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# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-000990-MR

WILLIAM ROY HELM, JR.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 06-CR-00602

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

J. LAMBERT, JUDGE: William Roy Helm, Jr. appeals from a Hardin Circuit Court order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without a hearing. Helm argues that his trial counsel was ineffective for advising him to waive jury sentencing; that his appellate counsel was ineffective for moving to dismiss his appeal; and that he was entitled to an evidentiary

hearing. Because we agree with Helm that his trial counsel was ineffective during the penalty phase, we reverse and remand for a new sentencing hearing.

Helm was charged with multiple counts of first-degree rape, first-degree sodomy, and one count of first-degree sexual abuse. The charges relate to sexual acts with two sisters, which began when each child was approximately twelve years of age. A jury convicted him of a number of lesser-included offenses: five counts of second-degree rape, two counts of second-degree sodomy, and two counts of first-degree sexual abuse.

Prior to the sentencing phase, Helm and the Commonwealth reached an agreement regarding his sentence. Helm agreed to concurrent sentences totaling ten years for all crimes related to each victim, with each ten-year sentence to run consecutively for a total sentence of twenty years' imprisonment. The trial court sentenced Helm in accordance with the agreement and also imposed a \$1,000 fine.

On direct appeal, the Kentucky Supreme Court affirmed Helm's convictions, but also found two errors. *Helm v. Commonwealth*, 2010 WL 4683562 (Ky. Nov. 18, 2010) (2008-SC-000716-MR). The first related to the trial court's imposition of the fine, which the Court determined was improper. The second error was found in the Trial Verdict and Judgment, as well as the Judgment and Order Imposing Sentence, which erroneously stated that, on Count 2, Helm was convicted of second-degree rape. However, the jury actually convicted Helm of first-degree sexual abuse under Count 2. The opinion concluded that "[b]ecause of the error, Helm agreed to an illegal sentence of 10 years' imprisonment for a Class

D felony.” In a footnote, the Court noted that “[a] clerical error in the court’s order led to Helm being convicted of second-degree rape on one count, when the jury in fact found him guilty of first-degree sexual abuse. . . . [W]e remand for correction of the error.” The Supreme Court vacated Helm’s sentence, and remanded the case for a new penalty phase or other proceedings consistent with the opinion.

On remand, the Commonwealth moved to amend the Judgment and Order Imposing Sentence pursuant to Kentucky Rules of Civil Procedure (CR) 60.01 and/or CR 60.02(a) and (f), arguing that a new sentencing proceeding was unnecessary in light of the fact that the parties had agreed to the total sentence and that the error in the final judgment was simply clerical. The trial court agreed, and entered orders amending the verdict, judgment, and sentence. Helm filed a response opposing the Commonwealth’s motion, arguing that it was contrary to the opinion of the Kentucky Supreme Court and that he was entitled to a new sentencing hearing. He argued that the error was not clerical because he had been subjected to an illegal sentence.

The trial court reviewed the sentencing proceedings and found that there was no misunderstanding between the Commonwealth and Helm regarding his convictions and the length of his sentence. The trial court concluded that the amended judgments corrected the clerical errors and enforced the actual terms of the sentencing agreement made between the Commonwealth and Helm.

Helm filed an appeal from the amended judgment and sentence, which he later successfully moved to dismiss. He then filed an RCr 11.42 motion, arguing

that his trial counsel was ineffective, that his appellate counsel was ineffective for moving to dismiss the appeal after remand, and that he was entitled to an evidentiary hearing. The circuit court denied the motion without a hearing, and this appeal followed.

Helm argues that his trial counsel was ineffective for waiving jury sentencing and allowing him to accept a plea for the maximum sentence.

When a defendant argues that his guilty plea was rendered invalid due to ineffective assistance of counsel, the trial court is required

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* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] inquiry into the performance of counsel.” To support a defendant’s assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

*Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations omitted).

At the commencement of the sentencing phase of Helm’s trial, his attorneys informed the court that he had agreed to waive jury sentencing and accept a total sentence of twenty years, which was the maximum sentence he could have

received from the jury. A discussion then ensued amongst the attorneys and the trial court regarding Helm's sentence and his parole eligibility. The trial court repeatedly expressed concerns about the deal and defense counsel's rationale for recommending it to Helm. The trial court told defense counsel that Helm could receive considerably less than a twenty-year sentence if he opted for jury sentencing, pointing out that if the jury imposed a five-year sentence for each Class C felony he would receive a ten-year total sentence. The trial court stated: "Your client is getting ready to accept a sentence of twenty years which is the maximum he could possibly receive." Defense counsel replied that there was a stipulation added that Helm would fall under the 20 percent parole eligibility rule. "Either he does or he doesn't," the trial court replied. Defense counsel said, "Oh no, I've got a manual here that says the judge must make a finding of parole eligibility at the sentencing hearing and get an agreed order." Defense counsel further justified the deal by hypothesizing that the jury might recommend a sentence of eighty years, which would send a harmful message to the Parole Board. The trial court pointed out that the jury instructions expressly capped the sentence at twenty years.

The attorneys and the trial court also discussed the implications of Kentucky Revised Statutes (KRS) 439.3401, which requires service of 85 percent of the sentence before parole eligibility for certain criminal defendants who are deemed "violent offenders." The statute has been amended on several occasions and the definition of "violent offender" has been modified. Before July 12, 2006, Helm's convictions for second-degree rape (KRS 510.050) and second-degree sodomy

(KRS 510.050) would not have rendered him a violent offender. After July 12, 2006, the definition of violent offender was expanded to include a person who had been convicted or pled guilty to “[t]he commission or attempted commission of a felony sexual offense in KRS Chapter 510[.]” There was some uncertainty as to the exact date of Helm’s offenses. The trial court pointed out that in any event the 85 percent rule would be inapplicable to Helm because it applied only to offenders who committed Class A or B felonies.

Although defense counsel eventually agreed that Class C and D felonies did not fall under the 85 percent rule, he warned that the DOC had been applying it incorrectly to all sexual offenses. Defense counsel apparently relied on the following passage from the DPA Manual:

**WARNING!!** KRS 439.3401(1) which lists the offenses which can qualify a person as a violent offender, includes offenses which are Class C or D felonies, or even misdemeanors. For example, subsection (1)(d) says that a person is a violent offender if convicted of or has pled to, “The commission or attempted commission of a felony sexual offense described in KRS Chapter 510.” Sexual abuse 1<sup>st</sup> Degree is a Class C or D felony. KRS 510.110. Attempted Sexual Abuse 1<sup>st</sup> Degree is a Class A Misdemeanor. KRS 506.010(4)(d). Although subsection (4) seems to limit 85% parole eligibility to Class A and B felonies, nevertheless, *the Department of Corrections has applied it to ALL felony sexual offenses in the past.* DPA Appeals Branch had to do a Declaratory Judgment action. So, have the judge make a finding of parole eligibility at the sentencing hearing and get an agreed order.

The trial court reiterated that the 85 percent parole eligibility requirement does not apply to Class C felonies or to sentences of ten years or less. The

Commonwealth attorney admitted that he was not used to the new parole eligibility chart.

Ultimately, the trial court asked Helm if he understood that the jury could have given him a lesser sentence, asked him if he had heard the arguments regarding parole eligibility and asked him if he was sure he wanted to enter the plea. Helm stated that he wished to proceed.

In its order denying Helm's RCr 11.42 motion, the trial court stated as follows:

As stated on the record, changes had been made to the parole eligibility guidelines. Count 8 of the Indictment had given a time frame of "through July 2006." If determined that this offense occurred after July 15, 2006, that charge would have been classified as a violent offense prohibiting certain time credits for Helm. Indeed, the Commonwealth later stipulated that the date for that charge was July 1, 2006, consistent with their agreement to avoid negative parole consequences pursuant to the sentencing agreement that had been made.

Because the Department of Corrections at the time of the trial in this case had been imposing higher percentage requirements on various charges, there was a dispute to be avoided by agreement to provide for certainty. Another point made was that the jury could have recommended a sentence in excess of twenty years, although the Court could not have imposed the sentence. Even so, this information may have had a negative impact on Helm's chances for parole. Indeed, this Court has had a jury recommend a greater than twenty year sentence despite being instructed in writing and again verbally that twenty was the maximum.

Helm's counsel made a reasonable and valid tactical decision with which Helm clearly agreed at the time of his sentencing. Helm cannot clear the first hurdle to establish

his entitlement to relief. Even if he could, he cannot clear the second hurdle. . . .

It is not enough to say that Helm could have done no worse. The requirement is to make an affirmative showing that Helm was in fact prejudiced by an error by his attorney. No reasonable probability of a different sentence has been shown. . . . Helm's suppositions in this case are not enough to satisfy this requirement. Overall, the circumstances do not bring into question the overall reliability or fairness of the final result.

Misadvice concerning parole eligibility may support a claim of ineffective assistance of counsel. *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012).

Defense counsel's justification for advising Helm to waive jury sentencing and accept the maximum sentence of 20 years was twofold: (1) that a stipulation would be made that Helm was subject to the 20 percent parole eligibility rule and that Helm could thereby avoid the possibility that the DOC might wrongfully impose the 85 percent rule; and (2) that the jury might ignore the jury instructions and impose a longer sentence than 20 years, thereby negatively influencing the Parole Board.

Even if the trial court had found that Helm was a violent offender, he would not be subject to the 85 percent rule under the clear terms of KRS 439.3401(3) because his felonies were Classes C and D. If the DOC imposed it nonetheless, Helm's recourse would be to file a declaratory action against the Department of Corrections. See *Mason v. Commonwealth*, 331 S.W.3d 610, 628-29 (Ky. 2011).

The only section of KRS 439.3401 that would apply to him, should he be deemed a violent offender, was section (4) which restricts the amount of credit that



may be awarded under KRS 197.045(1). Although the trial court mentioned this as a benefit of the sentencing agreement in its order denying the RCR 11.42 motion, it was never discussed during the sentencing waiver discussion, and thus formed no part in Helm's decision to waive jury sentencing.

The Kentucky Supreme Court has stated that "We do not believe it unreasonable to expect of competent defense counsel an awareness of the violent offender statute and accurate advice concerning its effect on parole eligibility." *Pridham*, 394 S.W.3d at 879. Helm's attorneys were not adequately familiar with the statute and consequently did not provide a sufficiently accurate explanation to Helm of the implications of accepting the maximum sentence. Reliance on the DPA Manual does not excuse this deficient knowledge of the content of the statute.

Defense counsel's concern that the jury might wrongfully impose a lengthier sentence and thus negatively affect the Parole Board's view of Helm was purely speculative and hypothetical, and certainly did not justify recommending acceptance of the maximum sentence.

Moreover, when waiver was being discussed in the trial court, the comments of both defense counsel and the Commonwealth attorney expressed a great deal of uncertainty and misunderstanding about the violent offender statute generally and its impact on parole eligibility specifically. Under these circumstances, when even trained attorneys were unsure of the situation, Helm could not be expected to make a knowing waiver of his right to jury sentencing. Consequently, he has met the deficiency prong of the *Strickland* test.

As to the prejudice prong, Helm received the maximum possible sentence that could have been imposed for the crimes of which he was convicted. “The fact that Appellant received the maximum sentence for the offense to which he pled guilty satisfies the requirement of prejudice.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 456-57 (Ky. 2001). In the context of the violent offender statute and parole eligibility, we turn for guidance to *Stiger v. Commonwealth*, 381 S.W.3d 230 (Ky. 2012), a case in which the appellant was not made aware of the violent offender statute and its effect on his parole eligibility prior to entering a guilty plea. In assessing whether Stiger had successfully met the prejudice prong of the *Strickland* test, the Kentucky Supreme Court stated that

The question is whether, had Stiger been made aware of the violent offender statute and its effect on his eligibility for parole, there is a reasonable probability that he would have rejected the Commonwealth’s plea offer and taken his chances at trial. Using *Padilla* ‘s language, would it have been a “rational” decision to reject the twenty-year plea deal under the circumstances?

*Stiger*, 381 S.W.3d at 237.

In Stiger’s case, the answer was “no,” because he had little, if any, chance of improving his outcome at trial, and could easily have fared far worse. “[W]e are not persuaded that, had he been correctly advised about the parole consequences of his plea, there is a reasonable probability that he would have rejected the plea bargain and insisted upon a trial. It simply would not have been a ‘rational’ choice under the circumstances.” *Id.* at 238.

By contrast, Helm could scarcely have fared worse had he proceeded to jury sentencing. The only advantage he may have gained from not being deemed a violent offender was the possibility of gaining credits in prison. But this issue was raised for the first time in the context of his RCr 11.42 motion and never formed part of the original decision to waive jury sentencing. Helm is therefore entitled to a new sentencing hearing. Because of this, his arguments regarding ineffective assistance of appellate counsel and an evidentiary hearing are moot and need not be addressed here.

We reverse the trial court's order denying Helm's RCr 11.42 and remand for a new sentencing hearing.

JONES, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS.

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