RENDERED: OCTOBER 8, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000176-MR

JASON COX — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 03-CR-00098

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON AND COMBS, JUDGES.

CLAYTON, JUDGE: Jason Cox appeals from the judgment of the Henry Circuit Court sentencing him to a total of ten years' imprisonment following his guilty plea to two counts of sexual abuse in the first degree. Cox asserts that the circuit court abused its discretion in denying his motion to withdraw his guilty plea. He alleges that the plea was involuntary because it was the product of ineffective assistance of counsel since his attorney did not fully advise him of the

ramifications of pleading guilty to an offense that would label him a sexual offender. This Court previously placed his appeal in abeyance pending a decision of the United States Supreme Court addressing whether a counsel providing incorrect information regarding a defendant's immigration status violates the Sixth Amendment right to counsel. That decision has now been rendered, and we shall address the merits of Cox's appeal. Having considered the record, the parties' briefs, and the applicable case law, we affirm the judgment of the Henry Circuit Court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, the Henry County grand jury indicted Cox for a single Class A felony of sodomy in the first degree of a child less than twelve years of age. From 1999 through 2003, Cox refused any plea offers by the Commonwealth. On March 30, 2003, Cox was convicted in Jefferson Circuit Court of kidnapping and second-degree robbery. He was sentenced to ten years on each offense with the sentences to run concurrently for a total of ten years. After the conviction in Jefferson County, Cox decided to plead guilty in the Henry County case. Thereafter, the indictment, with Cox's consent, was dismissed and a new proceeding was initiated by information. Proceeding by information, Cox was then charged with two counts of sexual abuse in the first degree.

Next, Cox filed a motion to enter a guilty plea. The motion, which was signed by Cox, recited that he believed that his attorney, Gary Stewart, had fully informed him about the case and that he understood the process. The plea

agreement itself included that Cox must engage in sexual offender risk assessment, submit to HIV and DNA testing, complete the sexual offender treatment program, and register as a sex offender following completion of his sentence. On November 20,

2003, the trial court placed Cox under oath and conducted a hearing pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Cox pled guilty to two counts of sexual abuse in the first degree, with a penalty of up to five years for each of the Class D felonies. He was to be sentenced to five years on each count, to run consecutively for a total of ten years. Further, the sentence in the Henry County case was to run concurrently with the ten-year sentence he received in Jefferson County. Among other requirements, the trial court ordered sex offender risk assessment and set sentencing for approximately two months later. Based upon this hearing, the circuit court entered a guilty plea on November 24, 2003, containing the following language: "the plea is made voluntarily, knowingly and intelligently." Final sentencing was set for January 15, 2004.

On January 20, 2004, Cox, through counsel, filed a motion to withdraw his guilty plea, claiming that at the time of the guilty plea he did not understand the ramifications of being labeled a "sex offender." The trial court overruled the motion. Approximately three months later, Cox filed a pro se motion to dismiss his privately retained counsel and withdraw his guilty plea. Cox claimed that his privately retained counsel told him that he would be eligible for

parole after serving two years of the sentence. But Cox contended that his parole eligibility date, plus both his minimum and maximum serve-out time, were extended because they were now based upon the date he completed the sexual offender treatment program (hereinafter "SOTP"). He maintained that the time necessary to complete SOTP is difficult to pinpoint and unlikely to be within the two-year serve-out time. The reason is that acceptance into SOTP is discretionary with the Department of Corrections and it takes time to complete the program. Additionally, Cox's newly appointed counsel filed a similar motion incorporating Cox's pro se motion and attachments.

On November 23, 2004, the trial court held an evidentiary hearing where both Cox and his original counsel, Gary Stewart, testified. Stewart said that he informed Cox that his original charge, sodomy in the first degree, carried a possible sentence of twenty to fifty years of life imprisonment and that he would be classified as a violent offender, and therefore, not eligible for parole until serving eighty-five percent (85%) of the sentence. In addition, Cox would not be eligible for early serve-out. Moreover, Stewart explained that the plea agreement allowed Cox to plead guilty to two counts of sexual abuse in the first degree by way of information. The plea agreement also provided for two five-year sentences to run consecutively for a total time period of ten years. Stewart also stated that he told Cox that he would be eligible for parole after serving two years or twenty percent (20%) of the sentence, but he would have to complete the SOTP.

Before entering into the plea agreement, Cox wrote Stewart and requested information including information about the SOTP. Stewart said they would discuss these issues on the date of the plea agreement hearing. Stewart said that he went over the details of the plea agreement with Cox including the requirement that Cox complete SOTP and the fact that it would be difficult to get into SOTP if he entered a guilty plea without admitting guilt. Stewart maintained that Cox did not ask about the details of SOTP until after he had entered the plea.

At the hearing, testimony was provided that, following the entry of the plea, Cox wrote another letter to his attorney saying that, in retrospect, he did not want to enter a plea. In the letter, Cox stated that, because it would be a hardship on his family for him to be considered a sex offender or labeled one for his entire life, he had a change of heart and did not want to enter the plea.

Cox admitted at the hearing that he had seen and received the Commonwealth's letter detailing the plea offer, agreed to the time offer, and read and signed the plea agreement but claimed that he only read the first page of the agreement. Cox acknowledged that, even though he only read the first page, he was aware of the content of the following pages because of previous involvement with the law. He further claimed that prior to entering into the plea, he had sent a letter to Stewart to find out how SOTP worked. Stewart, however, did not have the relevant information for him on the day he pled guilty.

Cox went on to say that because entry into SOTP was discretionary with the Department of Corrections, he could not start SOTP until formally

sentenced, and the program takes twenty-four to thirty-six months to complete. Finally, the parole board would not see him until he completed the program. Hence, Cox believed that his parole eligibility was pushed back from April 2005 to March 2008, his minimum serve-out time from December 2010 to December 2012, and his maximum sentence serve-out from May 2013 to May 2015. Nonetheless Cox's original understanding about the plea was that because both the Jefferson County and the Henry County sentences ran concurrently, he would meet with both parole boards in April 2005. Cox said if he had known this additional information about SOTP, he would not have pled guilty.

Notwithstanding this claim concerning his attorney's failure to give him information about SOTP, Cox admitted that he pled guilty. In addition, he stated during cross-examination that he would still see the parole board in four months and that he had no idea as to the parole board's actions or whether he might be paroled. On November 10, 2005, the circuit court denied the motions to withdraw the guilty plea. The trial court found that, although Cox's attorney did incorrectly inform him about his parole date, this occurrence did not constitute gross misadvice. Later, in March 2006, the trial court pronounced final judgment and sentencing pursuant to the plea agreement. On March 13, 2008, our Court granted Cox's motion for belated appeal from the November 2005 orders, which denied his motion to withdraw the guilty plea. We will now address the appeal.

ISSUE

Cox argues that, because of ineffective assistance of counsel, his guilty plea was involuntary, and hence, the trial court abused its discretion in denying his motion to withdraw his guilty plea. Additionally, since the denial of his motion to withdraw his guilty plea, the United States Supreme Court has rendered *Padilla v. Kentucky*, - U.S. - , 130 S.Ct. 1473, 176 L.Ed.2d 284, 78 USLW 4235 (2010), which Cox contends bolsters his position. We will examine the guilty plea, the ineffective assistance of counsel claim, and the effect of the recent United States Supreme Court decision.

STANDARD OF REVIEW

A trial court's determination whether a plea was voluntarily entered is reviewed under the clearly erroneous standard. *Bronk v. Com.*, 58 S.W.3d 482, 489 (Ky. 2001). A decision which is supported by substantial evidence is not clearly erroneous. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). If, however, a trial court determines that a guilty plea was entered voluntarily, it may then grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. *Bronk,* 58 S.W.3d at 487. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004).

Whereas on appeal of ineffective assistance of counsel, under *Strickland v. Washington,* the appellant must show that his counsel's performance was deficient and these deficiencies prejudiced the defense. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard of review for ineffective assistance of counsel arguments is de novo with the reviewing court evaluating counsel's performance and any potential deficiency caused by it. *See Brown v. Com.*, 253 S.W.3d 490, 500 (Ky. 2008), *citing Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997). But, "even though [] both parts of the *Strickland* test . . . involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court." *See Brown, supra, citing McQueen v. Com.*, 721 S.W.2d 694, 698 (Ky. 1986). "In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel [, Cox] has the burden of showing that the trial court committed an error in reaching its decision." *Id*. Keeping these standards in mind, we now turn to the facts of the case.

ANALYSIS

Our analysis requires us to address the claim of ineffective assistance of counsel, the impact of *Padilla v. Kentucky* on the issue and this case, plus the efficacy of the guilty plea. We will begin by discussing Cox's claim of ineffective assistance of counsel.

1. Ineffective Assistance of Counsel

Because Cox contends that he received ineffective assistance of counsel in connection with his plea agreement and guilty plea, we will examine whether this lack of effective assistance entitles him to withdraw his plea. Cox argues that the circuit court erred when it denied his motion to withdraw his guilty

plea and render the plea involuntary. Under the theory that a plea was made involuntarily, a claim of ineffective assistance of counsel may be made prior to sentencing. *Bronk*, 58 S.W.3d 482. Initially, we assess the legal requirements regarding effective assistance of counsel.

The law on claims of attorney ineffectiveness is clear. First, the defendant must show that counsel's performance was deficient by demonstrating that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and next the defendant must prove that the deficient performance prejudiced the defense so severely that it deprived the defendant of a fair trial. *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). In order to demonstrate the prejudice requirement,

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694; 104 S.Ct. at 2068.

In cases like this one, where the defendant disputes the voluntariness of the plea, for the trial court to confirm that it properly exercised its discretion, it must show that it considered the totality of the circumstances surrounding the guilty plea. *Centers v. Com.*, 799 S.W.2d 51, 54 (Ky. App. 1990). Then, the trial court must juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland* inquiry into the performance of counsel.

Continuing with our analysis of the ineffective assistance of counsel claim, we now examine its application to this case where Cox is claiming that the guilty plea was involuntary because of poor representation by his counsel. In particular, Cox must illustrate that counsel's assistance was ineffective in enabling him to intelligently weigh the legal alternatives in deciding to plead guilty, must demonstrate "that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance, and [must show] 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." *Sparks v. Com.*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

In its opinion, the trial court found that Cox did not show that his counsel made errors so serious that his performance fell outside the range of professionally competent assistance. The trial court found explicitly that Cox was fully aware of the consequences of pleading guilty to a sexual offense in that he knew, and his plea recited, that he must enter and successfully complete a SOTP while incarcerated. Further, Cox was informed that his parole would be subject to completion of the program, and he would not be released until it was completed. As noted by the trial court, a defendant does not need to be informed of the full range of sentences a court may impose, and a voluntary plea is not considered less valid because the defendant was not fully aware of the possible consequences arising from the pleading. *Jewell v. Com.*, 725 S.W.2d 593, 594 (Ky. 1987). We

concur with the trial court that Cox did not establish that counsel's performance was outside the prevailing norms of professional assistance in helping a defendant weigh alternatives in whether to enter into a guilty plea. In fact, the plea agreement itself cited Cox's requirement to participate in SOTP, and the trial court again informed Cox during the plea colloquy.

Cox also argues that his attorney grossly misadvised him about the effect of SOTP on his parole eligibility. While it is true that Cox's attorney mis-stated that Cox would be eligible for parole after serving two years of the sentence, it does not alter the fact that Cox was informed and knew that he must complete the SOTP in prison. In addition, we note that the plea agreement negotiated between Cox's counsel and the Commonwealth took the original charge, in which the violent offender statute would require that Cox serve eighty-five percent (85%) of his sentence, and amended it to one which mandated that Cox serve twenty percent (20%) of his sentence before becoming eligible for parole. Significantly, the original charge also carried a possible sentence of twenty to fifty years or life imprisonment. Cox's counsel provided him this information.

Cox also contends that even though it is universally accepted that an attorney is not required to advise a defendant about the "collateral consequences" of his plea, it has an exception; that is, flagrant or gross misadvice by counsel constitutes ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). Here, we do not find that the attorney's misinformation about parole

eligibility rises to the level of gross or flagrant misadvice since; as we have outlined, Cox knew about the SOTP requirements.

Thus, given the fact that a plea is not considered involuntary and unintelligently made when a defendant is not aware of all the potential consequences of the plea and that no constitutional right exists for a defendant to be fully informed about parole ("parole is not a constitutional right." (*Turner v. Com.*, 647 S.W.2d 500 (Ky. App. 1982)), we agree with the trial court that Cox received effective assistance of counsel. Because we have determined that Cox received effective assistance of counsel, it is not necessary for us to address the prejudice component of the *Strickland* analysis.

2. *Padilla v. Kentucky*

This appeal has been held in abeyance awaiting the results of *Padilla v. Kentucky*, 130 S.Ct. 1473. In *Padilla*, the Supreme Court held in a 7-2 decision that a criminal defense counsel had failed to provide his non-citizen client effective assistance when counsel did not tell the client that he was almost certain to be removed from the United States to his country of origin if he pled guilty.

The decision was the first where the Court has applied the *Strickland* standard to an attorney's failure to advise the client about a "collateral" consequence of conviction, meaning, about something other than imprisonment, fine, probation and the like (collectively known as "direct" consequences of conviction). *Brown v. Goodwin*, 2010 WL 1930574 (D.N.J. 2010). The federal court in discussing *Padilla* commented:

> However, while *Padilla's* implications for cases involving removal are clear, the holding of *Padilla* seems not importable-either entirely or, at the very least, not readily importable-into scenarios involving collateral consequences other than deportation. *See Padilla v. Kentucky*, 176 L.Ed.2d at 293-94 (stressing that the measure of deportation is unique at its being so intimately related to the underlying criminal conviction that the measure is ill-suited for the "direct/collateral consequences" distinction); *accord* 8 U.S.C. § 1226 (directing mandatory civil detention upon expiration of the alien's prison term).

Id. at 13 (footnote omitted). Hence, even though the holding in *Padilla* specifically refers to deportation measures, which are unique because they are so intimately related to the underlying criminal conviction, it apparently does not extend to other collateral consequences.

Furthermore, we do not believe that *Padilla* relies on the distinction between direct and collateral consequences of the right to counsel in the Sixth Amendment. Rather, we conclude, whether deportation is considered a "direct" or "collateral" consequence of conviction is irrelevant when advice of counsel is the issue. As the U.S. Supreme Court stated:

> The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

Padilla, 130 S.Ct at 1482. In pertinent part, the Supreme Court agreed that "counsel's representation fell below an objective standard of reasonableness," citing the first prong of the *Strickland* test. 130 S.Ct. at 1482. But the Supreme

Court remanded *Padilla* for a judicial determination of whether counsel's failure to notify him of the immigration consequences of his plea prejudiced him, which is the second prong of *Strickland*. *Id.* at 1483-1484.

3. Guilty plea

Following a trial court's determination that a guilty plea is not the result of ineffective assistance of counsel, it may exercise its discretion in granting or denying a motion to withdraw a guilty plea based on the totality of the circumstances. *Rigdon v. Com.*, 144 S.W.3d 283, 287-288 (Ky. App. 2004).

In fact, a guilty plea is valid only when it is entered intelligently and voluntarily. *Thompson v. Com.*, 147 S.W.3d 22, 41 (Ky. 2004). Thus, Kentucky Rules of Criminal Procedure (RCr) 8.08 requires a trial court, at the time of the guilty plea, to determine "that the plea is made voluntarily with understanding of the nature of the charge[,]" to fulfill "the dual purpose of having a judicial determination that the guilty plea is made voluntarily and understandingly and providing an appropriate court record demonstrating those important facts." RCr 8.08; *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). And RCr 8.10 gives trial courts the discretion to permit a defendant to withdraw his or her guilty plea before final judgment and proceed to trial. RCr 8.10. And as noted above, whether to permit withdrawal of a plea is a decision subject to the sound discretion of the trial court.

Moreover, the failure to understand the possible consequence of a guilty plea is not a basis for withdrawing it. "A multitude of events occur in the

course of a criminal proceeding which might influence a defendant to plead guilty or stand trial." *Jewell*, 725 S.W.2d at 595. Additionally, as stated in *Edmonds,* "[t]he 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 v. Com.*, 189 S.W.3d 558, 567 (Ky. 2006) (*quoting Armstrong v. Egeler*, 563 F.2d 796, 800 (6th Cir. 1977)). Consequently, it is the responsibility of the trial court to evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in such a manner as to give the trial court reason to doubt the voluntariness and validity of the plea.

Cox claims that he was not aware of the consequences of his guilty plea because he did not fully understand the ramifications of pleading to an offense that would label him as a sexual offender. He asserts that, had he been aware of the effect the SOTP would have on his parole eligibility, minimum expiration date, and maximum expiration date, he would not have pled guilty. This assertion, however, is not supported by the record. The plea agreement signed by Cox specifically obligated him, under Kentucky Revised Statutes (KRS) 17.495, to register as a sexual offender upon completion of his sentence. Furthermore, Cox knew that he must submit to sexual offender risk assessment, test for HIV and DNA, and complete the Department of Corrections' SOTP.

A mere change of heart by a party pleading guilty to an offense does not constitute adequate grounds for withdrawing a plea. Plea agreements that are

properly executed, as was the case herein, stand for something. Additionally, our Court has ruled that a defendant does not need to "be informed of every possible consequence and aspect of the guilty plea. . . . To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology." *Turner*, 647 S.W.2d at 500-01. Here, we find that the trial court did not abuse its discretion when it ascertained that Cox voluntarily entered a plea of guilty and denied his motion to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, the order of the Henry Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Meggan Smith
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky