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RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-13-06 [illegible]

2005-SC-000533-MR
AND
2005-SC-000534-MR

MARCUS JABAR PENMAN — APPELLANT

V.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
INDICTMENT NOS. 04-CR-00313 AND 04-CR-00569

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

These cases ask us to decide whether a trial court erred in failing to hold an evidentiary hearing on a motion to withdraw a guilty plea by a defendant who inexplicably pleaded guilty to a felony even though he had been indicted for a misdemeanor and whose attorney stated at the time of the plea that he was uninformed about the underlying facts of the case. We hold that the failure to hold the hearing was error. So we vacate the judgment and remand the case to the trial court.

I. FACTS AND PROCEDURAL HISTORY.

Based on a confidential informant's statement that he had bought marijuana at Marcus Penman's home, detectives got a warrant to search Penman's home and vehicle. In the vehicle, they found Penman with a Loritab in his back pocket; in the home, they found three small children alone, a large baggie of rock cocaine, and several baggies of marijuana. As a result, Penman was indicted on the following charges:

- Trafficking in a Controlled Substance, First Degree, Second Offense, Cocaine;
- Trafficking in a Controlled Substance Within 1000 Yards of a School;
- Three counts of Wanton Endangerment, First Degree;
- Possession of a Controlled Substance, Second Degree, First Offense, Loritab; and
- Possession of Drug Paraphernalia.

A few months later, Penman was separately indicted for being a Persistent Felony Offender in the First Degree (PFO I).[1]

Although the record does not pinpoint when this took place, Christian Woodall was appointed as counsel for Penman to replace his first court-appointed lawyer. Ultimately, Penman reached a plea bargain with the Commonwealth in which he agreed to plead guilty to:

- Trafficking in a Controlled Substance, First Degree, Second Offense;

[1] Penman's PFO indictment had a separate circuit court case number, and both indictment numbers appear on the same judgment. Penman filed a separate notice of appeal for each indictment so there are two appeals. These two appeals present identical issues of law and fact so we have consolidated them.

- Trafficking in a Controlled Substance Within 1000 Yards of a School;
- Three counts of Wanton Endangerment, First Degree;
- Possession of Drug Paraphernalia;
- An amended charge of Persistent Felony Offender in the Second Degree (PFO II); and
- Possession of a Controlled Substance, Second Offense, Loritab (a charge that did not appear in the indictment).

Under the terms of the written plea agreement, the Commonwealth recommended:

- A twenty-year sentence on the PFO II charge, to be served in lieu of ten years' imprisonment on the Trafficking in a Controlled Substance in the First Degree charge;
- Twelve months' incarceration on the Possession of Drug Paraphernalia charge; and
- Five years each on all other charges, including the new Possession of a Controlled Substance charge.

During the Boykin[2] colloquy with Penman at the guilty plea hearing, the trial court did not mention that there was a new felony charge. Instead, the trial court asked Penman if he was pleading guilty to Possession of a Controlled Substance, First Offense, which was the misdemeanor charge as it appeared in the indictment. Penman responded affirmatively to the trial court's question. And, in response to the trial court's other Boykin-related questions, Penman stated under oath that he had voluntarily agreed to the pleas and that he was satisfied with his attorney's services. Woodall stated at this same hearing that he had "grave reservations" about permitting Penman to plead guilty because that

[2] Boykin v. Alabama, 395 U.S. 238 (1969).

was the first day he had met Penman, and he knew nothing about Penman's case other than an allegation regarding crack cocaine. But Woodall assured the trial court that he believed that Penman was aware of the charges against him. So the trial court accepted Penman's guilty plea and set a sentencing date.

At sentencing, Woodall orally moved the trial court to allow Penman to withdraw his guilty pleas because Woodall knew nothing about the case when Penman entered them. Consequently, Woodall stated that he was unable to advise Penman whether the proposed plea agreement was a "good deal." The trial court continued the sentencing so that Woodall could follow-up with a written motion.

The written motion argued for withdrawal of the plea because when Penman pleaded guilty, (1) he pleaded guilty too hastily hoping to be released from jail on bond to attend to his ailing wife while awaiting sentencing; and (2) Woodall "had no advice to give [him] as to whether a 20[-]year sentence was in his best interests or not, as [Woodall] had not thoroughly reviewed the discovery. Essentially, [ ] Penman entered this plea without the guiding hand of counsel."

At the hearing on the motion, Woodall added another reason to allow withdrawal of the guilty plea: he had recently discovered a basis to suppress the evidence against Penman. In light of this, the trial court directed Woodall and the Commonwealth to file additional briefs. Woodall responded by filing a terse brief arguing that Penman's plea was not knowingly made because Penman "did not fully understand the nature of the charges against him." The Commonwealth responded that Penman's plea was voluntary and knowingly

made because Penman, who was a savvy defendant because of significant court contact in the past, had actively participated in negotiating his own deal with the Commonwealth.

When the parties appeared to reargue Penman's motion to withdraw his guilty plea, Woodall argued that the late-discovered suppression issue was a basis to allow withdrawal of the plea. The trial court denied the motion noting (1) its policy against allowing disgruntled defendants to withdraw their pleas; and (2) that Penman's plea met the Boykin requirements.

As the hearing continued, Penman himself spoke up, arguing that the plea agreement stated that he was guilty of possession of Loritab, second offense, although he had never been convicted of possession of Loritab, first offense. The Commonwealth responded that the substance possessed need not be the same illegal substance for a subsequent offense charge to lie. The trial court agreed. Penman's counsel stood mute during this brief exchange about the possession of Loritab charge. The trial court then sentenced Penman in accordance with the plea agreement's recommendation, after which Penman filed these appeals.[3]

There is nothing in the record to explain how the offense named in the indictment as "Possession of a Controlled Substance, Second-degree, First Offense, Loritab" (a Class A Misdemeanor) morphed into "Possession of a Controlled Substance, Second Offense" (a Class D Felony) appearing first in the plea agreement and, ultimately, in the judgment.

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[3] Ky. Const. §110(2)(b).

II. ANALYSIS.

A. Standard of Review.

Kentucky Rules of Criminal Procedure (RCr) 8.10 provides in relevant part that "[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill[ ] to be withdrawn and a plea of not guilty substituted." Because "[a] guilty plea is valid only when it is entered intelligently and voluntarily[,]"[4] a trial court should determine on the record whether the plea was made voluntarily before ruling on a motion to withdraw a guilty plea.[5] If the trial court finds that the plea was involuntary, it must permit the defendant to withdraw his plea.[6] But if the trial court determines that the plea was voluntary, it then has the discretion to either grant or deny the motion to withdraw the plea.[7]

In order to determine if a guilty plea was made voluntarily, a court must "consider the totality of the circumstances surrounding the guilty plea[.]"[8] When the motion to withdraw the plea is based upon a claim of ineffective assistance of counsel, a trial court must undertake "an inherently factual inquiry[.]"[9] "Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into

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4 Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

5 Rigdon v. Commonwealth, 144 S.W.3d 283, 287-288 (Ky.App. 2004).

6 Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002).

7 *Id.*

8 Bronk, 58 S.W.3d at 486.

9 *Id.* at 489 (Cooper, J., concurring).

what transpired between attorney and client that led to the entry of the plea, *i.e.,* an evidentiary hearing."[10]

We review a trial court's decision regarding the voluntariness of a guilty plea under a clearly erroneous standard.[11] And we review a trial court's decision to deny a motion to withdraw a plea, which it has determined was voluntarily made, under an abuse of discretion standard.[12] A ruling that is supported by substantial evidence is not clearly erroneous.[13] A trial court abuses its discretion only when it acts arbitrarily, unreasonably, unfairly, or outside of sound legal principles.[14]

So our task is first to determine if the trial court decided that Penman's plea was made voluntarily. If so, we review that decision under the clearly erroneous standard. If we determine that the trial court did not clearly err in determining that Penman's plea was voluntarily entered, we then determine whether the trial court's decision to deny Penman's motion to withdraw his guilty plea was so unfair as to constitute an abuse of discretion.

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[10] Rodriguez, 87 S.W.3d at 11.

[11] Rigdon, 144 S.W.3d at 288 (citing Bronk, 58 S.W.3d at 489 (Cooper, J., concurring)).

[12] *Id.* (citing Bronk, 58 S.W.3d at 487).

[13] *Id.*

[14] *Id.*

B. Was Penman's Plea Voluntary?[15]

The record does not reflect an express finding by the trial court regarding the voluntariness of Penman's plea. But before denying Penman's motion to withdraw his guilty plea, the trial court commented that Penman met all of the Boykin requirements. Boykin requires a trial court to "make an affirmative showing, on the record, that a guilty plea is voluntary and intelligent before it may be accepted."[16] We will construe the trial court's comment that Penman met the Boykin requirements as the functional equivalent of a finding that Penman's plea was voluntarily made. So we must next attempt to determine whether the trial court clearly erred when it concluded that Penman's plea was voluntary.

At the time he entered his plea, Penman stated under oath that he had freely and voluntarily decided to accept the Commonwealth's plea offer. Although we recognize that the question of whether a plea was voluntary does not depend upon "reference to some magic incantation recited at the time it is taken[,]"[17] we also are aware that "[s]olemn declarations in open court carry a strong presumption of verity."[18] The purportedly voluntary nature of Penman's plea is supported not only by his own statements under oath, but also by the

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[15] Before discussing the merits of Penman's arguments, we reject the Commonwealth's argument that Penman failed to preserve the issue of his counsel's ineffectiveness. Although Penman and his counsel also discussed other reasons they believed supported Penman's motion to withdraw his guilty plea, the issue of counsel's alleged ineffectiveness was also brought to the trial court's attention.

[16] Edmonds v. Commonwealth, 189 S.W.3d 558, 565 (Ky. 2006) (citing Boykin, 395 U.S. at 241-242).

[17] Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

[18] Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

statements of his counsel, who, at the time the plea was entered, stated that Penman was aware of the charges against him and the general nature of the plea proceedings. And because the Commonwealth agreed to amend the PFO I charge to a PFO II charge, Penman received a considerable benefit from his decision to plead guilty.

But there are significant factors that could lead us to conclude that Penman's plea was involuntary due to his counsel's ineffectiveness. "A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel."[19] Furthermore, a guilty plea may be attacked on the grounds that the defendant's attorney was ineffective.[20] In order to show ineffective assistance of counsel, Penman was required to demonstrate: "(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."[21]

Our review of whether Penman has satisfied those two requirements is severely hampered by the fact that the trial court did not hold an evidentiary hearing on Penman's motion. As previously noted, since a trial court must consider the totality of the circumstances in assessing a motion to withdraw

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[19] Rigdon, 144 S.W.3d at 288.

[20] Rodriguez, 87 S.W.3d at 10.

[21] Bronk, 58 S.W.3d at 486-487.

a guilty plea based on ineffective assistance of counsel, an evidentiary hearing is generally necessary to determine "what transpired between attorney and client that led to the entry of the plea,"[22] although the lack of a hearing may not be grounds for reversal if a defendant makes no allegation that the lack of a hearing caused him to suffer prejudice.[23] However, in the case at hand, Penman specifically argues in his reply brief that the trial court erred to his prejudice by failing to hold an evidentiary hearing before denying his motion to withdraw the guilty plea.

We are at a loss to understand how Penman pleaded guilty to a felony charge of Possession of a Controlled Substance, Second Offense, when he was indicted for the misdemeanor charge of Possession of a Controlled Substance in the Second Degree, First Offense. This is a question of practical significance because the possession charge for which Penman was indicted carries a maximum possible sentence of twelve months, whereas the charge to which he pleaded guilty carries a maximum possible sentence of five years.[24] This is also a question of legal significance as to whether the circuit court had jurisdiction to find Penman guilty of the felony possession charge that appears to have been added in the plea agreement.[25] We can locate no waiver of

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22 Rodriguez, 87 S.W.3d at 11.

23 Rigdon, 144 S.W.3d at 290.

24 *See* Kentucky Revised Statutes (KRS) 218A.1416(2).

25 Malone v. Commonwealth, 30 S.W.3d 180, 183 (Ky. 2000) ("[a] criminal prosecution requires the existence of an accusation charging the commission of an offense. Such an accusation[,] either in the form of an indictment or an information, is an essential requisite of jurisdiction. In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in

indictment, which could have permitted Penman to be charged with the felony possession charge without going back to the grand jury.[26] The confusion over the felony possession charge is magnified by the fact that the trial court referred only to the misdemeanor possession charge in its Boykin colloquy with Penman, yet, the judgment of conviction found Penman guilty of felony possession and ordered him to serve five years' imprisonment for that charge.

There may be benign reasons for the seemingly inexplicable enhancement of Penman's possession charge, such as a simple clerical error originating in the plea agreement and perpetuated in the final judgment.[27] But because this issue was not raised at all by Penman's counsel and was, consequently, given minimal attention by the trial court, we cannot definitively conclude what legal justification, if any, exists for the enhancement of Penman's second-degree possession charge. We conclude that the trial court should have held a hearing on this issue, especially in light of the fact that an effective attorney surely would not permit his client to plead guilty and be sentenced to five

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cases where the individual consents. Information is an agreement between the state and the individual to proceed without the formalities of a grand jury indictment . . . . Every accused person still enjoys an absolute procedural due process right to be prosecuted by indictment. However, he can be prosecuted by information if he knowingly waives that right.").

[26] *See* RCr 6.02(1) ("[a]ll offenses required to be prosecuted by indictment pursuant to Section 12 of the Kentucky Constitution shall be prosecuted by indictment unless the defendant waives indictment by notice in writing to the circuit court, in which event the offense may be prosecuted forthwith by information."). Section 12 of the Kentucky Constitution provides that "[n]o person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office."

[27] Notably, even the Commonwealth admits that Penman's agreement to plead guilty to a markedly more serious offense than that contained in the indictment "may have been out of the ordinary[.]"

years' imprisonment for a charge over which the court arguably lacked jurisdiction.

And we are troubled by the fact that Penman's attorney allowed him to plead guilty despite the attorney's admission that he had just met Penman and knew nothing about the facts underlying the charges. We realize that the fact that counsel may have only briefly met with a client is only one factor to be considered. It does not, in and of itself, conclusively constitute ineffective assistance of counsel.[28] However, we question whether Penman's counsel's admitted utter lack of knowledge of Penman's case at the time Penman pleaded guilty constitutes ineffective assistance of counsel. The potential problem of an attorney letting a client plead guilty without first gaining a fundamental knowledge of the client's case is amply highlighted by the fact that Penman's counsel discovered a basis for a motion to suppress only after Penman had already pleaded guilty. But as with the morphed possession charge, we cannot make a definitive conclusion as to the adequacy of Penman's counsel's performance on this point because the trial court held no evidentiary hearing on the matter. Thus, the record does not contain a sufficient explanation as to why Penman's counsel believed that his client properly pleaded guilty despite his counsel's being admittedly ignorant of the underlying facts and any possible defenses.

We also believe an evidentiary hearing is required so that Penman may attempt to demonstrate any possible prejudice stemming from his counsel's allegedly deficient performance.

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[28] Rigdon, 144 S.W.3d at 290; Bowling v. Parker, 344 F.3d 487, 505-506 (6th Cir. 2003).

Although we do not definitively decide whether the trial court lacked jurisdiction over Penman's felony possession charge, as a general rule, we believe that it is self-evident that a criminal defendant suffers prejudice when he is sentenced for a charge over which the trial court lacks jurisdiction. Furthermore, although it ultimately may have made no difference on the amount of time Penman actually served in prison due to the overriding effect of the PFO II sentence, the fact that Penman received a five-year sentence for possession when the possession charge contained in his indictment carried a maximum penalty of twelve months, is, at least on the surface, compelling evidence of prejudice. As with the deficient performance prong, however, we cannot definitively decide whether Penman suffered demonstrable prejudice until such time as an evidentiary hearing is held, when all parties and counsel can explain why they took the unusual actions we have discussed. The trial court can then consider the ramifications of those actions.

In short, given the uncertainty surrounding many aspects of this case, it clearly does not fall outside the general rule we have set forth requiring a trial court to hold a hearing on a motion to withdraw a guilty plea based on alleged ineffective assistance of counsel. This case must be remanded with instructions to hold an evidentiary hearing on Penman's motion to withdraw his guilty plea.

C. Did the Trial Court Abuse Its Discretion When It Denied Penman's Motion to Withdraw His Guilty Plea?

If the trial court concludes on remand that Penman's plea was involuntary, it must permit Penman to withdraw his plea. If the trial court

concludes that Penman's plea was voluntary, it must then exercise its discretion to determine whether Penman should be permitted to withdraw his plea. In other words, the trial court possibly could conclude that Penman's counsel was not constitutionally ineffective but that fundamental fairness dictates that Penman should, nevertheless, be permitted to withdraw his guilty plea due to the markedly unusual circumstances surrounding it. Since that decision depends on the facts adduced at the hearing on remand, we cannot speculate as to the outcome.

III. CONCLUSION.

For the foregoing reasons, the judgment of the Christian Circuit Court is vacated; and these matters are remanded with directions to hold an evidentiary hearing on Penman's motion; to make a determination based on the "totality of the circumstances" whether Penman's guilty plea was involuntary; and, if so, to permit Penman to withdraw his plea and reinstate his previous plea of not guilty. If the trial court determines that Penman's plea was voluntary, it must then decide in its discretion whether Penman's motion to withdraw his guilty plea should be granted or denied.

Lambert, C.J.; Graves, McAnulty, Minton, Roach, and Scott, JJ., concur. Wintersheimer, J., concurs in result only.

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