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Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001572-MR

STEVEN MITCHELL JACOBI

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NOS. 02-CR-00333 AND 03-CR-00391

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Steven Mitchell Jacobi appeals from the denial of his

motion for post-conviction relief pursuant to Kentucky Rule(s) of Criminal

Procedure (RCr) 11.42 and Kentucky Rule(s) of Civil Procedure (CR) 60.02. After

careful review, we affirm in part, reverse in part, and remand.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(2006-CA-002135-MR), a previous appeal, this Court fully set forth the facts underlying Jacobi's conviction as follows:

The Hardin County Grand Jury returned an indictment in case number 00-CR-00318 charging Steven Mitchell Jacobi with possession of drug paraphernalia, first offense; possession of marijuana; trafficking in marijuana under eight ounces, first offense; cultivation of marijuana, five or more plants, first offense; first-degree possession of a controlled substance, first offense; and manufacturing methamphetamine, first offense.

Jacobi was again arrested on May 19, 2002 and was charged with manufacturing methamphetamine and possession of drug paraphernalia in Hardin County case number 02-F-00247. Those charges were bound over to the grand jury which returned an indictment. On September 27, 2002, he was arraigned in Hardin Circuit Court in case number 02-CR-00333 and was charged with manufacturing methamphetamine, second offense and possession of drug paraphernalia, second offense.

The Commonwealth filed a notice on April 21, 2003 indicating the intent to introduce evidence of "the Defendant's prior case number 00-CR-318 as evidence at the trial by Jury, under KRE 404(b) ..." and filed an additional identical notice on August 21, 2003. Jacobi responded on August 26, 2003 with a request for a motion in limine asking the trial court to "FORBID the Commonwealth from presenting any evidence from case number 00-CR-0318 ... based upon the fact that the Commonwealth moved the Court and the Court granted a dismissal of case number 00-CR-00318 on 19 November 2002." There is nothing in the record to indicate Jacobi ever requested a ruling from the Court and no order was ever entered.

On August 29, 2003, the Commonwealth extended an offer on plea of guilty for the charges in case number 02-CR-00333. Handwritten on the offer is the indication that it also included an offer involving case number 03-

CR-00391, yet another case where Jacobi was facing charges involving manufacturing of methamphetamine. Also handwritten on this offer is an indication that the offer in case number 02-CR-00333 was to run consecutive to the offer in case number 03-CR-00391 that was an indictment by information. This offer recommended a sentence of twenty years in case number 02-CR-00333 for the charges of manufacturing methamphetamine and possession of drug paraphernalia, both second offenses. It then notes that in case number 03-CR-00391, the offer was an additional twenty years for the charge of manufacturing methamphetamine with a gun enhancement. That sentence was to run consecutive to the twenty years in case number 02-CR-00333 for a total of forty years but the entire sentence was to be probated. Jacobi's initials and those of counsel appear in the margins near this handwritten addition.

Jacobi submitted a motion to enter guilty plea in cases 02-CR-00333 and 03-CR-00391. This motion was signed by both counsel and Jacobi. The trial court accepted that guilty plea and in an order entered September 2, 2003, Jacobi was found guilty of the charge of manufacturing methamphetamine, gun enhanced in case number 03-CR-00391 with a sentence of twenty years. He was also found guilty of the charges of manufacturing methamphetamine, second offense and possession of drug paraphernalia, second offense in case number 02-CR-00333. He was sentenced to serve twenty years on the manufacturing methamphetamine charge and two years on the drug paraphernalia charge with those sentences to run concurrent with each other. The sentences in each case were to run consecutively for a total sentence of forty years. Those sentences were then probated for five years.

On November 7, 2003, Jacobi submitted to a random drug screen as a condition of his probation. He tested positive for amphetamines and opiates. On December 17, 2003, he was again tested and was positive for amphetamines, opiates and another narcotic, propoxyphene. The probated sentences in cases numbered 02-CR-00333 and 03-CR-00391 were revoked

and he was ordered to serve the previously imposed and agreed upon sentence of forty years.

Id. at *1-*2. In that previous appeal, this Court held that Jacobi was not entitled to CR 60.02 relief and declined to address claims under RCr 11.42 because those claims were withdrawn. *Id.* at *3.

Subsequently, on March 12, 2008, Jacobi, pro se, again filed a motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02. The trial court then appointed counsel. Counsel filed a memorandum of law and facts to supplement the motion. The trial court denied the motion without an evidentiary hearing. This appeal followed.

Jacobi argues that indictment no. 2002-CR-00333 was defective because it was based on erroneous or falsified evidence, that the waiver of his right to be indicted by grand jury was invalid, that his guilty plea was invalid because he was under the influence of pain medication, and that counsel was ineffective for providing gross misadvice regarding his parole eligibility.

We first consider the claims alleging a defective indictment, an invalid indictment waiver, and an invalid guilty plea. In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the Supreme Court of Kentucky stated:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin*^[2] defenses. It is for relief that is not available by direct appeal and not available under

² *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

The Court further stated:

[W]e hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are “issues that could reasonably have been presented” by RCr 11.42 proceedings.

Id. at 857.

Jacobi previously filed a motion for relief pursuant to RCr 11.42 and CR 60.02. He chose to withdraw his claims under RCr 11.42. The first three claims Jacobi raises could and should have been raised in the prior proceeding. Jacobi is not entitled to relief on those claims.

Finally, Jacobi argues that counsel was ineffective for providing gross misadvice regarding his parole eligibility. This allegation is timely under RCr 11.42(10)(a) because Jacobi did not discover his parole eligibility status until 2007. By letter of April 18, 2007, a representative of the Department of Corrections advised Jacobi that his sentence had not been correctly calculated as a violent

offense and that Corrections had now corrected his sentence calculations to reflect the change in designation.

Jacobi claims that counsel misled him into believing that he would be eligible for parole after serving 20% of his sentence rather than the 85% required by KRS 439.3401(3).³ He asserts that he would have not pled guilty and insisted on going to trial had he been informed that he would be required to serve 85% of his sentence.

Although parole is not a right, parole eligibility is an integral part of plea negotiations and impacts a defendant's decision to plead guilty. Affirmative acts of gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). This Court had adopted the rationale of *Sparks* in several unpublished opinions.⁴ In *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), the Supreme Court of Kentucky held that erroneous advice concerning collateral issues did not provide a basis for post-conviction relief. The U.S. Supreme Court has recently stated that there is no relevant distinction between acts of commission and acts of omission in the context of misadvice concerning the consequences of a guilty plea. *Padilla v. Kentucky*, U.S., 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). The Court further held that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional

³ KRS 439.3401(3) states “A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.”

⁴ See *Cox v. Commonwealth*, 2010 WL 3927704 (Ky. App. 2010)(2008-CA-000176-MR); *Turner v. Commonwealth*, 2010 WL 2132676 (Ky. App. 2010)(2006-CA-001185-MR).

assistance under *Strickland*.” *Id.* at __, 130 S. Ct. at 1481(internal quotations omitted).

In *Padilla*, the U.S. Supreme Court held that the failure to advise a client of the deportation consequences of a plea falls below prevailing professional norms, regardless of whether deportation is a direct or collateral consequence of the plea. The Court found that deportation is “intimately related to the criminal process” and “nearly an automatic result” following certain criminal convictions. *Id.* The Court also noted that the immigration statutes were “succinct, clear and explicit” about the consequences of a defendant’s pleading guilty. *Id.* at __, 130 S. Ct. at 1483. Parole eligibility involves a foreseeable and material consequence of a guilty plea that is “intimately related to the criminal process” and is an “automatic result” following certain criminal convictions. The parole eligibility requirements under KRS 439.3401 are “succinct, clear and explicit” about the consequences of a guilty plea. The parole classification system is automatic upon conviction and permanently affects a defendant’s minimum term of imprisonment. Therefore, we conclude that factors relied upon in the deportation context apply equally, if not more strongly, to the context of parole eligibility.

Although the trial court found that Jacobi did not assert actual misadvice concerning his parole eligibility, this finding is refuted by Jacobi’s allegations in his RCr 11.42 motion and the supplemental memorandum in support of his motion. It is undisputed that Jacobi pled guilty to two Class A felonies. *See* KRS 218A.1432 and KRS 218A.992. While the plea agreement was silent as to

parole eligibility, it is clear that all parties operated under the misapprehension that Jacobi was not subject to violent offender status because the plea offer recommended probation and his sentence was probated, in violation of KRS 439.3401(3).

In light of the holding in *Padilla, supra*, we conclude that trial counsel's gross misadvice or nonadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief. Because the trial court did not hold an evidentiary hearing, there are no findings of fact upon which to determine whether counsel failed to advise or erroneously advised Jacobi concerning his parole eligibility. If the trial court so finds, then there must a determination of whether the requisite prejudice resulted from that erroneous or missing advice.

Therefore, we affirm in part and reverse in part the order of the Hardin Circuit Court and remand this matter to the trial court with instructions to hold an evidentiary hearing on Jacobi's claim of counsel misadvice or nonadvice concerning parole eligibility and, if found, then whether sufficient prejudice occurred so as to allow Jacobi post-conviction relief.

ALL CONCUR.

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