IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 20, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000684-MR

RAY WALKER — APPELLANT

V.

ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
NO. 05-CR-00268

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ray Gene Walker, pled guilty to two counts of rape in the second degree and was sentenced to twenty (20) years imprisonment. He now appeals as a matter of right from the trial court's denial of his motion to withdraw his plea. Ky. Const. § 110(2)(b).

I. Background

Appellant was alleged to have engaged in sexual intercourse with his stepdaughter, who was under the age of twelve at the time, and was indicted by a Hopkins County Grand Jury for two counts of first-degree rape and two counts of incest. Appellant pled not guilty to the charges and trial was set for May 18, 2006.

Approximately one week before trial, attorney Christopher Oglesby filed a motion for continuance and explained that Appellant, who had been released on bond, could now afford private counsel. Oglesby stated that he had represented Appellant in a related bond hearing and that he would represent Appellant at trial if the court would grant a thirty-day continuance allowing him to prepare.

The trial court denied the motion. At the hearing, Appellant stated that he did not feel that his appointed public defender was representing him the way he "could have been." Though the public defender expressed no objection to Appellant's request, the trial court concluded that its late timing was suspect.

Three days later, Appellant changed his plea to guilty. The Commonwealth's offer recommended that the two counts of first-degree rape be amended to rape in the second-degree and that the two counts of incest be dismissed. The Commonwealth recommended ten years imprisonment on each count, to run consecutively.

That same day, the trial court held a hearing on Appellant's motion to enter a plea of guilty. The Commonwealth reiterated its recommendation as to sentencing but no mention was made of probation eligibility. After conducting a standard colloquy with Appellant, the trial court accepted his plea and found that it was knowing and voluntary.

At final sentencing, Appellant moved to withdraw his guilty plea and alleged that he had discovered other evidence which would affect his conviction. The trial court noted that the inquiry was whether Appellant's plea was voluntarily entered and that newly discovered evidence was not an appropriate ground. Nevertheless, the trial court arranged a hearing at Appellant's request.

Prior to that hearing, Appellant filed a motion to withdraw his plea asserting a different argument. He alleged, in relevant part:

> The Defendant requests that the Court allow him to withdraw the plea he entered into on May 15, 2006 in Hopkins Circuit Court pursuant to RCr 8.10. As the basis for this request the Defendant states the following:
>
> . . .
>
> 3. The Defendant's attorney informed the Defendant that probation was possible under Kentucky statutory law. [sic] Though any probation would be at the discretion of the trial court and the Defendant, with counsel, would have to make this argument. The defendant was told that Peggy Bridges, a Mitigation Specialist with the Department of Public Advocacy, would be contacted that she would assist on developing an alternative sentencing plan for the Defendant.
>
> 4. The Defendant was told – correctly – that Ms. Bridges was good at her job and would do her best for the Defendant. He entered his plea with this hope and expectation.
>
> 5. Unfortunately, Ms. Bridges was unable to adequately meet with the Defendant due to unforeseen duties with her home office of Paducah (see attached letter).
>
> 6. At his final sentencing of October 2, 2006, the Defendant expressed frustration at not having meet [sic] enough with Ms. Bridges and that there was no alternative sentencing plan to present to the Court and told his Counsel that he wished to

withdraw his plea due to the fact that he saw no chance of probation being granted.

On October 10, a hearing was conducted on Appellant's motion. At the hearing, Appellant stated that he "rested on his pleading" and did not feel that enough had been done to present the alternative sentencing plan to the trial court. In response, the Commonwealth noted that Appellant's argument did not address the actual validity of his guilty plea. The trial court asked whether continuing final sentencing until the mitigation specialist had completed the report "would solve the issue," and Appellant responded, "I guess that would be alright." On October 17, 2006, the trial court denied Appellant's motion to withdraw his plea and commented that the motion was denied "in view of [the] continuance granted" for the mitigation specialist to present her recommendation.

Final sentencing was continued to November 20, 2006, when an alternative sentencing plan was, in fact, presented with the mitigation specialist available to answer any questions. The trial court noted that it had reviewed the alternative sentencing plan but concluded that it was "probably not appropriate." Appellant was sentenced in accordance with his plea agreement.

In January of 2007, Appellant filed a motion for shock probation. In response, the Commonwealth noted that KRS 439.265 and KRS 532.045 prohibited probation for the offense of second-degree rape – a fact of which

Appellant now claims he was never aware. The trial court overruled Appellant's motion.[1]

This Court granted Appellant's motion for a belated direct appeal from the trial court's October 17, 2006 order denying his motion to withdraw his guilty plea. Appellant raises a single allegation of error: that the trial court abused its discretion when it denied his motion to withdraw his guilty plea because he was not advised of a direct consequence of his plea – namely, that the crime for which he pled guilty was ineligible for probation. He, therefore, asserts that his plea was involuntary. For the reasons that follow, we affirm the judgment of the Hopkins Circuit Court.

III. Analysis

Appellant's allegation of error is not preserved. It is axiomatic that "an appellant is not permitted to make a different argument on appeal than was made in the trial court." *Harp v. Commonwealth*, 266 S.W.3d 813, 824 n.47 (Ky. 2008) (*citing Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)). Though Appellant now asserts that the trial court erred in denying his motion to withdraw his guilty plea because he was not informed of a direct consequence of his plea, the record demonstrates that he never contested the

[1] Several months later, Appellant filed a pro se motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42. Therein, he asserted, inter alia, that he pleaded guilty to the underlying offenses because he was assured by counsel that his sentence would be probated. The trial court, however, overruled the motion. In a written order, the court found Appellant's plea to be voluntary and concluded that there was no issue of material fact requiring an evidentiary hearing or appointment of counsel. Appellant does not appeal or otherwise contest the trial court's denial of his RCr 11.42 motion here.

actual voluntariness of his guilty plea prior to sentencing, let alone on the grounds now asserted.

Nevertheless, Appellant requests palpable error review of the trial court's decision. RCr 10.26 provides that

> [a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In other words, in order to merit relief, there must be error that is plain or obvious under current law, *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006), that "is more likely than ordinary error to have affected the judgment," *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005), and which seriously affects the fairness, integrity, or public reputation of the proceeding so as to be deemed "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). We, however, find no such error.

RCr 8.10 provides 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." "Though an RCr 8.10 motion is generally within the sound discretion of the trial court, a defendant is entitled to a hearing on such a motion whenever it is alleged that the plea was entered involuntarily," *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006) (*citing Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002); *Bronk v. Commonwealth*, 58

S.W.3d 482, 486 (Ky. 2001); *Brady v. United States*, 397 U.S. 742, 749 (1970)), and "a proper exercise of this discretion requires trial courts to consider the totality of the circumstances surrounding the guilty plea." *Bronk*, 58 S.W.3d at 486 (*citing Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990); *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978)); *see also Edmonds*, 189 S.W.3d at 565 ("Due process 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.") (citation omitted). If the trial court finds that the plea was involuntary, it must permit the defendant to withdraw his plea. *Rodriguez*, 87 S.W.3d at 10 (*citing Haight v. Commonwealth*, 760 S.W.2d 84, 88 (Ky. 1988); *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976); *Wood v. Commonwealth*, 469 S.W.2d 765, 766 (Ky. 1971)). If, however, the trial court determines that the plea was voluntary, it then has the discretion to either grant or deny the motion. *Id.*

It is, of course, true, as Appellant asserts, that the voluntariness of a guilty plea may be attacked where the defendant "lacked full awareness of the direct consequences of the plea." *Edmonds*, 189 S.W.3d at 566 (*citing Brady*, 397 U.S. at 755); *see Ruelas v. Wolfenbarger*, 580 F.3d 403, 408 (6th Cir. 2009) ("A defendant who pleads guilty waives a number of federal constitutional rights, including the right to a jury trial and the right to confront his accusers. Because of the importance of these rights, reviewing courts must ensure that the defendant's waiver was knowing and voluntary. We therefore insist that

the defendant appreciated the consequences of the waiver, did so without coercion, and understood the rights surrendered.") (citations omitted). "At a minimum, the defendant must understand the 'critical' or essential' elements of the offense to which he or she pleads guilty." *United States v. Valdez*, 362 F.3d 903, 909 (6th Cir. 2004) (*citing Bousley v. United States*, 523 U.S. 614, 618-19 (1998)). We have held that a defendant must be made aware of the full range of penalties for the charge to which he pleads guilty. *Edmonds*, 189 S.W.3d at 567 n.5 (*citing Armstrong v. Egeler*, 563 F.2d 796, 799-800 (6th Cir. 1977)); *see also King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1994) (defendant must be made aware of maximum sentence).

It is, however, equally true that a defendant need not be made aware of all possible consequences of his guilty plea. For example, "[a] conviction's possible enhancing effect on subsequent sentences has been held to be merely a collateral consequence of a guilty plea, about which a defendant need not be advised, even when there was a pending investigation into the charge upon which the subsequent sentence was based." *King*, 17 F.3d at 153 (citations omitted). Similarly, "a defendant need not be advised that a conviction based on a guilty plea can be used in a subsequent prosecution resulting from a pending investigation." *Id.* at 153-54 (citations omitted). It has also been held that "a defendant need not be informed of the details of his parole eligibility, including the possibility of being ineligible for parole." *Id.* at 154 (citations

omitted); *accord Edmonds*, 189 S.W.3d at 567 (*citing Armstrong*, 563 F.2d at 799-800).

It thus appears that the trial court's *Boykin* colloquy was satisfactory.[2] *See generally Boykin v. Alabama*, 395 U.S.238 (1969). When Appellant entered his guilty plea, he affirmed under oath that he had reviewed the plea agreement with his attorney before signing it and that he understood it. Within that document, Appellant was properly informed of the range of penalties and the rights he was waiving as a result of his guilty plea. In response to the trial court's inquiries, Appellant affirmed that he understood his constitutional rights and that, by pleading guilty, he was waiving those rights.

We acknowledge that the premise of Appellant's contention is that he was given erroneous legal advice by his attorney regarding probation eligibility. That a defendant's guilty plea may be set aside where he was deprived of effective assistance of counsel is now well-established. *See Bronk*, 58 S.W.3d at 486 ("In cases where the defendant disputes his or her voluntariness, a proper exercise of this discretion requires trial courts 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 (1984)] inquiry into the performance of counsel.");

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[2] We reject Appellant's contention that it "became incumbent upon the trial court to determine whether [his counsel's advice regarding probation] impacted the validity of [his] plea" when his motion revealed the misinformation. "The requirement that a plea be intelligently and voluntarily made does not impose upon the trial judge a duty to discover and dispel any unexpressed misapprehensions that may be harbored by a defendant." *Edmonds*, 189 S.W.3d 567 (*quoting Armstrong*, 563 F.2d at 800).

Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."); *see also Rodriguez*, 87 S.W.3d at 11-12 ("[W]e reject the Commonwealth's assertion that claims of ineffective assistance of counsel can be asserted only in a collateral attack via RCr 11.42. To the contrary, nothing precludes raising the issue either in a motion for a new trial or, as here, in a motion to set aside a plea of guilty so long as there is sufficient evidence in the trial record or adduced at a post-trial evidentiary hearing to make a proper determination.") (*citing Humphrey v. Commonwealth*, 962 S.W.2d 870, 872-73 (Ky. 1998)); *cf. Rodriguez*, 87 S.W.3d at 12 (remanding for evidentiary hearing).

However, this Court is also well aware of the risks of such determinations absent an appropriate RCr 11.42 proceeding involving all the parties to the ineffective assistance of counsel allegation in which testimony may be received and appropriate findings made. Here, Appellant does not allege in his direct appeal that defense counsel was ineffective or that such ineffectiveness rendered his guilty plea involuntary. No evidentiary hearing was conducted on the matter, nor does Appellant request it. Accordingly, the issue is not properly before this Court.

IV. Conclusion

Therefore, for the above stated reasons, we hereby affirm the judgment of the Hopkins Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shannon Renee Dupree
Assistant Public Advocate
Department of Public Advocacy
Suite 302
100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael Louis Harned
Assistant Attorney General
Office of the Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204