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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001592-MR
AND
NO. 2011-CA-001593-MR

JAMES R. DEHART — APPELLANT

v.

APPEALS FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NOS. 10-CR-00065 AND 10-CR-00114

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, James Ray Dehart, was convicted by a guilty plea of burglary in the third degree, two counts of theft by unlawful taking, and burglary in the second degree, all enhanced by a conviction for persistent felony offender in the first degree. Dehart was ultimately sentenced to fifteen

years' imprisonment. Dehart asserts that he pled guilty under the belief that he would be eligible for parole after serving either fifteen or twenty percent of his sentence, and that upon realizing that he was instead subject to serve a minimum of ten years, filed a motion to withdraw his guilty plea, which was denied. He now appeals the circuit court order denying his motion to withdraw guilty plea, arguing first that his plea was not knowing, intelligent, and voluntary, and secondly, that his trial counsel had a conflict of interest. Upon review of the record, the arguments of the parties, and the applicable law, we reverse and remand this matter for additional proceedings consistent with this opinion.

As noted, Dehart pled guilty to burglary and receiving stolen property.[1] Dehart was represented by the Honorable Jerry Anderson. Dehart was instructed by the court that he could talk with his counsel if he did not understand any portion of the plea process. The court reviewed both indictments and all of the charges with Dehart, who then pled guilty to each one. Dehart indicated that he understood the charges, that his judgment was not impaired, and that he was not under the influence. He further indicated that he was aware of the various rights associated with trial which he was forfeiting in order to plead guilty.

Dehart indicated an understanding that for burglary in the third degree and theft in Indictment 10-CR-00065, he could receive one to five years on each, enhanced to ten to twenty years as a persistent felony offender (PFO). He also

[1] Dehart was charged in Indictment 10-CR-00065 with burglary in the third degree, felony theft by unlawful taking and for being a persistent felony offender (PFO) in the first degree. He was also charged in Indictment 10-CR-00114 with burglary in the second degree, felony theft by unlawful taking, and for being a persistent felony offender in the first degree.

indicated an understanding that in Indictment 10-CR-00114, he could receive five to ten years for burglary in the second degree, and one to five years for theft, enhanced to ten to twenty years as a PFO. Dehart indicated that he understood that each count could be enhanced to a maximum of twenty years as a PFO.

During his plea colloquy, Dehart expressed concern only with respect to parole eligibility. The following exchange occurred between Dehart and the court:

> **Court**: What's the Commonwealth's recommendation on this?
> **Commonwealth**: 15.
> **Court**: Total of 15? On all?
> **Dehart (addressing Court)**: Can you tell me if it's 15 or 20%?
> **Court**: I can't.
> **Defense Counsel**: Judges are not in that business.
> **Court**: I cannot.
> **Defense Counsel**: You need to assume it's flat, or ten.
> **Trial Court**: I cannot. You need to assume it's the higher amount. Although we did have a trial yesterday and I think the 15%, does that only apply to D's?
> **Commonwealth**: The 15% applies to the D's.
> **Trial Court**: I think you need to assume it's a higher one, I know there's a C in here, but no I can't answer that one. I am not sure.[2]

Dehart then indicated that he had reviewed, understood, and signed the offer made by the Commonwealth and the motion to enter a guilty plea.

Thereafter, at the sentencing hearing on May 20, 2011, Anderson informed the court that he had just spoken with Dehart for an hour, and had arranged a plea in which his client received the minimum mandatory sentence of ten years with

[2] VR 04/15/2011 at 11:50:50-11:51:44.

parole eligibility on the balance. This was understood as Dehart serving ten years to be parole eligible as a PFO in the first degree. Anderson stated that Dehart would be terminating Anderson's services and that Dehart did not want to follow Anderson's advice. Anderson stated that Dehart had told him that he would "take fifty, but would not do ten." Anderson said that he would be "doing fifty." Anderson moved to withdraw from the case and stated that he would be moving to withdraw from Dehart's cases in both Rowan and Bath Counties.

The Commonwealth then stated that it seemed as if Dehart wanted to withdraw his plea, and suggested that the court review the plea and decide if Dehart should be permitted to do so. Dehart told the court that when he signed the plea the previous month, he thought it was for "twenty percent" and did not know that he would have to do "ten flat." Anderson stated that he did not want the court to think that he had told Dehart this was the case, that he did not tell Dehart this was the case, and that he wanted to keep the sentence under twenty years, or "twenty flat." The court indicated that it would review the plea, permit Anderson to withdraw, and appoint new counsel for Dehart.

Newly appointed counsel, Honorable Robert Clark, filed a motion to withdraw the guilty plea on Dehart's behalf. Clark stated that Anderson failed to explain the ramification of the plea to PFO first-degree, and that Dehart believed his parole eligibility date would be calculated at twenty percent instead of ten years served. Clark argued that the plea was not knowingly, voluntarily, and intelligently entered.

The Commonwealth filed a response to the motion to withdraw the plea, arguing that at the hearing Dehart was aware of the terms of his plea and should not be permitted to withdraw it. The court agreed with the Commonwealth, finding that the plea was knowingly, intelligently, and voluntarily made. The court stated that if Dehart had gone to trial, he could have received ten years minimum as a PFO. The court noted that all of the other counties where Dehart had charges[3] might not run their time concurrently without a plea deal, which could expose Dehart to more time than his Fleming County "ten flat." The court determined that it would proceed with sentencing and then sentenced Dehart to a total of fifteen years as a PFO in the first degree.

The formal order entered by the court indicated that Dehart was advised of the penalty ranges for his crimes, including that they could be enhanced by ten to twenty years. The court noted that Dehart was not impaired at the time of his plea, and that he made the plea knowingly, intelligently, and voluntarily, and after having had the opportunity to consult with counsel. It is from the order denying his motion to withdraw guilty plea that Dehart now appeals to this Court.

As his first basis for appeal, Dehart argues that he is entitled to withdraw his guilty plea because it was not knowingly, intelligently, and voluntarily entered. Dehart asserts that during the course of the hearing on his motion to withdraw the guilty plea, all parties mistakenly agreed that parole eligibility was not a "direct consequence" of a guilty plea which would render a plea involuntary. Dehart

[3] Below, the Commonwealth indicated that Dehart possibly had additional charges in Rowan, Morgan, and Carter counties.

asserts that in making this assumption, the parties relied upon *Edmonds v. Commonwealth*, 189 S.W.3d 558, 567 (Ky. 2006), which he argues has since been abrogated by the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1483, 176 L.Ed.2d (2010).

In *Edmonds*, our Kentucky Supreme Court held that a guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court. *Edmonds v. Commonwealth*, 189 S.W.3d at 567. As noted, Dehart argues that the holding of *Edmonds* was abrogated by the decision of our United States Supreme Court in *Padilla*, wherein the Court stated that it had, "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance'" required of counsel. *Padilla*, 130 S.Ct. at 1481.

Dehart acknowledges that parole is not a right, but nevertheless asserts that parole eligibility is an integral part of plea negotiations and impacts a defendant's decision to plead guilty. He argues that in light of *Padilla*, Kentucky courts are recognizing that the failure to inform a client about the parole eligibility consequences of a plea falls below prevailing professional norms, regardless of whether parole is a direct or collateral consequence of the plea.[4] Dehart argues that the trial court erroneously accepted the argument that parole eligibility was merely

[4] In making this assertion, Dehart relies upon the unpublished Kentucky cases of *Barnes v. Commonwealth*, 2011 WL 3862320 (Ky. App. 2011)(2010-CA-001678-MR), and *Taylor v. Commonwealth*, 2011 WL 4633734 (Ky. App. 2011)(2010-CA-001293-MR).

a collateral consequence of a plea, and that Dehart could thus enter into a plea intelligently despite the misunderstanding on parole eligibility.

Dehart further asserts that both the Commonwealth and the court reinforced his erroneous belief that he would be eligible for parole after serving twenty percent of his sentence, and that Anderson's assertion that he informed Dehart of the "ten flat" parole requirement is refuted by the record. Dehart argues that if he had been informed of the ten flat provision, he would not have asked whether he would have to serve fifteen or twenty percent of his sentence before becoming parole eligible during the course of the colloquy. Dehart asserts that the record clearly establishes his confusion as to parole eligibility and that, accordingly, reversal is required so that he may be allowed to withdraw his plea.

In response, the Commonwealth argues that the court properly overruled Dehart's motion to withdraw his plea, and asserts that the plea was knowingly, intelligently, and voluntarily entered. The Commonwealth argues that the distinction between "direct" and "collateral" consequences is still recognized in Kentucky, and was not abolished by *Padilla*. The Commonwealth directs the attention of this Court to the entirety of the quote from *Padilla* cited by Dehart, which provides that:

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

Padilla at 1481. Thus, the Commonwealth argues that *Padilla* never actually reached the question of whether the distinction between direct and collateral consequences was appropriate, and that it certainly did not hold that such a distinction was impermissible. The Commonwealth notes that *Padilla* was a deportation case, a matter which is closely connected to the criminal process and which is difficult to label as a "direct" or "collateral" consequence of a plea. It therefore argues that *Padilla* has no bearing on the instant matter, and that parole eligibility is a collateral consequence which does not factor into voluntariness.

The Commonwealth asserts that Dehart received a careful explanation of the terms of his plea, as well as the potential penalties for each indictment count, and the rights associated with trial. The Commonwealth notes that Dehart indicated an understanding of these rights, and that he was waving them by pleading. It further notes that Dehart received documents which clearly indicated that he could have his burglary and theft charges enhanced by ten to twenty years each by virtue of being a PFO in the first degree. Thus, the Commonwealth asserts that Dehart was not without some notice that his plea carried serious consequences with respect to both enhancement of the underlying offenses and parole eligibility.

In reviewing the arguments of the parties, we note that Kentucky Rules of Criminal Procedures (RCr) 8.10 provides that, "At 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." A motion to withdraw a guilty plea is generally

within the sound discretion of the trial court, but a defendant is entitled to a hearing on the motion if it is alleged that the plea was made involuntarily. *Edmonds v. Commonwealth*, 189 S.W.3d at 566-67. If, under the totality of the circumstances, the plea is found to have been entered involuntarily then the court must allow the defendant to withdraw the plea. *Id.* The inquiry into the voluntariness of the plea is fact-sensitive. *Id.* This court will review the determination of the court below for clear error, namely, whether or not it is supported by substantial evidence. *Id.* If the court below determines that the plea was voluntary, the denial of a motion to withdraw it is reviewed for an abuse of discretion. *Id.*

A guilty plea is deemed involuntary if the defendant lacked full awareness of the consequences of the plea or if he relied upon the misrepresentations by the prosecution or the trial court. A guilty plea is made intelligently if the defendant is competently advised by counsel and when the defendant himself is competent at the time he enters the plea. *Id.* It is recognized that when a defendant expressly indicates in open court that his plea is voluntary, he ordinarily may not repudiate his statements to the sentencing judge. *Id.*

Upon review of the record, we are ultimately not persuaded that Dehart's plea was knowingly, intelligently, or voluntarily entered. Our review of the colloquy between Dehart and the court below indicates that at the time that he entered his plea, Dehart asked questions specifically with respect to parole eligibility. Clearly, Dehart was confused as to what parole eligibility applied to a fifteen-year sentence, and requested that the court clarify this issue.

The colloquy between Dehart, counsel for both parties, and the court was confusing at best. We cannot accept the Commonwealth's assertion that the plea documents in this case clearly indicated that Dehart had "carefully had the terms of his plea explained to him." If that were the case, Dehart would not have specifically asked the court to tell him when he would be eligible for parole. Unfortunately, when he did so, he received erroneous and confusing information. While true that his own attorney stated something about assuming it would be "ten flat," both the court and the Commonwealth provided other information which clearly could have led Dehart to believe he would serve twenty percent of his sentence prior to being eligible for parole.

In *Edmonds*, our Kentucky Supreme Court held that a guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court. *Edmonds v. Commonwealth*, 189 S.W.3d at 567. *Sub judice*, we believe there is little question that Dehart relied upon the misrepresentations of the court and the Commonwealth as to his parole eligibility when entering his plea. Certainly, the Commonwealth correctly notes that the *Edmonds* Court also held that "A defendant's eligibility for parole is not a 'direct consequence' of a guilty plea the ignorance of which would render the plea involuntary." *Edmonds* at 567. However, we believe the factual situation in *Edmonds* to be sufficiently distinguishable from that *sub judice*.

Of import, we note that in making its findings, the *Edmonds* Court stated that:

> A defendant's eligibility for parole is not a "direct consequence" of a guilty plea the ignorance of which would render the plea involuntary. *Armstrong v. Egeler,* 563 F.2d 796, 799–800 (6th Cir.1977); *see also Ex parte Evans,* 690 S.W.2d 274, 279 (Tex.Crim.App.1985) ("We think, then, that the speculative nature of parole *attainment* is such as to discount its legal importance on the subject of voluntariness of a guilty plea.").
>
> Neither in the quoted language nor elsewhere in *Boykin* does it appear that a precise knowledge of all of the penal ramifications rises to the quality of a constitutional requirement....
> ....
>
> 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. This is especially true as to mistaken assumptions for which there is no reasonable basis.
>
> ... The district court was not bound to accept [defendant's] testimony years later in the face of the colloquy which took place at the time of the plea. *Armstrong,* 563 F.2d at 799–800 (footnote omitted).

Edmonds at 567.

In *Edmonds*, the appellant argued that prior to his colloquy with the court, he was misinformed in a letter sent from his counsel regarding when he would be released from the penitentiary and that this misinformation rendered his conditional guilty plea involuntary. However, during his colloquy with the trial court, the court clearly and correctly explained to appellant that he would be

sentenced to twenty years, be required to serve eighty-five percent of that sentence prior to eligibility for parole, and be credited with time served prior to sentencing. This scenario is opposite from that *sub judice* because, here, Dehart specifically asked questions during the course of the colloquy concerning his parole eligibility, and received ambiguous if not misleading information in response, upon which he relied in entering his plea.

Likewise, in a very recent opinion issued by our Kentucky Supreme Court in *Commonwealth v. Pridham* ___ S.W.3d ___, 2011-SC-000126-DG (Ky. 2012), the defendant's motion to vacate, set aside, or correct sentence alleged that his counsel rendered ineffective assistance by erroneously advising him that if he pled guilty to drug offenses, he would become eligible for parole upon having served twenty percent of a thirty-year sentence, or six years. In fact, the violent offender statute applied, rendering him ineligible for parole for twenty years. This Court found Pridham's situation - wherein he would be eligible for parole after six years of his thirty-year sentence instead of the twenty-year period of ineligibility which is imposed by the violent offender statute - sufficiently analogous to the misadvice at issue in *Padilla* to an evidentiary hearing on the merits of his claim. Our Supreme Court agreed, noting that the sharply extended period of parole ineligibility under the violent offender statute was serious enough and certain enough detriment that a person pleading guilty was entitled to know about it, and had defendant been correctly advised, he might have concluded that he risked almost nothing by going to trial.

Below, as in the case of *Pridham*, *supra*, Dehart was given misinformation. This is substantially different than having been given no information. As the Court clearly provided in *Edmonds*, the trial court had no duty to seek out and dispel any unexpressed misapprehensions that a defendant might have. *Sub judice*, however, the defendant, Dehart, clearly expressed his misapprehensions and received confusing and conflicting information in response. He relied upon that misinformation in entering his plea, which we believe is a distinctly different situation than that set forth in *Edmonds*, and a situation much more akin to *Pridham*.

Accordingly, we believe that the court erroneously overruled Dehart's motion to withdraw his plea, and that its decision to do so was not supported by substantial evidence of record; reversal is appropriate. In so finding, we decline to address Dehart's remaining argument as to whether his counsel was conflicted when he informed the court that Dehart wished to withdraw his guilty plea.

Wherefore, for the foregoing reasons, we hereby reverse the order of the Fleming Circuit Court denying Dehart's motion to withdraw, and remand this matter for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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