and with being a persistent felony offender (PFO) (first degree). Pursuant to a plea agreement, the

Commonwealth dismissed one charge of first-degree trafficking in a controlled substance and recommended a total sentence of ten-years' imprisonment upon the remaining two charges. Eventually, appellant entered a guilty plea to one count of first-degree trafficking in a controlled substance and with being a first-degree PFO. He was sentenced to a total of ten-years' imprisonment in accordance with the plea agreement.

Thereafter, appellant filed an RCr 11.42 motion to vacate his sentence of imprisonment. Relevant to this appeal, appellant claimed that trial counsel was ineffective for giving gross misadvice concerning parole eligibility, thereby causing him to enter an unintelligent and involuntary guilty plea. The circuit court denied appellant's RCr 11.42 motion without an evidentiary hearing and concluded that gross misadvice concerning parole eligibility may not form the basis for an ineffective assistance of counsel claim:

It is well established that an attorney is not required to advise a defendant about the collateral consequences of a guilty plea, *i.e.*, those matters not within the sentencing authority of the trial court. *See Commonwealth v. Furtado*[, sic] 170 S.W.3d 384, 385 (Ky. 2005). The reasoning behind this standard “derives from the fact that defendants Sixth Amendment right to counsel encompasses criminal prosecution, and does not extend to requiring counsel on collateral consequences that may result from such proceedings.” *Id.* It is also well established that the Kentucky Supreme Court considers parole eligibility a collateral consequence. *See Turner v. Commonwealth*[,] 647 S.W.2d 500, 582 (1982). This distinction clearly refutes the contention that a defendant must be informed by his counsel of the date he will first be eligible for parole.

This appeal follows.

Appellant contends that the circuit court erred by denying his RCr 11.42 motion without conducting an evidentiary hearing. Specifically, appellant alleges:

[T]he Fayette Circuit Court entered final judgment on [appellant's] guilty plea sentencing him to ten (10) years, to run consecutively with prior sentences for a total of seventeen (17) years. [Appellant] entered his guilty plea based on the advice provided by his attorney that he would be eligible for parole after serving only six (6) years and six (6) months. Defense counsel was aware of the importance of parole eligibility to [appellant] as evidenced by notes taken during their meeting on July 11, 2006, during which [appellant] “balk[ed] at PFO I ten flat.” However, unknown to [appellant], that is exactly the plea [appellant] ended up entering into on February 6, 2007. Only after [appellant] was turned over to the Department of Corrections to begin serving his sentence did he become aware of the effect of KRS 532.080 to his plea.

[Appellant] pled guilty to trafficking in a controlled substance first degree, a class C felony, and to being a persistent felony offender first degree. Pursuant to KRS 532.080(7), a persistent felony offender in first degree who “presently stands convicted of . . . a Class A, B, or C felony, . . . shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years.” While [appellant] pled guilty to the minimum sentence of ten (10) years, the application of KRS 532.080(7) to his sentence removes any possibility of parole on his ten (10) year sentence. [Appellant] relied upon his attorney's representations, that he would be parole eligible after serving only a portion of his sentence, when in fact, he will not be eligible for parole at all. [Appellant] relied on defense counsel's advice to his detriment in that it caused him to enter a guilty plea whereas, had he known he would not be eligible for parole until he served out his entire ten

(10) year sentence, he would not have pled guilty but would have proceeded to trial.

Appellant's Brief at 7-8 (citations omitted). Thus, appellant argues that trial counsel erroneously advised that he would be eligible for parole after serving six years and six months of the ten-year sentence. However, because appellant pleaded guilty to PFO I, appellant maintains that he was not eligible for parole but rather was required to serve the entire ten-year sentence.

To prevail upon his claim, appellant must demonstrate that trial counsel rendered ineffective assistance and that absent such ineffective assistance, there exists a reasonable probability that he would not have pleaded guilty and would have insisted upon a jury trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

In the order summarily denying appellant's RCr 11.42 motion, the circuit court concluded that trial counsel's alleged misadvice concerning parole eligibility cannot as a matter of law amount to ineffective assistance of trial counsel. As a result of such legal conclusion, the circuit court declined to address whether appellant's particular claim of gross misadvice as to parole eligibility was prejudicial.

In the recent Supreme Court decision of *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012), the Court resolved the legal question of whether trial counsel's misadvice upon parole eligibility may form the basis of an ineffective assistance of counsel claim. The Supreme Court answered the question in the

affirmative and held that misadvice concerning parole eligibility may form the basis of a Sixth Amendment claim of ineffective assistance of counsel. The Court noted that Pridham alleged that trial counsel erroneously advised that he would be parole eligible after six years of the thirty-year sentence; however, because of the violent offender statute, Pridham was not parole eligible until serving twenty years. The Court held that “[w]e do not believe it unreasonable to expect of competent defense counsel [to possess] an awareness of the violent offense statute and accurate advice concerning its effect on parole eligibility.” *Pridham*, 394 S.W.3d at 879.

Likewise, in our case, we believe that competent defense counsel should have been aware of the PFO I statute and should have been able to accurately advise defendant concerning its effect on parole eligibility. And, under the circumstances herein, appellant has set forth a *prima facie* showing of prejudice. Rather than being eligible for parole after serving six years and six months of the ten-year sentence, appellant must actually serve the entire ten-year sentence without ever being eligible for parole per the PFO I statute.¹

¹ The relevant statute, Kentucky Revised Statutes 532.080(7) reads:

A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a person or a sex crime as that term is defined in [KRS 17.500](#), in which case, probation, shock probation, or conditional discharge may be granted. If the offense the person presently stands convicted of is a Class A, B, or C felony, the person shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years, unless another sentencing scheme applies. A violent offender who

Consequently, we reverse and remand to the circuit court for an evidentiary hearing upon appellant's RCr 11.42 motion.

For the foregoing reasons, the Order of the Fayette Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: I wholly concur with the sound reasoning of the majority opinion and would add only one point: that the trial court correctly acted in accordance with the law in effect at the time of its initial ruling. *Pridham* has changed the law – undoubtedly for a more just result. But the point upon which we reverse this case did not become error until *Pridham*.

BRIEF FOR APPELLANT:

M. Brooke Buchanan
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

is found to be a persistent felony offender in the first degree shall not be eligible for parole except as provided in [KRS 439.3401](#).