

RENDERED: SEPTEMBER 18, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001467-MR

WILLIAM FUGATE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 14-CR-00211

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: William Fugate appeals from a final judgment entered on August 29, 2014, accepting his conditional guilty plea to a charge of operating a motor vehicle while license revoked or suspended for driving under the influence, third offense.¹ Prior to entry of the order, Fugate argued two misdemeanor convictions used to bump the charge to a Class D felony should be suppressed

¹ Kentucky Revised Statutes (KRS) 189A.090(2)(c), a Class D felony.

because records of the district court guilty pleas were silent as to whether he knew his constitutional rights and knew pleading guilty would waive those rights.

Following an evidentiary hearing—at which Fugate did not testify—the Kenton Circuit Court denied his motion to suppress, and Fugate ultimately entered the conditional guilty plea from which he now appeals. Upon review of the briefs, the the record, and the law, we vacate and remand for proceedings consistent with this Opinion.

According to the uniform citation, on January 30, 2014,

Fugate backed out of a parking space as [Officer D. Hoyle] was passing by on Welsh Drive and nearly struck [Hoyle's] vehicle. Upon contact, it was discovered that he has a DUI suspended license.

Ten minutes later, Fugate was arrested on a charge of driving on a DUI-suspended license, first offense.

Fugate's extensive criminal history—beginning in 1991—resulted in his indictment in March 2014 on a charge of driving on a DUI-suspended license, third offense.² Between 2001 and 2012, three times he would be charged with—and convicted of—driving on a license suspended due to DUI—including twice in 2012. The Commonwealth offered the two Kenton County 2012 misdemeanor convictions—Case Nos. 12-T-06856 and 12-T-07448—to enhance the most recent

² He was also indicted as a first-degree persistent felony offender (PFO I), KRS 532.080, but the Commonwealth dismissed that charge upon Fugate entering a conditional guilty plea to the charge of DUI-suspended license, third offense. PFO enhancement would have been based on felony convictions for receiving stolen property-firearm and second degree robbery.

driving on a suspended license charge from a first³ or second offense⁴—which would be a misdemeanor—to a third offense—a Class D felony.

In May 2014, appointed counsel filed a written motion to suppress the 2012 misdemeanor convictions arguing both times Fugate had pled guilty in Kenton District Court without counsel, without being informed of the right to counsel, without being told his constitutional rights, without completing a written plea form, without specifically stating he waived any constitutional rights—including the right to counsel—and, while he was *asked* if he wanted to plead guilty, Fugate *never actually uttered* the word “guilty.” In the motion to suppress,⁵ counsel wrote that Fugate did not appreciate the constitutional rights he was waiving by pleading guilty; did not understand he had the right to speak with an attorney before and during his court appearance; and, did not understand the consequences of pleading guilty to an “enhanceable” crime. Finally, because there was no written waiver of rights or motion to enter a guilty plea in either court record, defense counsel maintained the pleas were not knowing, intelligent and voluntary as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

³ KRS 189A.090(2)(a).

⁴ KRS 189A.090(2)(b).

⁵ Fugate did not personally sign the motion, therefore, the record is devoid of any personal statement from Fugate that he was not advised of his constitutional rights, did not know his constitutional rights, or, did not intend to enter a guilty plea.

In its written response, the Commonwealth argued the totality of the circumstances showed the two challenged guilty pleas passed *Boykin* muster, especially since a presumption of regularity attaches to a judgment. *Dunn v. Commonwealth*, 703 S.W.2d 874, 876 (Ky. 1985). The Commonwealth began by noting that before pleading guilty in both cases, Fugate had received his constitutional rights from the district court as part of a group of prisoners just before the arraignment dockets commenced—a fact stipulated by defense counsel. At a subsequent hearing, the Commonwealth introduced Fugate’s driving record, criminal history, and recordings of both misdemeanor guilty plea colloquies.

The violation date in Case No. 12-T-06856 was May 29, 2012, for a charge of driving on a DUI-suspended license, first offense. The court session began with the district court addressing the audience as a whole, describing their constitutional rights and the process that would follow. This is the explanation the district court gave in Case No. 12-T-06856:

Good morning, Ladies and Gentlemen. I am Judge Easterling and this is the Felony, Misdemeanor and Traffic Arraignment Docket here in Kenton County. The purpose of this docket is to formally advise you of the charges which have been filed against you, your constitutional rights and the penalties which those charges carry.

You have the right to plead not guilty, you have the right to not testify against yourself and remain silent throughout these proceedings. You have the right to have the Commonwealth prove your guilt beyond a reasonable doubt. If you cannot afford a lawyer, the court can consider the appointment of a public defender if you qualify financially. You have the right to confront

and cross-examine all witnesses called to testify against you, and you have the right to produce any evidence, including witnesses in your favor. If you lose that trial, you have the right to appeal that conviction to a higher court and you have the right to reasonable bail throughout these proceedings.

If you are charged with a misdemeanor traffic offense, you will have an opportunity to enter a plea today. The pleas we authorize are guilty or not guilty. We do not recognize no contest like some other states. If you plead not guilty, I'll set your case over for a pretrial conference.

Keep in mind that there are certain offenses, certain crimes that every time you get them, the penalties go up and the jail time is more substantial. They're called enhanceable crimes. Enhanceable crimes in Kentucky include carrying concealed deadly weapon, unauthorized use of a motor vehicle, alcohol intoxication, assault or domestic, DUI, no insurance, operating on a suspended license.

Now, if you are assessed a fine or court costs today, I don't expect you to pay it to get out. I'll give you some time. I'll give you a show cause date. That is a date in the future that I'm going to look at your case and see if you did what you were supposed to do. So, if you were supposed to pay costs, or do some community service or get into some type of treatment, you have to have proof in the file on or before November 1st. Your show cause date is going to be November 2nd so get everything done the day before. If you don't have everything done the day before your show cause date, you're going to end up back in jail. You pay on the third floor of the Justice Center. The Justice Center is located down in Covington, 230 Madison Avenue, right beside the Convention Center.

That's your basic rights. If you have specific questions, let me know when your name is called. When your name is called, approach the podium there in the courtroom, give me your name, and date of birth.

Not mentioned in that explanation was the right to a jury trial, one of three rights *Boykin* directs will not be presumed from a silent record. *Boykin*, 395 U.S. at 243, 889 S.Ct. at 1712. Also missing was the effect of entering a guilty plea—pleading guilty waives the rights the court just mentioned. These details may be known to a defendant with a lengthy record, but wholly unknown to a defendant making his first court appearance.

Fugate did not plead guilty that day; instead, a pretrial conference was scheduled as the court stated it would do for any defendant pleading not guilty.

While

Case No. 12-T-06856 was pending, Fugate was arrested on June 8, 2012, in Case No. 12-T-07448, on yet another charge of driving on a DUI-suspended license, first offense. He was promptly arraigned and pled guilty the same day.

Here is the script the district court followed on July 18, 2012:

All right, good morning, Ladies and Gentlemen. I am Judge Easterling. This is the Felony, Misdemeanor and Traffic Arraignment Docket here in Kenton County. The purpose of this docket is to formally advise you of your rights, the charges against you, and the penalties which they carry.

Now, you have the right to plead not guilty, you have the right not to testify against yourself; remain silent throughout these proceedings. You have the right to a speedy and public trial by jury, and at that trial, the Commonwealth would have to prove your guilt beyond a reasonable doubt. You have the right to be represented by a lawyer and if you cannot afford a lawyer, the court can consider the appointment of a public defender if you qualify financially. You have the right to confront and

cross-examine all witnesses called to testify against you. You have the right to produce any evidence, including witnesses in your favor, and, if you lose that trial, you have the right to appeal that conviction to a higher court and you have the right to reasonable bail throughout these proceedings.

If you are charged with a felony offense, I will enter a not guilty plea for you and I will schedule your case for a preliminary hearing. The purpose of that preliminary hearing is for this court to determine whether there is probable cause to believe you committed a felony offense. If the court makes that finding of probable cause, then your case is transferred to the Kenton County Grand Jury. They take up your case; determine whether or not to return an indictment; if they indict you, then you appear in the circuit court, a court that is different than the court that you're in today.

If you are charged with a misdemeanor traffic offense, you will have an opportunity to enter a plea today. The pleas we authorize in Kentucky are guilty or not guilty. We do not recognize no contest like some other states. If you plead not guilty, I will schedule your case over for a pretrial conference.

I want you to be further advised that there are some crimes that every time you get them, the penalty goes up; the jail time is more substantial. They are called enhanceable crimes. In Kentucky, those enhanceable crimes include carrying concealed deadly weapon; unauthorized use of a motor vehicle; alcohol intoxication; assault fourth which is domestic in nature; driving under the influence; no insurance; operating on suspended license.

Now, if you are assessed a fine or a court cost, I'll give you a show cause date. That's a date in the future. The date that I'm using today is December the twelfth, which means that you have to have proof in your packet. You have to come down and show proof in your packet, do whatever it is you are supposed to do before that day. If you don't have done what you are supposed to do before

December the twelfth, then you're going to have to appear on December the twelfth. On December the twelfth, it's a show cause meaning that you could be held in contempt if you fail to do what the court ordered and you could be held in custody. So make sure you get done what you are supposed to do. You pay down at the Courthouse. Courthouse is located at 230 Madison Avenue, Covington, Kentucky, down by the Convention Center. You go to the third floor. They accept credit cards.

Now, those are your basic rights. If you have a specific question about your rights, let me know when your name is called. When your name is called, I want you to approach the podium there in your courtroom, give me your name, and date of birth for the record that we are making today.

Specifically mentioned in this version are the three federal rights for which *Boykin* directs waiver will not be presumed from a silent record—the right to remain silent, to have a jury trial, and to confront one's accusers. *Boykin*, 395 U.S. at 243, 89 S.Ct. 1712. However, still missing was the effect of entering a guilty plea—waiver of those constitutional rights. Within minutes of hearing how the process would unfold on July 18, 2012, Fugate was called to the podium and the following colloquy occurred with the trial court:

Judge Easterling: William Fugate.

Fugate: (unintelligible).

Judge Easterling: All right, sir, you were arrested for not, for having a license that was suspended? Do you know what's going on with your license?

Fugate: (unintelligible).

Judge Easterling: Do you have a prior DUI that has suspended you?

Fugate: I had (unintelligible).

Judge Easterling: All right. Looks like he's got a DUI second, aggravated.

Judge and Commonwealth talking at same time, (unintelligible).

Commonwealth: He's also got a DUI, suspended license, pending, on June 21st. . .

Judge Easterling: Got multiple DUI, firsts.

Commonwealth: . . . and . . . 26th. So, the Commonwealth's moving to amend this to DUI, suspended license.

Judge Easterling: All right, the Commonwealth's moved to amend this to a driving on a DUI, suspended license. The penalty is the same, but is enhanceable. *(To the Commonwealth - Is the penalty the same or is it . . .)*

Commonwealth: It's a B misdemeanor, a B as in boy.

Judge Easterling: It's up to 90 days, sir. Do you want to talk to a lawyer?

Fugate: Naw, I'll plead guilty, your honor.

Judge Easterling: All right.

Commonwealth: It's 90 days, serve 10.

Judge Easterling: All right. Do you understand, Mr. Fugate, that this is one of those charges that if you get another one, the penalty goes up? It's enhanceable. Enhancement advised. All right, on the recommendation of the Commonwealth, we'll sentence you to 90 days, you'll serve 10. I'll probate the balance for two years.

No driving without a license. You owe \$134.00. Have that paid by November the second. All right, sir.

During the colloquy, Fugate—a “frequent flyer” as the circuit court would later characterize him, asked no questions of the district court and expressed no confusion or misgivings about what he was doing. During the exchange, the court specifically apprised Fugate he was about to plead guilty to an enhanceable offense, and specifically asked him whether he wished to speak to a lawyer, to which Fugate replied, “Naw, I’ll plead guilty, your honor.”

In August 2012, Fugate returned to district court for the pretrial conference in Case No. 12-T-06856, at which the following exchange occurred:

Judge Easterling: William Fugate. William Fugate.

Commonwealth: He’s in lockup. Does he have a PD?

Judge Easterling: It doesn’t say so, I guess we’ll find out. Mr. Fugate? State your name and date of birth for me.

Fugate: Please?

Judge Easterling: Will you state your name and date of birth for me.

Fugate: Uh, birthdate, uh, 4-25-64.

Judge Easterling: All right, it looks like you’re being held here on this case and then a theft out of Campbell County?

Fugate: Uh, no, I came from Campbell County to here.

Judge Easterling: Yeah.

Commonwealth: Are you looking at . . . it looks like this Campbell County case (unintelligible) is 12-M-1883?

Judge Easterling: Yeah, that looks like it's done.

Commonwealth: It's done.

Judge Easterling: All right, well it's here on driving on a DUI-suspended license. Do you have a lawyer?

Fugate: No, sir.

Judge Easterling: Do you intend to hire a lawyer?

Fugate: (unintelligible).

Judge Easterling: Can you aff . . . Do you wish to maintain a not guilty plea, and I can talk to you about a lawyer, or do you want to talk to the prosecutor about a potential plea?

Fugate: Uh . . . I could go ahead and plead to it.

Judge Easterling: Today? Alright. Commonwealth?

Commonwealth: Commonwealth's recommendation on a plea would be on the driving DUI-suspended, 90 days CD, serve 45.

Judge Easterling: How much time has he had in? How many days have you been in custody?

Fugate: 30.

Judge Easterling: 30? I'll give you that 30 days. If you want to plead, sir. Do you want to plead to driving on a DUI-suspended license?

Fugate: Yes, sir.

Judge Easterling: Do you understand that these are enhanceable crimes, meaning every time you get them, driving on a DUI-suspended license, the next one the

penalty is worse. It's a class, it's up to a year in jail. A third one is five years in the state penitentiary. Do you understand that?

Fugate: Yes, sir.

Judge Easterling: Do you still wish to enter a plea to the enhanceable offense of driving on DUI-suspended?

Fugate: Yes.

Commonwealth: Judge, just so the court is aware, he had a conviction here on driving DUI-suspended on from June 8. It occurred after this offense date. So, they are both first offenses.

Judge Easterling: Enhancement advised. Alright, so I'll accept your plea, I'll sentence you to 90 days. You'll serve 30. I'll give you credit for the time you have served. I'll probate the balance for two years. No convictions. No driving without a license. I merged count 1 and 3, and waived your costs. All right, you'll be getting out. Do not drive again. If you do, you're going to come back and serve 90 days. 60 days. Understand?

Fugate: (mumble, unintelligible).

In the foregoing, Fugate approached the podium, asked no questions and displayed no hesitancy. He confirmed he had no lawyer, and when given a choice between talking with the judge about getting a lawyer or talking with the prosecutor about a possible plea, Fugate responded, "I could go ahead and plead to it." We are not troubled by Fugate saying he could *plead* rather than *plead guilty* to the offense because "the validity of a 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 surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978)

(internal citation omitted). When specifically asked if he wanted “to plead to driving on a DUI-suspended license,” he replied, “Yes, sir.” The trial court then emphasized to Fugate he would be pleading to an enhanceable crime and the third such conviction would result in a sentence of five years in the state penitentiary. Fugate confirmed both that he understood the significance of pleading guilty and that he still wanted to plead guilty. The district court then accepted the guilty plea.

The circuit court heard the suppression motion on the felony charge on May 14, 2014. Fugate was present but did not testify. The only evidence heard that day were recordings of the two challenged guilty pleas. Thereafter, on June 9, 2014, the court orally announced its decision from the bench, followed by entry of a written order on June 13, 2014. Considering the totality of the circumstances—including the accused’s background, experience and conduct as allowed by *Kotas*, 565 S.W.2d at 447—the court found Fugate had knowingly, voluntarily and intelligently pled to both misdemeanors and *Boykin* was satisfied. In reaching its decision, the circuit court found *Conklin v. Commonwealth*, 799 S.W.2d 582, 584 (Ky. 1990), particularly persuasive.

A judgment of conviction is entitled to some presumption of regularity. Even though the validity of the judgment may not be presumed if properly challenged, the regularity of the judgment should be presumed at least until there is some evidence that it is invalid. A bare allegation in a motion to suppress on the grounds that the plea was involuntary is not sufficient. A defendant is not entitled to have a conviction suppressed simply because the record is silent on *Boykin* matters when neither he nor anyone else has testified under oath that the *Boykin* requirements were not explained to him

and that he did not understand his constitutional rights before the entry of the plea. In this case the appellant, by counsel, moved for a hearing to determine the validity of one of his three prior felony convictions. The hearing was held, and the appellant at no time stated that he did not understand his constitutional rights prior to the entry of his plea of guilty in the prior conviction.

In effect, his contention is that even if his rights were explained to him in the former proceeding, and that he did, in fact, understand them, the conviction must be invalidated nevertheless because the record fails to show what actually occurred. If the appellant had testified that the judge in the former trial accepted his plea without explaining his rights or that he did not understand his Constitutional rights, then under *Dunn v. Commonwealth, supra*, the Commonwealth would have the burden of proof that the judgment was entered in a manner which fully protected his constitutional rights. A silent record would not suffice.

Since the appellant offered no such attack upon the prior conviction after the judgment was introduced, there was no error in failing to suppress it.

Here, Fugate never swore he did not understand his constitutional rights nor did he ever say he did not intend to plead guilty. As noted by defense counsel, Fugate's comment about the two challenged misdemeanors throughout the current prosecution was "utter silence."

On the strength of *Conklin*,⁶ we could affirm denial of the motion to suppress and entry of the conditional guilty plea because the district court record refutes many of the claims voiced by defense counsel—for example, the court

⁶ On appeal, citing *Riley v. Commonwealth*, 120 S.W.3d 622, 632 (Ky. 2003), and *Commonwealth v. Lamberson*, 304 S.W.3d 72, 77 (Ky. App. 2010), the Commonwealth argues Fugate has launched an impermissible collateral attack. Because of our result, we need not address this argument.

specifically asked Fugate whether he wanted counsel and Fugate declined. However, to affirm this case would be disingenuous, because while the trial court mentioned *some* of a defendant's constitutional rights, he did not recite *all* of them. Nor did he mention entry of a guilty plea waives those constitutional rights. Reflecting on Fugate's extensive record, the circuit court noted it is difficult to fathom a man who had appeared in court as often as Fugate, and been convicted as many times as he had, would not know his constitutional rights and the consequences of pleading guilty. But making assumptions is dangerous and a practice we cannot condone. From the totality of the circumstances, Fugate *probably* knew his constitutional rights and the consequences of pleading guilty, but without a better record, we cannot be sure.

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (*Garner v. Louisiana*, 368 U.S. 157, 173, 82 S.Ct. 248, 256, 7 L.Ed.2d 207; *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Boykin, 395 U.S. at 243-44, 89 S. Ct. at 1712-13 (footnotes omitted). We are keenly aware of the volume of criminal cases handled by district courts across the Commonwealth everyday and urge the exercise of care to ensure every jot and tittle is complete—especially when tedium and familiarity may set in. Otherwise,

as in this case, the accused's rights will not be fully protected, and a felony prosecution must be vacated.

Having scrupulously reviewed the record in this case, specifically the two explanations of constitutional rights given by the district court, we cannot say with confidence Fugate's pleas to the two 2012 misdemeanors were intelligent, knowing and voluntary. We therefore hold the suppression motion should have been granted and the most recent guilty plea is hereby vacated and remanded for prosecution as a first offense.

ALL CONCUR.

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