



Court: Douglas County District Court
Case Number: 2015-CV-[REDACTED]
Case Title: [REDACTED] vs. State of Kansas
Type: Journal Entry

SO ORDERED.

A handwritten signature in cursive script that reads "Paula B. Martin".

Paula B. Martin
District Court Judge
Division 5

/s/ Honorable Judge Paula B. Martin

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

██████████,)
Defendant/ Movant) Civil Case No. 2015 CV ██████████
v.) Criminal Case No. 14 CR ██████████
STATE OF KANSAS,)
Respondent,)

JOURNAL ENTRY

NOW ON THIS 17th DAY OF JUNE, 2016, the Court issues the following as its Journal Entry of Judgment to be filed in both case numbers set forth above:

OVERVIEW:

This matter is before the Court on Defendant/Movant ██████████ motion to set aside his convictions and correct his sentence, pursuant to K.S.A. 60-1507. Mr. ██████ timely filed said motion on ██████ 20, 2015 (Civil Case No. 2015 CV ██████████), less than one year following his ██████████ 2014 sentencing (in Criminal Case No. 14 CR ██████████). On ██████████ ██████, 2016, the Court - after consideration of the briefs submitted by both parties - held an evidentiary hearing. At the conclusion of the hearing, the Court announced its decision from the bench, finding that Mr. ██████ and his post-conviction "1507" attorney had shown "ineffective assistance of counsel" on the part of Mr. ██████ plea/sentencing counsel by proving both deficient performance and resultant prejudice. Accordingly, the Court indicated to the parties that it intended to grant Mr. ██████'s "1507" motion.

The Court then invited the parties to weigh in on the issue of the appropriate remedy. A re-sentencing could not be done with the counts of conviction remaining in place from Mr. ██████'s original 2014 guilty plea, per the Kansas Sentencing Guidelines. The only way relief could be afforded to Mr. ██████ was by setting aside his guilty plea. A recess

was granted to afford the parties a chance to withdraw and convene to attempt negotiation of a resolution. Weeks later the parties informed the Court that a settlement on a remedy had indeed been reached. On [REDACTED], 2016, Mr. [REDACTED]'s 2014 guilty plea and convictions and sentence were set aside, and Mr. [REDACTED] pled to amended charges and received a sentence agreed upon by the parties under a plea agreement approved by the Court that day, and then memorialized in a Journal Entry filed in Criminal Case No. 14 CR [REDACTED] on [REDACTED], 2016.

Because the case was ultimately resolved by way of a plea agreement and sentencing on [REDACTED], 2016, from which neither side appealed further detailed findings of fact and conclusions of law are unnecessary. Furthermore, both sides have agreed that a short summary of the case will suffice for purposes of this Journal Entry.

FACTS OF CRIMINAL CASE:

[REDACTED] was charged in this Court on [REDACTED] 2014 with four counts of unlawful distribution of a controlled substance (marijuana; in violation of K.S.A. 21-5705) and one count of unlawful possession of drug paraphernalia (in violation of K.S.A. 21-5709(b)(1)), after being observed by police to have taken part in three drug sales several months earlier in late 2013, on [REDACTED] (quarter pound), 7th (quarter pound) and 11th (half pound); and, after officers found over 11 pounds of marijuana in his apartment during a search executed days later, on [REDACTED], 2013. These offenses took place within several hundred feet of the St. John's School, thereby increasing the

range of punishment because they occurred "within a school zone." As charged, Mr. ■ faced over 400 months in prison if convicted. (See Guilty Plea Transcript, page 4)

Shortly after his arrest, Mr. ■ family hired attorney ■ to represent Mr. ■ On ■, 2014, Assistant District Attorney Deborah Moody extended a very generous plea offer. She proposed that Mr. ■ plead guilty to two amended counts charging distribution of drugs, which would carry a severity level 3 designation instead of a severity level 2 designation as charged. And, she wanted Mr. ■ to plead to one count charging possession of drug paraphernalia, which is designated as a severity level 5 felony. In exchange for Mr. ■'s guilty plea, Ms. Moody offered to recommend 49 months in prison for Mr. ■ but with the understanding that neither side could ask for a departure sentence. Ms. Moody set a time limit on the offer, with its expiration date being June 25, 2014. (See e-mail detailing plea offer, attached to Mr. ■'s "1507" motion as Exhibit A; see also, Exhibit B, Guilty Plea Transcript, pp. 3-4, and Exhibit E, ■ Affidavit, para. 1)

Upon receipt of the plea offer, defense counsel ■ neglected to conduct any factual investigation or legal research into what might constitute acceptable departure arguments, which derive from, but are limited by, K.S.A. 21-6815(c)(1)(A) through (c)(1)(E), as well as the case law interpreting this statute. In short, this statute sets forth a non-exclusive list of "mitigating factors" which can be relied upon by a district court judge in departing to a reduced sentence. The factors then must be supported by findings, which constitute "substantial and compelling reasons." However, case law makes clear that all factors must relate to the relative severity of the defendant's criminal conduct, and

1. ■■■■■ was facing 4 counts of unlawful drug distribution and a paraphernalia charge, and a minimum 92-month prison sentence;

2. His attorney rejected a 49-month plea offer, and when questioned by this Court as to why, counsel said that he would instead be tendering a "departure motion";

3. Had counsel researched the law on departure motions before the expiration of the plea offer, and before Mr. ■■■ guilty plea "straight up" to all charges, counsel would have learned that Mr. ■■■ qualified for no sentencing departures whatsoever under Kansas law;

4. Counsel's departure motion (little more than one page in length) did not provide any bases at all, as a matter of law, upon which this Court could have granted a departure. In other words, the departure motion (and the oral argument in favor of it) was entirely non-compliant with K.S.A. 21-6815(c)(1)(A) through (c)(1)(E), as well as the case law interpreting this statute;

5. Accordingly, counsel's failure to research K.S.A. 21-6815(c)(1)(A) through (c)(1)(E), as well as the case law interpreting this statute led him to misadvise Mr. ■■■ in plea negotiations, and caused Mr. ■■■ to receive a statutory minimum 92-month sentence that the State had otherwise been willing to reduce to 49 months.

These shortcomings were not part of a conscious strategic plan. There was no benefit to be gained by Mr. ■■■ in passing on the State's June 11, 2014 plea offer, as advised by defense counsel. Instead, counsel mis-advised Mr. ■■■ to pass up the plea offer because counsel *planned later* to submit a departure motion he was confident

would succeed. Defense counsel never advised Mr. ■ that counsel's departure motion, as envisioned, could not be granted as a matter of law by this Court, due to its statutory shortcomings and evidentiary void. (See "1507" motion, Ex. B, Guilty Plea Transcript, p. 5) This is because counsel did not investigate or research the bases for the departure motion before advising Mr. ■ to reject the State's 49-month offer.

Months later, when Mr. ■ came before this Court for sentencing on ■, 2014, his appearance was preceded by a single-page departure motion submitted the day before by defense counsel. (See "1507" motion, Exhibit C) The motion presented no statutorily acceptable grounds for a departure sentence, nor was any evidence or testimony offered by defense counsel during Mr. ■'s sentencing hearing. This Court overruled the departure motion because it was non-compliant with the applicable statute and case law, and the factual basis upon which such leniency could only be predicated was non-existent. Thus, as a matter of law, defense counsel's advice that Mr. ■ pass up the State's 49-month offer in lieu of counsel's "strategy" to later file a departure motion was ineffective and indisputably prejudicial; costing Mr. ■ the opportunity to accept the 49-month sentence instead of lodging an unwinnable departure motion against a 92-month statutory minimum sentence.

In the end, both "deficient performance" and "resultant prejudice" are present in this case. Accordingly, the Court grants Mr. ■'s motion to vacate his 2014 convictions and sentence, pursuant to his ■, 2015 motion filed under K.S.A. 60-1507.

The parties agreed upon a remedy that these convictions and 92-month sentence be vacated, with Mr. [REDACTED] then pleading guilty to amended charges and receiving a 49-month sentence, all as set forth in the Journal Entry of Sentencing filed by this Court in Criminal Case No. 14 CR [REDACTED] on [REDACTED], 2016.

The Clerk is directed to file a copy of this Journal Entry in both Criminal Case No. 14 CR [REDACTED] and Civil Case No. 2015 CV [REDACTED]. The Clerk is directed to forward a copy of this Journal Entry to the parties, and to the Kansas Department of Corrections along with a copy of the Journal Entry of Sentencing filed by this Court in Criminal Case No. 14 CR [REDACTED] on [REDACTED] 2016.

IT IS SO ORDERED.

/s/ The Honorable Paula Martin
The Honorable Paula Martin, District Court Judge

[REDACTED]/16
Date

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