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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000838-MR

DENVER L. STEWART, III — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 97-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING, VACATING
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Denver L. Stewart, III appeals the Pike Circuit Court's order denying his RCr[1] 11.42 motion and his CR[2] 60.02 motion. After a careful review of the record, we reverse, vacate, and remand this matter for entry of an order

[1] Kentucky Rule(s) of Criminal Procedure.

[2] Kentucky Rule(s) of Civil Procedure.

consistent with this opinion because Stewart received the ineffective assistance of counsel when he was advised to plead guilty to charges when he had a valid double jeopardy defense.

I. FACTUAL AND PROCEDURAL BACKGROUND

To place this case in context, it should be noted that the felony assault charges to which Stewart pled guilty, and which are presently under review, involve a long and convoluted procedural history spanning thirteen years. Throughout the thirteen-year span, there are long periods of time in which the Commonwealth took no action to prosecute the matter, and numerous occasions when Stewart was arrested on the charges and released,[3] but not tried. Additionally, bench warrants were issued for his arrest while he was—by specific agreement with the prosecution—banished from Kentucky. And, as will be analyzed *infra* through the maze of this case, we believe that the Commonwealth should not have pursued this charge against Stewart once he fulfilled the terms of his banishment agreement in the fall of 1999 on a related charge for which he was found guilty by a jury.

Turning to how this convoluted matter began, in 1997 the Commonwealth charged Stewart with trafficking marijuana in case number 97-CR-00008-001 (97-CR-8). Separately, Stewart was charged, in case number 97-CR-

[3] According to Stewart's unrefuted testimony at the RCr 11.42 hearing, he was arrested on the felony assault charges seven or eight times. The Commonwealth did not know how many times Stewart was arrested on these charges. According to Stewart, one of these arrests resulted in his being terminated from his employment in Tennessee while he was in Kentucky, and the company car which he was driving at the time being impounded. His Tennessee employer had to retrieve the car in Kentucky.

0070 (97-CR-70), with two counts of assault in the third degree, for allegedly assaulting police officers during his trafficking arrest. The trafficking charge went to a jury trial, and Stewart was found not guilty of trafficking but guilty of possession. Consequently, Stewart was sentenced to a term of one-year incarceration. For reasons not disclosed in the record, the assault charges were not tried at that time.

After serving a portion of his sentence, Stewart's counsel, Stephen W. Owens, negotiated an agreement with the Commonwealth for shock probation for Stewart. On October 31, 1997, the Commonwealth and Stewart appeared in open court to put the probation agreement on the record. At this time, Attorney Robert Wright substituted for Owens on behalf of Stewart. Although at the RCr 11.42 evidentiary hearing, the witnesses from the Commonwealth's Attorney's Office could not recall who negotiated the probation agreement, Elizabeth Graham[4] appeared on behalf of the Commonwealth and explained the agreement to the court, with Honorable Charles E. Lowe, Jr. presiding, as follows:

> The Commonwealth has agreed not to object to shock probation being entered in Mr. Stewart's case on the condition that he leave (sic) Kentucky by the end of this weekend. By 6:00 p.m. Sunday, I believe is the agreement. The balance of his sentence is to be probated for a period of twenty-four (24) months and the other felony charge will be tabled.

The court questioned Wright if this was his understanding of the agreement, and he answered in the affirmative. Although the agreement as stated by Ms. Graham did

[4] Ms. Graham subsequently married and used her married name of "Burchett." We will reference her in this opinion as Ms. Graham.

not specify the felony charge by number, the assault charge (97-CR-70) was the only pending felony charge against Stewart at the time. The court then directed the Commonwealth to draft a written order memorializing the agreement. The order as presumably drafted by the Commonwealth stated:

> This cause having come on for hearing upon the defendant's motion for shock probation and the Defendant having offered to leave the state of Kentucky if he could be probated. The Commonwealth having agreed to same, IT IS HEREBY ORDERED that shock probation is GRANTED on the condition that Denver Stewart, III comply with the terms of his agreement.

Judge Lowe signed the order on October 31, 1997. It is worthy of note that neither the agreement nor the order required Stewart to return to the Commonwealth at the conclusion of his two-year probationary period, or at any time for that matter. This is the last order that appears in the record in 97-CR-8.

Consistent with this agreement and order, Stewart left the Commonwealth within days. As was testified to at the evidentiary hearing on Stewart's RCr 11.42 and CR 60.02 motions, the Commonwealth specifically wanted Stewart to go west of the Mississippi River. Stewart moved his family west and remained out of the Commonwealth for approximately five years.

Turning back to the posture of the assault charges in 97-CR-70, prior to the shock probation agreement reached by the parties, it appears from the record in 97-CR-70 that the assault charges were set to be tried on October 28, 1997. Subpoenas were served on Stewart and the police officers he allegedly assaulted on either October 18 or October 20. However, the trial did not commence on October

28, 1997, but nothing appears in the record of 97-CR-70 explaining this. Presumably, during this time Owens and the Commonwealth were negotiating the shock probation agreement, which was made of record in 97-CR-8 on October 31, 1997, and this resulted in cancellation of the trial. But, the record in 97-CR-70 is silent. In other words, if one only looked at the record in 97-CR-70, a trial was set but there is no explanation for why it did not take place.

Thereafter, on July 31, 1998, Judge Lowe signed an order assigning 97-CR-70 for a bond hearing on August 7, 1998. Then, Judge Lowe set the case for trial on October 28, 1998, and on August 14, 1998, Judge Lowe signed and entered a bench warrant for Stewart's arrest. On the same date, Judge Lowe reassigned the case for trial on October 15, 1998, and then later for October 27, 1998. A few days later, Judge Lowe entered an order setting aside the previous orders and setting the case for trial on October 13, 1998. Apparently, when Stewart did not appear for trial on October 13, 1998—having been banished from Kentucky by agreement and order signed by Judge Lowe—Judge Lowe signed an order for a bench warrant for Stewart's arrest on October 14, 1998. Thereafter, on October 19, 1998, Judge Lowe signed an order of bond forfeiture.

While not entirely clear from the record, at the evidentiary hearing there was testimony that during this time there appeared to be a dispute between the court and the Commonwealth regarding who was responsible – the court or the Commonwealth – for "calling" criminal cases. Nonetheless, it is unknown why the Commonwealth failed to remind Judge Lowe that Stewart had, by agreement with

the prosecution, been "banished" from the Commonwealth and would be in violation of his probation if he appeared. Further, there is nothing in the record suggesting that Stewart was put on notice that the court was issuing orders and setting hearings. Finally, in May 2000, despite the Commonwealth's agreement on banishment and the court's acceptance of such, the trial court found Stewart to be a fugitive and struck 97-CR-70 from the active docket until his apprehension.

The record then goes silent for two years until October 2002, when Stewart - who had returned to Kentucky - was arrested on the August 1998 bench warrant. Following his arrest, confusion surrounding whether Wright or Owens was serving as Stewart's counsel and repeated miscommunication on court dates and service resulted in Stewart's failure to appear at a January 2003 pretrial conference. Later, the Commonwealth classified this instance among others as evidence of the case "falling through the cracks." However, the immediate impact of the failure on the part of both defense counsel and the Commonwealth was that the court again issued a bench warrant for Stewart's arrest.

Throughout 2003, two bench warrants were served on Stewart and, while it is not entirely clear, he apparently was incarcerated at least for some period of time as a result of these bench warrants. However, no further steps toward prosecution of the assault charges were taken during most of the year. Then, in December of 2003, Owens, again serving as counsel for Stewart, informed the court that the Commonwealth was supposed to have dismissed the assault charges as part of the 1997 shock probation agreement. Owens could not

present a written order specifically stating this point of the agreement, but he did inform Judge Steven Combs, who was assigned to the case by that time, that it was put on the record in open court. The Commonwealth neither confirmed nor denied this, and subsequently, the Commonwealth neither tried nor dismissed 97-CR-70 at that time.

Rather than taking any action to resolve the status of the 1997 assault charges, the Commonwealth focused on new theft charges against Stewart in 2004, for which he received a two-year prison sentence probated for two years. Shortly thereafter, the Commonwealth revoked Stewart's two-year probation in the theft case, and he was incarcerated.

Throughout this period of bench warrants being executed against Stewart, and his arrest several times and being lodged in the Pike County Jail under the bench warrants, as well as his 2004 prosecution, conviction and subsequent incarceration, the Commonwealth took no action regarding 97-CR-70. Finally, in August of 2007, the Commonwealth resumed prosecution of 97-CR-70. Robert Wright, acting as counsel, advised Stewart to enter a guilty plea in return for a four-year sentence probated. Wright testified at the evidentiary hearing that Stewart was facing a trial that day on the assault charges and advised Stewart to plead guilty. Wright was aware there was some discussion about whether an agreement had previously been reached on the assault charges. But, when he reviewed the written record, he did not find a written agreement. Yet, Wright was the attorney, substituting for Owens, on October 31, 1997, when the

Commonwealth informed the court of the banishment agreement and that the "other felony charge will be tabled." Nonetheless, Wright testified at the RCr 11.42 hearing that he did not review the trial tape of the probation hearing. He advised Stewart to plead guilty because the Commonwealth agreed that Stewart would be on supervised probation for only one year, with the remaining three years unsupervised if he moved out of the Commonwealth. However, if Stewart remained or returned to the Commonwealth during this time, his probation would be supervised for the entire length of the agreement. Ultimately, relying upon advice from counsel and his own belief, according to his evidentiary hearing testimony, that the double jeopardy issue would be "dealt with" to his benefit, Stewart entered a guilty plea in 97-CR-70 for a term of four years, probated. Stewart's probation was later revoked on June 26, 2009, and Stewart once again was incarcerated and remains so to date on the 1997 assault charges.

Subsequently, Stewart filed motions pursuant to RCr 11.42 and CR 60.02.[5] Stewart claims he received the ineffective assistance of counsel when counsel failed to move the court to correct the written October 31, 1997 order to include the dismissal of the assault charges in the shock probation agreement and in counsel's advice to enter the guilty plea in 97-CR-70 against Stewart's double jeopardy interest in 2007. In addition, he claims that the trial court abused its discretion, erred to his substantial prejudice, and denied him due process of law in denying his CR 60.02 claim.

[5] At the time of these motions, Honorable Eddy Coleman, Judge, was assigned to the case.

At the February 2010 evidentiary hearing, Stewart and the Commonwealth disputed the nature of the 1997 agreement, what offenses the agreement covered, and the meaning of the word "tabled" as it was used in this agreement. Both Owens, who negotiated Stewart's shock probation agreement with the Commonwealth, and Stewart testified consistently that the phrase "the other felony charge will be tabled," as cited by Ms. Graham in open court on October 31, 1997, meant that the felony assault charges would be dismissed if Stewart complied with the banishment agreement. Owens was resolute on this and testified that the agreement included that the felony assault charges would be "dismissed, not prosecuted or resolved in [Stewart's] favor." Stewart testified that his understanding of the agreement was that if he would leave the Commonwealth, the felony charges would be dismissed.

Ms. Graham, the Assistant Commonwealth's Attorney who appeared at the shock probation hearing, testified that she could not recall who negotiated the terms of the agreement with Stewart on behalf of the Commonwealth. She testified that "tabled" had no legal meaning, but she believed it meant that prosecution would not be imminent. She could not state why the assault charges went unprosecuted for so long or why the case had apparently just "fallen through the cracks."

The trial court denied Stewart's motions for several different reasons. It found there was no double jeopardy issue since Stewart "had neither previously entered a guilty plea nor had been tried before he pled guilty." Further, the trial

court also "believe[d] that while Defendant may have had an enforceable agreement with the Commonwealth to dismiss the Indictment, he waived this defense knowingly after specifically discussing this defense with his counsel. . . ." Stewart timely appealed that order.

II. ANALYSIS

"The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). *Strickland* provides a familiar two-part test to determine ineffective assistance: (1) the defendant must show that counsel's performance was deficient; and (2) the defendant must show that this deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064; *accord Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

Review of a guilty plea for ineffective assistance of counsel requires a slightly different two-part test. The Kentucky Supreme Court explained this difference as follows:

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001).

We must then determine whether counsel's performance affected the outcome of the plea process. *See Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky. App. 1998). In this instance, Stewart claims that he would not have entered the guilty plea to the assault charges if not for counsel's advice regarding his double jeopardy claim.

The trial court found, however, there was no double jeopardy issue as Stewart "had neither previously entered a guilty plea nor had been tried before he pled guilty." Further, the trial court also "believe[d] that while Defendant may have had an enforceable agreement with the Commonwealth to dismiss the Indictment, he waived this defense knowingly after specifically discussing this defense with his counsel. . . ." Regarding the agreement, the court found that "[t]here is no writing or oral explanation as to an agreement to table this Indictment, if there were indeed an agreement. There was no term of years, no plea and no conditions. The silence of the record could presume to mean either nothing, as the Commonwealth suggests, or it could be a period of diversion to run concurrently with the probation, as suggested by the Defendant." Ultimately, the court held that Stewart "gave up [the double jeopardy defense] by pleading guilty. He cannot be allowed to forsake an argument for the expediency of a plea to a

sentence of probation then make the argument when he has failed to live up to the terms and conditions of that probation."

Contrary to the trial court's ruling, the defense of double jeopardy is not waived, despite the guilty plea, if the State is precluded from haling the defendant into court on a charge, particularly where the punishment for the crime has already been served. *See Menna v. New York*, 423 U.S. 61, 62, 96 S. Ct. 241, 242, 46 L. Ed. 2d 195 (1975). "Such cases appear to provide an exception to the general longstanding rule that "a 'valid guilty plea effectively waives all defenses other than that the indictment charged no offense.'" *Lay v. Commonwealth*, 207 S.W.3d 18, 19-20 (Ky. App. 2006) (review of a guilty plea) (citations omitted); *see also Clark v. Commonwealth*, 267 S.W.3d 668, 674-75 (Ky. 2008) ("[F]ailure to present a double jeopardy argument to the trial court should not result in allowing a conviction which violates double jeopardy to stand.") The Kentucky Supreme Court has held that while a defendant may waive his right to avoid double jeopardy in "exchange for some benefit," there must be an express waiver. *Henry v. Commonwealth*, 275 S.W.3d 194, 202 (Ky. 2008), *overruled on other grounds, Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). Furthermore, in reviewing an RCr 11.42 motion involving the advice to plead guilty, the dispositive issue is not whether the appellant's double jeopardy rights were violated, but whether the advice of counsel to plead guilty amounted to the ineffective assistance of counsel. A guilty plea may be set aside when a defendant was not properly advised by counsel and, as a consequence, the plea would not be considered constitutionally

voluntary and intelligent. *See United States v. Broce*, 488 U.S. 563, 574, 109 S. Ct. 757, 765, 102 L. Ed. 2d 927 (1989). This is because in certain instances – and specifically one where there is a legitimate double jeopardy claim – the defendant would not have entered the plea but for the deficient conduct of his counsel or could not have entered into his plea. *See Osborne*, 992 S.W.2d at 863; *Greer v. Commonwealth*, 713 S.W.2d 256, 256 (Ky. App. 1986) (citing *White v. Sowders*, 644 F.2d 1177 (6th Cir. 1980)); *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970). However, counsel's advice to enter a guilty plea may not constitute the ineffective assistance of counsel where a proper investigation did not reveal a patent constitutional defense and where the defendant did not apprise counsel that such existed. *See Eggerson v. Commonwealth*, 656 S.W.2d 744, 745-46 (Ky. App. 1983).

In entering into the shock probation agreement on the trafficking charges, Stewart was entering into a contract with the Commonwealth. *See McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010). Interpretation of the plea agreement then is analogous to interpretation of a contract and is a matter of law once an agreement becomes binding through offer and acceptance. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007); *see also Matheny v. Commonwealth*, 37 S.W.3d 756, 758 (Ky. 2001). "The interpretation of a contract - including a determination of whether it is ambiguous - is a question of law." *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky. App. 2007) (citing *Baker*, 219 S.W.3d at 207). In examining an agreement with the Commonwealth as a

contract, any ambiguity within the agreement is interpreted against the Commonwealth as the drafter of the agreement as a matter of law. *Id.* Also, like a contract, a plea agreement includes an implied obligation of good faith and fair dealing. *See Ranier v. Mount Sterling Nat. Bank*, 812 S.W.2d 154, 156 (Ky. 1991) (citing 17A Am. Jur. 2d *Contracts* § 380); *see also U.S. v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995) (citing Restatement (Second) of Contracts § 205 (1981)). "'Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.'" *Cantrell Supply Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381, 384-85 (Ky. App. 2002) (quoting *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986)).

Beginning our analysis of the shock probation agreement as a contract, we recognize that the written order granting shock probation does not specifically state that the "other felony charge will be tabled" as contained in the agreement. As a general rule, the court speaks only through written orders entered upon the official record. *Midland Guardian Acceptance Corp. of Cincinnati v. Britt*, 439 S.W.2d 313, 314 (Ky. 1968); *Commonwealth v. Wilson*, 280 Ky. 61, 132 S.W.2d 522, 523 (Ky. 1939). However, the written order does state that "shock probation is GRANTED on the condition that Denver Stewart, III comply with the terms of his agreement." Hence, the written order specifically references the agreement as the parties acknowledged it before the court. Additionally, both parties acknowledge the terms of the shock probation agreement as stated in court included that the "other felony charge will be tabled," and the circuit court's

decision on the RCr 11.42 motion centered around the agreement read into the record in open court. Under the general principles outlined in *Dickerson v. Commonwealth,* 278 S.W.3d 145 (Ky. 2009), given that this agreement was read into the record, both parties acknowledged it was their agreement, and it was accepted by the trial court and the trial court asked the Commonwealth to draft the written order, we conclude that the terms of the probation agreement as stated in open court comports with the parties' actual agreement.

Reviewing the agreement, two issues must be interpreted against the Commonwealth. First, in the agreement the Commonwealth referenced no case numbers even though it mentioned "the other felony charge." At that time, the only felony charge pending against Stewart was 97-CR-70. Therefore, while the agreement did not directly reference the assault charges, the only reasonable interpretation is that those charges had to be the ones intended by the parties. Thus, the assault charges that counsel advised Stewart to plead guilty to were included in the shock probation agreement.[6]

Second, the Commonwealth failed to define the word "tabled" and what effect completion of the banishment agreement would have upon the charges in 97-CR-70. It has long been understood in Kentucky that "[a]n ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid,* 617 S.W.2d 32, 33 (Ky. 1981).

[6] The shock probation agreement in regard to the assault charges can best be characterized as a pretrial diversion. If Stewart satisfactorily completed such, it should have allowed him to avoid a felony conviction and to have the indictment dismissed.

At the evidentiary hearing, Owens testified that the agreement he negotiated on behalf of Stewart included a dismissal of the assault charges or a favorable resolution for Stewart in exchange for Stewart's leaving Kentucky and going west past the Mississippi River for twenty-four months. Stewart testified that this was the agreement. Ms. Graham testified at the evidentiary hearing that she did not know who on behalf of the Commonwealth negotiated the agreement with Owens. She testified that the term "tabled" had no legal meaning, but she viewed it as a housekeeping matter that there would be "no active prosecution of the case imminently." When questioned what "imminently" meant, Ms. Graham could not give a period of time. Although Stewart was arrested and placed in jail several times on the assault charges upon his return to Kentucky,[7] and although he was tried in 2004 for an unrelated theft charge, Ms. Graham could not state why he was not prosecuted for the 1997 assault charges until 2007.[8]

As was the case in *Elmore*, 236 S.W.3d at 627, in which this Court reviewed a plea agreement involving the word "likewise," both parties offer "equally plausible interpretations." According to Black's Law Dictionary, there is no common or plain language meaning for "table." First, "to table" can be interpreted in the original English Parliamentary meaning: "to set aside the pending

[7] Stewart testified that he was arrested seven to eight times on the charges. Ms. Graham could not state how many times Stewart was arrested but knew it was a number of times.

[8] This directly contradicted a statement Ms. Graham made to the court at a status hearing in August of 2007. At that hearing she stated that the Commonwealth had been unable to "comprehend" Stewart and that "now that we have him in the flesh" she did not know of any reason why the Commonwealth could not go ahead with the case.

business until the assembly votes to resume its consideration." Second, Black's cites Alice Sturgis, The Standard Code of Parliamentary Procedure 70 (4th ed. 2001) to explain that when something is "tabled" sometimes the purpose of the motion is not merely to postpone temporarily, but to set the motion aside indefinitely — in effect, to "kill" it. *Black's Law Dictionary* (9th ed. 2009).

Applying the rationale of *Elmore* to the case at bar - where one definition comports with the Commonwealth's interpretation and another to the defendant - "both definitions are reasonable interpretations of the meaning of the word [at issue but] they are also inconsistent with one another in the context of this case. Thus, this comport of the plea agreement is indeed ambiguous." 236 S.W.3d at 627.

At the time the Court decided *Elmore*, Kentucky had "no clear rule as to which party should benefit from an ambiguity where a plea agreement is involved." *Id.* In *Elmore*, the Court did a comprehensive review of the issue and agreed with the Supreme Court of West Virginia that "imprecisions or ambiguities in plea agreements" should be construed against the Commonwealth. *Id.* at 628 (quoting *State ex rel. Forbes v. Kaufman*, 404 S.E.2d 763, 768 (W.Va. 1991)).

In accord with *Elmore*, the plea agreement between the Commonwealth and Stewart, as stated in open court by the Commonwealth, that "the other felony charge will be tabled" is ambiguous and should be resolved against the Commonwealth. Consequently, the term "tabled" in the agreement should have been construed by the circuit court to equate with the interpretation

given by Stewart. Thus under *Elmore*, the plea agreement must necessarily be interpreted to mean that if Stewart complied with the terms of his banishment from Kentucky, the felony assault charges in 97-CR-70 would be dismissed. Nothing in the record, and specifically nothing presented by the Commonwealth, indicates that Stewart did not fully comply with the terms of his banishment.[9] For this reason, the plea agreement should have been construed by the circuit court to mean that the felony assault charge against Stewart should have been dismissed by the Commonwealth as early as the fall of 1999.

We briefly pause to address that the Commonwealth makes a passing statement in its brief and referenced at oral argument that the circuit court did not making a finding that an agreement existed with regard to dismissal of the assault charges, *i.e.,* "the trial court did not explicitly find that there was an agreement to dismiss the case, though it did note that such an agreement 'could be inferred.'" We acknowledge that the circuit court's order is somewhat vague on this and did not explicitly make a finding that there was an agreement to dismiss the assault charges. The court's order included statements *inter alia* that

> the Defendant may have had an enforceable agreement with the Commonwealth to dismiss the indictment.
>
> ****
>
> There is not writing or oral explanation as to an agreement to table this Indictment, if there were indeed an agreement.

[9] In fact, his testimony that he remained out of the Commonwealth for approximately five years was not refuted.

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> There may have been an agreement between the Commonwealth and the Defendant. . . . There is no writing or oral statement of an agreement except to say that the prosecution of this case was tabled. However, it could be inferred that an agreement may have existed. . . .

An agreement "must be construed as a whole, giving effect to all parts and every word in it if possible." *Cantrell Supply*, 94 S.W.3d at 384-85 (quoting *City of Louisa*, 705 S.W.2d at 919). There is no dispute that the term "the other felony charge will be tabled" existed as part of the agreement. The issue before the circuit court was the *meaning* of this term, not the *existence* of it. To the extent the circuit court did not specifically find the existence of an agreement, this was clearly erroneous.

There being a term in the shock probation agreement in existence that referenced the assault charges, the interpretation of that agreement, including whether any ambiguities existed, is reviewed by this Court *de novo*. *Id.* at 385 (citations omitted). As analyzed *supra*, the term "tabled" was an ambiguity in the agreement. As a matter of law, this must be construed against the Commonwealth. *Elmore*, 236 S.W.3d at 626-27.

Turning to the question of whether Stewart had the ineffective assistance of counsel when he entered a guilty plea in 2007 to the 1997 felony assault charges, clearly he did. Under both the U. S. Constitution and the Kentucky Constitution, double jeopardy prohibits multiple punishments for the same offense. *Commonwealth ex. rel. Bailey v. Bailey*, 970 S.W.2d 818, 819 (Ky.

App. 1998). The Fifth Amendment to the U. S. Constitution and Section 13 of the Kentucky Constitution act to "protect a criminal defendant from three distinct abuses: (1) a second prosecution from the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the offense." *Hourigan v. Commonwealth*, 962 S.W.2d 860, 862 (Ky. 1998) (citing *U.S. v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).

Stewart's situation is markedly different from *Eggerson*, 656 S.W.2d at 745-46, where counsel was not deemed to be ineffective for advising Eggerson to plead guilty where review of the matter did not reveal a patent constitutional defense and Eggerson did not apprise counsel of such. Stewart's case is highly distinguishable from Eggerson's for a variety of reasons.

First, Wright was present when the shock probation agreement was put on the record in 1997. Wright testified that he knew there was discussion prior to Stewart's guilty plea in 2007 that the 1997 assault charges were supposed to be dismissed. And although Owens, rather than Wright, negotiated the 1997 probation agreement with the Commonwealth for Stewart, Wright did not investigate the nature of the probation agreement to verify whether the assault charges were to be dismissed. Rather, in advising Stewart to enter a guilty plea in 2007, Wright only reviewed the written record and did not review the 1997 video recording of the probation agreement. While the record is silent regarding whether Wright spoke to Owens regarding the terms of the 1997 probation, either way this weighs in Stewart's favor on his RCr 11.42 claim. If Wright spoke to Owens about

the agreement, presumably Owens would have said the same thing he did at the evidentiary hearing and at several hearings over the years: that the probation agreement included dismissal or a favorable resolution of the assault charges. If Wright did not speak to Owens about the terms of the probation agreement, then he failed to investigate a constitutionally valid defense of which he was on notice. Where counsel has notice of a constitutionally valid defense and nonetheless counsels his client to plead guilty without defending such, this is presumptively the ineffective assistance of counsel. And under the facts of this case, it clearly constituted the ineffective assistance of counsel.

By Stewart's fulfilling the agreement to be banished from Kentucky for twenty-four months, the Commonwealth should have dismissed these charges.[10] Accordingly, when the Commonwealth pursued prosecution of the assault charges in 2007, Stewart's double jeopardy rights were violated. He thereafter received the ineffective assistance of counsel when he was advised to plead guilty. Consequently, the circuit court erred when it decided to the contrary, and reversal is required.

We note that Stewart also argues that Owens and/or Wright provided the ineffective assistance of counsel when one or both of them did not ensure that the October 31, 1997 written order reflected the terms of the shock probation

[10] We note that our decision does not condone the punishment of banishment. As early as 1965, the former Court of Appeals stated that the "Commonwealth concedes it is beyond the power of a court to inflict banishment as an alternative to imprisonment." *Weigand v. Commonwealth*, 397 S.W.2d 780 (Ky. 1965). Yet, this practice continues, as is evident in this case. *See also Butler v. Commonwealth*, 304 S.W.3d 78, 79 (Ky. App. 2010).

agreement. Certainly, this is a matter of concern and is beyond doubt a factor that started the chaos in this matter. This is somewhat of an unusual posture for an RCr 11.42 case: a claim for the ineffective assistance from separate counsel ten years prior to the guilty plea under review currently. However, having found Stewart is otherwise entitled to relief under RCr 11.42 and given that this would be somewhat of an academic question at this juncture, we decline to try to resolve this. But, we cannot deny that this was the genesis of the formation of the dark cloud hanging over Stewart's head from 1997 until the present time -- while he sits in jail awaiting the resolution of this appeal.

Turning to Stewart's CR 60.02 arguments, they are not properly before the Court. Although Stewart raised them before the circuit court, the circuit court's order only disposed of Stewart's claims under RCr 11.42 and did not rule on his CR 60.02 motion. The circuit court's not having ruled on the CR 60.02 motion, it is not properly before us. *See Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-51 (Ky. App. 2008).

From any vantage point, the reasons set forth are more than sufficient to reverse the circuit court. And, while the disposition of the matter centers around the ineffective assistance of Stewart's counsel regarding the advice to enter a guilty plea although Stewart had a valid constitutional defense to the charges, the Court cannot be silent given that throughout the thirteen-year history of this case nearly all officers of the court involved -- and to some extent the court itself -- failed to ensure that justice was done in this matter. Heavy caseloads and impaired

memories by the Commonwealth, the circuit court and defense counsel are no excuse for the constitutional injustices Stewart has endured since his return to Kentucky in 2002. Despite the thorough review of this record undertaken by this Court, the Court cannot recount all the wrongs he suffered, including bench warrants issued against him while he was out of Kentucky complying with the terms of his shock probation agreement and his subsequent arrests on those bench warrants and incarcerations in the Pike County Jail. Either Stewart or his family had to put up several bonds so that he could be released from jail — having been detained on bench warrants that never should have issued. He had numerous court hearings and presumably he or his family paid counsel to appear on his behalf. To fully recount all the injustices that have taken place in this case would nearly be overwhelming.

Not only did defense counsel fail Stewart, the Commonwealth clearly failed to seek justice. Plea agreements involve an obligation of good faith and fair dealing. Moreover, despite the fact that the Commonwealth argued it had a heavy caseload resulting in the case "falling through the cracks," there were numerous signals that this matter demanded its attention for resolution. Ms. Graham was present at most, if not all, of the hearings. When Stewart was represented by Owens -- which was nearly all of the hearings prior to August of 2007 -- the Commonwealth was on full notice of the issue of dismissal of the assault charges, with Ms. Graham herself referencing the agreement as a "diversion."

The Commonwealth certainly shares blame in the injustices done in this case. It had an obligation to comply with the terms of its agreement. And, beyond that, if somehow its version of the agreement can be reasonably reconciled, to hold a felony charge over Stewart's head for thirteen years; to fail to prosecute him when he was being held on an unrelated charge and held on bench warrants on numerous occasions; and to continue to allow him to be badgered by bench warrants issued when he -- per an agreement with the Commonwealth -- was residing outside of Kentucky, are simply inexcusable. Moreover, the

> interest of the Commonwealth in a criminal prosecution is not that it shall win a case but that justice shall be done. The decisions of this court afford abundant support of this principle. We have many times declared that there rests upon prosecuting attorneys the obligation to deal fairly with the accused and to recognize his legal rights as well as the rights of the Commonwealth, and that these public officials should see that the truth is disclosed and that justice shall prevail.

Arthur v. Commonwealth, 307 S.W.2d 182, 185 (Ky. 1957).

Finally, there is the court. The court failed Stewart as well. Initially, the court itself did not inquire into what the parties meant by "the other felony charges will be tabled." Thereafter, the court signed a vague written order presumably tendered by the Commonwealth that referenced that Stewart would abide by the terms of the agreement, without having the terms set forth in the written order. Judge Lowe, who entered that agreement, also issued bench warrants against Stewart within a year of the beginning of his two-year banishment

agreement, and Stewart suffered numerous injustices due to these bench warrants upon his return to Kentucky.

Later, when the case was heard by Judge Combs, the matter had become extraordinarily convoluted due to the numerous mistakes by defense counsel, the Commonwealth and the court. Yet, even Judge Combs acknowledged the confusion of whether the case should have been dismissed, which brought to light an unresolved double jeopardy violation. Consequently, this Court ponders whether there exist palpable error issues that could also have been raised as grounds for reversal.

We also note that lurking in the background of all the other injustices is the potential issue regarding whether Stewart's right to a speedy trial under the Sixth Amendment to the U. S. Constitution and Section 11 of the Kentucky Constitution was violated. Stewart was under indictment in this matter for ten years. Unfortunately, the issue has never been raised in the case; perhaps, it was not raised due to palpable error, the ineffective assistance of counsel and/or the Commonwealth's failure to ensure that justice -- not a prosecution -- prevail.

Justice eluded this case, and there is nothing but empty excuses for the numerous constitutional wrongs inflicted on Stewart in this matter. All involved who were charged with upholding the U. S. Constitution and the Kentucky Constitution failed in one way or another in their obligations to ensure that justice prevail. All share in the blame.

The Court's having concluded that Stewart received the ineffective assistance of counsel when he was advised to enter a guilty plea contrary to his constitutional right to be protected against double jeopardy, the circuit court is reversed, and the judgment is vacated.

Moreover, the analysis of Stewart's RCr 11.42 claims before the Court necessarily included a review of the terms of the shock probation agreement. Pursuant to *Elmore*, 236 S.W.3d 623, and as analyzed *supra*, the ambiguous phrase "the other felony charge will be tabled" must be construed against the Commonwealth as requiring dismissal of the charges if Stewart complied with the terms of the agreement. Stewart's having fulfilled the term of shock probation, he completed his term of pretrial diversion for the felony assault charges. Accordingly, the indictment should have been dismissed, and the prosecution of these charges in 2007 was necessarily a double jeopardy violation. Hence, the judgment against Stewart cannot stand.

> [S]imply postpon[ing] the ultimate adjudication of [Stewart's] right to relief and . . . requir[ing] further court proceedings . . . under the circumstances appear unnecessary in the administration of justice. . . . Having considered the many problems involved, we are of the opinion that justice requires terminating this controversy in this proceeding. On the assumption that [Stewart] has already served his [] sentence, he is entitled to immediate relief.

Hardy v. Howard, 458 S.W.2d 764, 765 (Ky. 1970).

Furthermore, the

> sentence imposed [is] manifestly infirm. Under the facts of this case, the indictment should be dismissed. As it stands, the [Appellant] sits in prison wrongfully convicted.

Commonwealth v. Nash, 338 S.W.3d 264, 268 (Ky. 2011) (wherein the Court determined that the defendant could not be guilty for violating a statute that did not apply to him) (note omitted).

As in *Nash*, this matter is remanded to the circuit court for an entry of an order consistent with the terms of the agreement of October 31, 1997, between Stewart and the Commonwealth, dismissing the indictment in 97-CR-70, and to order the release of Denver L. Stewart, III from these charges.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT.

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