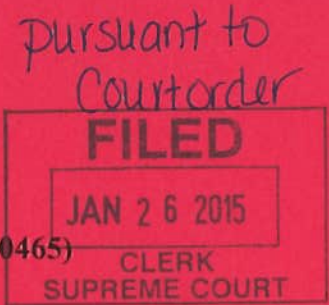


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2013-SC-000559-DG



(On review from Ky. Court of Appeals, No. 2011-CA-000465)

LAWRENCE E. PATE

APPELLANT

VS.

Appeal from the Bracken Circuit Court
Hon. Lewis D. Nicholls, Special Judge
Case No: 03-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

AMENDED BRIEF FOR APPELLANT

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2015, the foregoing "Amended Brief for Appellant" was served by first class mail upon the following:

- Hon. Lewis D. Nicholls, Special Judge, c/o Bracken County Circuit Court Clerk, Bracken County Courthouse, P.O. Box 205, Brooksville, KY 41004-0205
- Hon. Kenneth Riggs, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601
- Hon. Kelly Clarke, Commonwealth's Attorney, 100 West Third Street, Maysville, KY 41056
- Mr. Lawrence Pate, #164306, Little Sandy Correctional Complex, 505 Prison Connector, Sandy Hook, KY 41171

I also certify that the record has been returned to the Supreme Court of Kentucky.

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INTRODUCTION

Appellant was convicted of manufacturing methamphetamine, second offense, in 2005 for an offense committed in 2003. In an opinion of the Kentucky Court of Appeals, the lower court determined that modification of Appellant's sentence two years after his final sentencing did not deny him due process and did not constitute extraordinary circumstances warranting relief pursuant to CR 60.02.

STATEMENT OF ORAL ARGUMENT

Appellant requests oral argument to assist the Court in understanding not only the procedural and substantive facts involved, but more importantly the legal arguments in support of his request for relief.

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STATEMENT OF THE CASE

Lawrence Pate, Appellant, comes before this Court convicted of manufacturing methamphetamine, first offense, and manufacturing methamphetamine, second or subsequent offense. (TR Vol. 4: 49). It is the later offense that is the basis for his conviction in Bracken County, Indictment No. 03-CR-00008, and the basis for his present appeals to this Court. (TR Vol. 1: 1); Pate v. Ky. Dept. of Corrections, 2011-CA-000465, 2009-CA-002110, 2009-CA-000734 (Ky. App. Jul. 19, 2013) (slip opinion)¹.

On September 17, 2002, Lawrence was arrested in Bracken County, Kentucky, and later indicted for manufacturing methamphetamine, second or subsequent offense. (TR Vol. 1: 1). The offense was alleged to have been committed while Lawrence was out of custody and awaiting sentencing for a conviction for manufacturing methamphetamine, first offense, occurring in Pendleton County, for which Lawrence received a twenty-year sentence. See Pate v. Commonwealth, 134 S.W.3d 593 (Ky. 2004). Based upon counsel's advice, Lawrence believed that the Bracken County and Pendleton County sentences could be served concurrently and that both carried twenty-percent parole eligibility. (VR Tape 2: 7/15/05; 10:24:18-10:32:16). Contrary to counsel's advice, any sentence received in the Bracken County case would be required by law to be served consecutively to his Pendleton County sentence. KRS 532.110.

Prior to trial in the Bracken County case, the Commonwealth offered Lawrence two plea deals, each modifying the manufacturing charge to criminal attempt to manufacture methamphetamine, first offense, with a recommendation of five years consecutive to the Pendleton County conviction, which Lawrence rejected based upon the

¹ This opinion is part of the Evidentiary Appendix, Tab 1, pursuant to CR 76.12(4)(c)(vii).

above-noted advice of counsel. (TR Vol. 1: 58, 120). After several pre-trial motions were unsuccessful in mitigating the charge, a trial was held June 8-9, 2005, and Lawrence was found guilty of manufacturing methamphetamine, second offense, and sentenced to serve another twenty-year term. (TR Vol. 1: 60-66, 176-77).

During the penalty phase of Lawrence's trial, the Commonwealth called Detective Chuck Rectin to testify regarding the different aspects of Lawrence's possible sentence. (VR Tape No. 2: 6/9/05; 2:32:00-2:38:10)². Det. Rectin testified that Lawrence would be sentenced as a non-violent offender, with a penalty range of twenty (20) to fifty (50) years or life imprisonment. (Id.). Det. Rectin testified that sentenced to a term of years, Lawrence would be eligible to receive statutory good time credits in the amount of twenty-five percent (25%) of his total sentence, as well as other types of sentence credits, all of which would operate to reduce Lawrence's minimum sentence. (Id.). Det. Rectin further informed the jury that should Lawrence receive a sentence of thirty-nine (39) years or more, or a term of life imprisonment, the absolute most time Lawrence would have to serve before being eligible for parole was eight (8) years as a non-violent offender. (Id.). This testimony reflected the understanding of the Department of Corrections (DOC) at this time; that is, KRS 439.3401 did not apply to all Class A felony convictions. (Id.); (TR Vol. 4: 46-47)³.

Also during the penalty phase of the trial, the Commonwealth reiterated to the jury that Lawrence would be a non-violent offender, eligible for parole consideration after serving four (4) years if given the minimum twenty-year sentence. (VR Tape 2:

² A transcript of Lawrence's truth-in-sentencing trial and final sentencing have been attached hereto as part of an Evidentiary Appendix, Tab 4, for the convenience of the court pursuant to CR 98(3)(e)(4)(b).

³ A copy of Mr. Jonathan Hall's Affidavit has been attached hereto as part of an Evidentiary Appendix, Tab 3, for the convenience of the court pursuant to CR 76.12(4)(c)(vii).

6/9/05; 2:32:00-2:38:10). The Commonwealth further informed the jury that as such Lawrence would receive statutory good time credit of twenty-five percent (25%) of his sentence, if sentenced to a term of years. (Id.). The Commonwealth also told the jury that Lawrence could receive meritorious good time credit which would operate to reduce the amount of time Lawrence would actually spend in prison if given a term of years and not a sentence of life. (Id.). These statements reflect the Commonwealth's understanding of KRS 439.3401 at the time of trial.

Further, at final sentencing, Lawrence, defense counsel and the Commonwealth were at the bench discussing the sentence with the court. (VR Tape 2: 7/15/05; 10:24:00). Defense counsel specifically asked the Commonwealth and the Commonwealth agreed that manufacturing methamphetamine, second offense, was a non-violent offense subject to twenty percent (20%) parole eligibility. (Id.).

Lawrence filed a *pro se* action for declaratory judgment against DOC in Franklin Circuit Court asserting that imposition of the violent offender statute violated his State and Federal Constitutional Rights to Due Process and prohibitions against *ex post facto* law. (TR Vol. 4: 33-39); Pate, slip op. at 2; U.S. CONST., art. I, §10, cl. 1, *Ex Post Facto* Clause; KY. CONST., §19(1); U.S. CONST., 14th Amend.; KY. CONST., §11. The circuit court granted DOC's motion to dismiss and Lawrence appealed. Pate, slip. op. at 2.

Lawrence also filed a *pro se* motion in the Bracken Circuit Court to clarify his judgment and, then separately, through counsel, a motion for relief pursuant to RCr 11.42 and CR 60.02. (TR Vol. 3: 197-202; Vol. 4: 2-39, 43-50). As a basis for relief pursuant to CR 60.02, Lawrence asserted that his reclassification as a violent offender, despite

everyone's assurances that such a classification would not apply, constituted an extraordinary circumstance necessitating equitable relief. (TR Vol. 4: 20-22). The circuit court rejected all of these motions without a hearing and Lawrence appealed. (TR Vol. 3: 204, 226; Vol. 4: 60⁴).

On appeal, Lawrence's three separate appeals were consolidated for review and resolution. See generally, Pate v. Ky. Dep't of Corrections, slip opinion. In its opinion affirming the Franklin Circuit Court's dismissal of the declaratory action, the Court of Appeals cited Garland v. Commonwealth, 997 S.W.2d 487 (Ky. App. 1999), and the proposition that the *Ex Post Facto* Clause does not apply to statutes imposing a condition precedent to completion of the sentence. Pate, slip op. at 25; U.S. CONST., art. I, §10, cl. 1, *Ex Post Facto* Clause; KY. CONST., §19(1). The Court of Appeals also rejected Lawrence's CR 60.02 claim, finding that it had been litigated in the RCr 11.42 motion, that there was no prejudice since Pate received the minimum sentence, and that the testimony regarding parole eligibility at that time was not false. Pate, slip op. at 23.

The Court of Appeals did reverse in part and remand a single claim raised in Lawrence's RCr 11.42 Motion for an evidentiary hearing. Pate, slip op. at 18-19. The remanded claim alleged that trial counsel failed to properly advise Lawrence during plea negotiations that any sentence he received in his Bracken County case would be required by law to be served consecutively to his twenty-year sentence out of Pendleton County. Id.

⁴ The Order denying the CR 60.02 and RCr 11.42 Motion is part of the Evidentiary Appendix, Tab 2, pursuant to CR 76.12(4)(c)(vii). Appellant did not seek review before this Court on the denial of his pro se Motion for Sentence Clarification and thus, Appellant has not attached a copy of that Order for purposes of the present appeal.

Lawrence moved this Court to review the Court of Appeals opinion in regard to his Petition for Declaration of Rights, resulting in Case No. 2013-SC-000558, and his CR 60.02 Motion, resulting in the present case, Case No. 2013-SC-000559. This Court granted review of both cases on August 12, 2014. After this Court granted Lawrence's Motions for Discretionary Review, no review was sought by the Commonwealth on the Court of Appeals' RCr 11.42 ruling per CR 76.21. "CR 76.21(1) requires such a cross-motion by the party prevailing in the Court of Appeals if he wishes review of issues raised in but not addressed by the Court of Appeals or *issues the Court of Appeals decided adversely to him*. 'If the party prevailing in the Court of Appeals wishes further consideration of such issues along with the issues for which discretionary review has been granted, the prevailing party *must* file a cross motion for discretionary review.'" Commonwealth v. House, 295 S.W.3d 825, 829 (Ky. 2009)(emphasis added)(quoting Perry v. Williamson, 824 S.W.2d 869, 871 (Ky. 1992)(emphasis in original)). Consequently, that aspect of the opinion is now final. Thus, the following argument only addresses the CR 60.02 Motion on which the Court of Appeals denied relief.

ARGUMENT

The record in this case is clear – all parties to this conviction believed prior to trial, during trial, and for the two years following his sentencing that a conviction for manufacturing methamphetamine, second offense, a Class A felony, did not render him a violent offender subject to the punitive restrictions of KRS 439.3401, and so informed him repeatedly. (TR Vol. 4: 13-17, 28-30, 34-35; VR Tape 2: 6/9/05; 2:32:00-2:38:10; 7/15/05; 10:24:18-10:32:16). So too is the record equally clear that DOC changed its interpretation of KRS 439.3401 after the amendment to the statute in 2006 and re-

classified Lawrence as a violent offender two years into his sentence. (TR Vol. 4: 46-50). “[T]he Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment” in reliance on the bargain. Lynce v. Mathis, 519 U.S. 433, 440 (1997) (internal citation omitted).

If this Court concludes, as part of its holding in Case No. 2013-SC-000558-DG, that Lawrence is in fact properly classified under the law as a violent offender, then the continued imposition of this classification on Lawrence is unconstitutional and inequitable as it violates his right to due process of law under the Kentucky and United States Constitutions. U.S. CONST., 14th Amend.; KY. CONST., §11.

I. THE CIRCUIT COURT AND COURT OF APPEALS ERRED WHEN IT DENIED LAWRENCE CR 60.02 RELIEF FOR DETRIMENTALLY RELYING ON THE CRIMINAL JUSTICE SYSTEM’S ASSURANCES THAT HE WOULD NOT BE A VIOLENT OFFENDER WHEN HE REJECTED PLEA DEALS AND PROCEEDED TO TRIAL.

A. Statement of Preservation

This claim is preserved by Lawrence’s CR 60.02 Motion and the circuit court’s order denying. (TR Vol. 4: 20-22, 60).

B. Standard of Review

The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). Abuse of discretion occurs when a trial court’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

C. Lawrence was Denied Due Process When the Entire Court System Failed to Properly Advise Him of the Harsh Sentence He Faced If Convicted at Trial and Rejected Multiple Plea Offers.

A motion for relief under CR 60.02(f) “gives a trial court authority to relieve ‘a party or his legal representative’ from its final judgment for any reason ‘of an extraordinary nature....’” Hinshaw v. Hinshaw, 216 S.W.3d 653, 656 (Ky. App. 2006). While it is recognized that relief under CR 60.02(f) may be granted with extreme caution, it is also equally well established that relief under CR 60.02(f) may be granted under unusual and compelling circumstances. See Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996); Bishir v. Bishir, 698 S.W.2d 823 (Ky. 1985); Ringo v. Commonwealth, 455 S.W.2d 49 (Ky. 1970). “Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made.” Bishir, 698 S.W.2d at 826.

The circumstances supporting this motion are unusual and present extremely compelling equities in that Lawrence will be denied due process of law at the hands of this Commonwealth’s judicial system and the state agency responsible for enforcing his conviction. Lawrence was arrested, proceeded through pretrial hearings, rejected plea offers, was convicted by a jury, and sentenced by the court, all the time being repeatedly told that the terms of his sentence would not subject him to the harsh punishment of the violent offender statute. (TR Vol. 4: 13-17, 28-30, 34-35; VR Tape 2: 6/9/05; 2:32:00-2:38:10; 7/15/05; 10:24:18-10:32:16). In the absence of relief from his judgment, Lawrence will serve out his entire twenty-year sentence behind bars. (TR Vol. 4: 49-50). This is in complete contradiction to what his trial counsel told him prior to trial, what law enforcement told the jury during sentencing, what the court and prosecutor told him at sentencing, and what DOC told him when he was first processed upon conviction for the

Bracken County offense. (TR Vol. 4: 13-17, 28-30, 34-35; VR Tape 2: 6/9/05; 2:32:00-2:38:10; 7/15/05; 10:24:18-10:32:16). Contrary to the Court of Appeals opinion below, this claim is not about whether anyone failed to act reasonably in advising Lawrence. This claim is about the criminal justice system advising Lawrence he faced a certain sentence upon conviction and then substantially altering that sentence several years after he was finally sentenced.

In this case, the entire judicial system interpreted KRS 439.3401(1) as not applying to Lawrence's possible conviction for manufacturing methamphetamine, second offense. (TR Vol. 4: 13-17, 28-30, 34-35; VR Tape 2: 6/9/05; 2:32:00-2:38:10; 7/15/05; 10:24:18-10:32:16). All parties accepted the terms of possible punishment that they understood to be applicable to Lawrence's charges, and all parties proceeded through pre-trial and trial under this united cloud of misconception. After trial, all parties assumed Lawrence would receive twenty (20) years, with twenty percent (20%) parole eligibility, and the opportunity to earn sentence-reducing credits when his judgment was entered.

Because of this interpretation KRS 439.3401(1) by all the parties involved and Lawrence's reliance on this interpretation, Lawrence viewed the plea offers made by the Commonwealth prior to trial very differently. While a defendant is not entitled to plea offers, here, the Commonwealth did extend a plea offer to Lawrence, twice, and once "a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution," including the Due Process Clause of the Fourteenth Amendment. Lafler v. Cooper, 132 S.Ct. 1376, 1387 (2012)(quoting Evitts v. Lucey, 469 U.S. 387, 401 (1985)). The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be

consistent with the fundamental principles of liberty and justice. Buchalter v. People of the State of New York, 319 U.S. 427 (1943). It exacts from the states a conception of fundamental justice. Foster v. People of State of Illinois, 332 U.S. 134 (1947). In failing to inform Lawrence accurately of the terms of a sentence he faced if convicted at trial, the Commonwealth has not acted, through its agencies, in accordance with the fundamental principles of liberty and justice; for what good was it to offer Lawrence these plea bargains, without also informing him of the true sentence he faced upon conviction. When determining whether a due process violation has occurred, courts “are to determine only whether the action complained of ... violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.” Dowling v. United States, 493 U.S. 342, 353 (1990); see also, Ditty v. Hampton, 490 S.W.2d 772, 774 (Ky. 1972).

Lawrence relied on the court system to accurately state the possible sentence he faced, so he could accurately weigh the risk of a conviction at trial. To be clear, it is not Lawrence's conviction that is patently unfair, but the sentence terms being imposed as a result thereof. This Court has recently held that the “sharply extended period of parole ineligibility is a serious enough and certain enough detriment that a person pleading guilty is entitled to know about it.” Commonwealth v. Pridham, 394 S.W.3d 867, 878 (Ky. 2012). The same must be said of person who is weighing the risk of trial and the benefits of a plea offer.

Most concerning about these events which led to Lawrence's conviction and classification, is that there was no one with whom Lawrence could have inquired that would have or could have told him that his conviction, if he proceeded to trial and was

convicted, would result in a violent offender classification. Consequently, had Lawrence had any doubts as to the interpretation of KRS 439.3401(1), DOC, the agency tasked with interpreting the statute and enforcing it, would have assured him that his offense did not fall within the statutory definition. Further still, had Lawrence believed that KRS 439.3401(1) applied to him, DOC would have informed him and the court that such an interpretation was wrong. This is not a matter of Lawrence or his counsel incorrectly assessing the law or the evidence before proceeding to trial and in hindsight regretting the risk taken. Lawrence fully accepts the twenty-year term his jury gave him, subject to the twenty percent (20%) parole eligibility and unfettered ability to earn sentence credits, which he and his jury believed he would receive and that which he anticipated if convicted.

The Court of Appeals wrongly concluded that this claim was one of ineffective assistance of counsel. Pate, slip op. at 21. To the contrary, a claim of ineffective assistance of counsel requires the reviewing court to objectively examine trial counsel's performance to see if it falls within the wide-range of prevailing professional norms. See Strickland v. Washington, 466 U.S. 668 (1984). Under the present claim and request for relief, Lawrence is not asserting that trial counsel acted outside the wide range of prevailing professional norms. Lawrence is asserting that the entire criminal justice system has denied him the minimal due process to which he is entitled under the Kentucky and United States Constitutions, which was acknowledged by this Court in Pridham, supra, when Lawrence was never informed at any time leading up to trial, during the proceedings of the full extent of the sentence he faced upon conviction and chose to reject the plea offers and proceed to trial.

In addition to this Court’s holding in Pridham, 394 S.W.3d at 878, acknowledging the right to be informed of the violent offender classification prior to pleading guilty, the U.S. Supreme Court has held that the rejection of a plea offer based upon an incorrect information given to the defendant regarding the risk of trial and benefits of the plea offer is entitled to constitutional protection and a conviction will not be upheld even if it resulted from a trial that was otherwise “free from constitutional flaw.” Lafler, 132 S.Ct. at 1386 (“[E]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.”). “Because ours ‘is for the most part a system of pleas, not a system of trials,’ it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Lafler, supra, at 1388) (internal citation omitted). While Lafler and Frye were cases involving Sixth Amendment claims, the Supreme Court’s opinions demonstrate that the due process protections⁵ for a defendant are just as, if not more, important prior to trial when critical decisions are made regarding plea offers, motions *in limine*, and possible trial strategies.

If a defendant is entitled to be correctly informed by his trial counsel as to his parole eligibility prior to pleading guilty, then where he rejects plea offers and proceeds to trial under the mistaken representation by *all of the parties* – defense counsel, prosecution, the court and law enforcement – that he will not be classified as a violent

⁵ See U.S. v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (noting that the right to effective assistance of counsel was originally based upon the Due Process Clause, and even the present interpretation of the Sixth Amendment is the “consequence of our perception that representation by counsel ‘is critical to the ability of the adversarial system to produce just results.’” quoting Strickland, 466 U.S. at 685.).

offender, the result must be the same. Lawrence's decision to reject plea offers and proceed to trial was not knowing, voluntary and intelligent. In rejecting the plea offers of the Commonwealth, Lawrence essentially bargained to accept either acquittal or conviction for manufacturing, second offense, but did not voluntarily accept the greater sentence imposed by application of the violent offender statute.

It is patently inequitable to determine that the failure to be accurately informed of parole eligibility at 85% invalidates a guilty plea when it is the result of attorney error, but that where the misadvice comes from the agency responsible for interpreting and enforcing the statute, such does not invalidate the rejection of pleas and decision to proceed to trial. Lawrence is entitled to equitable relief from this sentence. Lawrence requests this Court vacate his conviction and allow him to either reconsider the plea offers of the Commonwealth made prior to trial, in light of DOC's change in interpretation of KRS 439.3401(1) and mandatory consecutive sentences under KRS 532.110, or receive a twenty-year conviction without the violent offender classification.

CONCLUSION

DOC changed its interpretation of KRS 439.3401(2002) in 2007, two years after Lawrence was convicted and sentenced. If this Court upholds DOC's new interpretation of KRS 439.3401(2002), as the Appellee in Case No. 2013-SC-000558-DG proposes, then CR 60.02 relief is appropriate here to repair the deprivation of due process and inequitable change in the terms of Lawrence's sentence, which were unknown to him and could not be known to him, prior to trial when he rejected plea deals and proceeded to trial. For the foregoing reasons, Lawrence requests this Court vacate his conviction as

being procured in violation of State and Federal Constitutional Right to Due Process rights and grant him equitable relief.

Respectfully Submitted by,


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