NO. TSR CV22-5001234-S STATE OF CONNECTICUT

JOSEPH VISCONTI : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF TOLLAND

COMMISSIONER OF CORRECTION : JUNE 11, 2024

Memorandum of Decision

In *State v. Garvin*, 242 Conn. 296, 699 A.2d 921 (1997), our Supreme Court held that due process principles allow a trial court to increase a defendant's sentence beyond that called for in a plea agreement if the defendant fails to comply with one of the conditions of the agreement. Id., 314. These conditions commonly include appearing for the sentencing hearing or avoiding new arrests. See *State v. Yates*, 169 Conn. App. 383, 401, 150 A.3d 1154 (2016), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017). In this habeas corpus case, the petitioner, Joseph Visconti, claims, inter alia, that his guilty pleas violated due process because the trial court did not advise him that the pleas were subject to *Garvin* conditions.

I. HISTORY OF THE CASE

A. The 2019 Pleas

The record reveals the following undisputed facts. On September 18, 2019, the petitioner, represented by Attorney Jeremiah Morytko, pleaded guilty in Geographical Area Court # 2, Bridgeport, to charges in three separate files. The charges were: unlawful restraint in the first degree under General Statutes §53a-95 (a Class D felony with a maximum

sentence of five years in prison); reckless endangerment in the first degree under General Statutes § 53a-63 (a Class A misdemeanor with a maximum of one year); and assault in the third degree under General Statutes § 53a-61 (a Class A misdemeanor with a maximum of one year) (the "2019 cases"). Thus, the maximum prison sentence for all three offenses combined was seven years in prison.[1] The prosecutor presenting the case, Kevin Dunn, read from his file that the plea agreement called for "Maybe a five, one, three cap with no guarantee per State. The State [sic] not seeking jail." The prosecutor added: "And if he does well in AIC, Evolve [sic] I'm not gonna [sic] be asking for jail. I think I said five, one, three before."[2] Shortly thereafter, he reiterated: "I was talking about a five, one, three after speaking with the complainant [sic] I think it's fair." (Exhibit (Ex.) 3 (9/18/19 Transcript (Tr.)), pages (pp.) 1, 3, 4.)

After canvassing the petitioner on the rights he was waiving by pleading guilty, the following colloquy occurred when the trial court, *Calistro, J.*, spoke to the petitioner. "THE COURT: All right. And what this calls for is a five-year suspended after one-year, three year probation cap. That means the State cannot seek more than one year incarceration. If you're unsuccessful in the AIC, Evolve program, if you pickup any new cases, if you don't

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[1]At some point, the maximum penalty for the misdemeanors became 364 days rather than one year but, for purposes of this decision, the court will refer to the maximum penalty as one year.

Although the maximum penalty for all offenses includes fines, the court overlooks that aspect of the maximum punishment because there was no realistic possibility of imposing or collecting fines in these cases.

[2]"AIC" commonly refers to the alternate incarceration program.

abide by the protective order.

Madam Clerk, status?

"THE CLERK: It's a no contact.

"THE COURT: Full no contact that still remains in effect. Then the State can seek up to one year incarceration. On the other hand, if you successfully complete AIC. If you successfully complete the Evolve program, what's the end game, Mr. Dunn?

"ATTY. DUNN: Your Honor, I will argue, Your Honor, that if he does well at AIC and Evolve, I will not ask for incarceration. We will put him on probation, and we'll come up with some type of standing order.

...

"THE COURT: Is that your understanding of the agreement, sir?

"THE DEFENDANT: Yes." (Ex. 3, pp. 10-11.)

The court ultimately accepted the guilty pleas and ordered a presentence investigation. At the end of the proceeding, Judge Calistro stated: "[S]o I mean, look if there's gonna be a violation and I hope that doesn't happen where she set you up sort of speak [sic] but if you have any contact whatsoever, you're exposed to that one-year cap and the rest of the split sentence. You understand, right?" The petitioner replied "Yes." (Ex. 3, pp. 13-15.) There was no mention of *Garvin* or any analogous concept at any time during this proceeding.[3]

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[3]The petitioner had appeared in court on at least three previous dates on some or all of these files. With one exception, there was no discussion of a plea agreement. (Exs. 1, 2, 4.) That exception occurred on August 13, 2019, when the prosecutor stated: "I indicated to Counsel, I – I – might consider like 5, 1, 3. I might speak to – he has the right to argue for less. Let me speak to

On October 30, 2019, December 6, 2019, January 15, 2020, and February 26, 2020, the court heard the case for the purpose of monitoring the petitioner's progress in treatment (Exs. 5, 6, 7, 8.) There was no specific discussion of the plea agreement during these appearances. On October 30, the prosecutor stated: "There's a lot at stake here, Your Honor. A big cap, he's got to do well. I'm hoping he does." (Ex. 5 (10/30/19 Tr.), p. 2.) On the next appearance in December, the court stated: "So he's got to be aware that the – the felony, misdemeanor, so he's facing cap. [sic] So there's a lot at stake for you, Mr. Visconti." (Ex. 6 (12/6/19 Tr.), p. 2.) At no time was there any mention of a *Garvin* plea or anything analogous.

B. The 2021 Proceedings

Although on February 26, 2020, the court had continued the case to April 8, 2020, the COVID pandemic apparently interrupted the progress of the case. On May 18, 2021, the defendant next appeared in court because of three new arrests by warrant in domestic violence cases. (the "2021 cases") (Ex. 9 (5/18/21 Tr.), p. 1.) The 2019 cases came back to court on the next day, at which time the clerk stated "Yes, your Honor, I have pleas in all three files from September 18th, 2019. The defendant is on a five-year CAP [sic]." (Ex. 10 (5/19/21 Tr.), p. 4.) In a subsequent hearing on June 8, 2021, there was no mention of the 2019 plea agreement. (Ex. 11 (6/8/21 Tr.)) At no point during these preliminary proceedings was there any reference to a *Garvin* plea.

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the victim ... But this is a 5, 1, 3; that would continue to be that." (Ex. 2 (8/13/19 Tr.), pp. 1-2.) There was no reference to a *Garvin* plea.

The case returned to court on October 13, 2021. At that time, the court, *Dayton, J.,* stated: "So, at this point, he had been on, I believe, it was a five-year cap with a seven-year *Garvin*, and with the – there's three new cases." Judge Dayton subsequently remarked: "My understanding of the offer is that it's 15 years execution suspended after seven years and five years of probation. Includes pleas on the three new cases. That's my understanding of what the offer was." (Ex. 12 (10/13/21 Tr.), pp. 1, 6.) Neither Morytko nor assistant public defender Dennis Salzbrunn, who now represented petitioner in the 2021 cases, made any comment about the reference to a *Garvin* plea.

The petitioner appeared for pleas and sentencing before Judge Dayton on December 1, 2021. Judge Dayton commented: "He was placed on a five-year cap and given a seven - year *Garvin* ... then he picked up three new cases with offense dates of November 13th, 2020, February 7th, 2021; there was two charges – or two cases from that same date. I made an offer for a resolution for all of the files ...." In response, Salzbrunn stated: "I believe he will go forward with the 15 after 7, 5 years probation; that would wrap up all six of these cases." (Ex. 13 (12/1/21 Tr.), p. 2.)

The petitioner then pleaded guilty in the three new files to three counts of violation of a protective order, one count of strangulation in the second degree, and one count of unlawful restraint in the first degree.[4] The court next proceeded to canvass the petitioner.

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[4]The maximum sentence for each violation of the protective order is ten years; General Statutes § 53a-223 (c); five years for strangulation in the second degree; General Statutes § 53a-64bb; and five years for unlawful restraint in the first degree; General Statutes § 53a-95. Salzbrunn testified that the maximum sentence for these offenses was nonetheless only twenty-

Judge Dayton asked: "Did [your attorney] explain to you the charges to which you're pleading and the terms of the plea agreement" and "Did he explain the maximum penalty you could face?" In each case, the petitioner answered "Yes." (Ex. 13, pp. 3-7.)

The court then solicited comments from the state and defense counsel. The prosecutor asked "the Court to impose the agreed upon recommendation, 15 years suspended after 7 to serve, 5 years probation." Morytko commented that "[h]e has subsequent arrests, so this becomes a seven-year deal but the cap was five, and I ask you to give him some consideration with regard to that in sentencing today." Salzbrunn made some additional comments, but neither defense attorney questioned the court's belief that the petitioner had entered a plea in 2019 with a five year cap and, in the event of a *Garvin* violation, a seven year cap. (Ex. 13, pp. 11-15.)

Judge Dayton thereupon sentenced the petitioner to a net effective sentence of fifteen years suspended after seven years with five years of probation on the 2021 cases and a net effective sentence of five years concurrent on the 2019 cases. The combined net effective sentence was fifteen years suspended after seven with five years of probation. (Ex. 3, pp. 18-19.)

II. ANALYSIS

The petitioner claims that his entry of guilty pleas without being advised of the *Garvin*

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five years given claims that some of the offenses merged with each other. Salzbrunn also testified that the petitioner's total exposure in the 2021 cases was at least 56 years in view of additional offenses with which the state charged him but agreed not to prosecute if he pleaded guilty.

consequences constitutes a violation of due process and Practice Book § 39-19. (Amended Petition, p. 8.) The petitioner also alleges that Morytko and Salzbrunn rendered ineffective assistance of counsel, principally in failing to discover that the court had never advised the petitioner under *Garvin*.[5] The petitioner asks the court to vacate the judgment of the trial court and return the matter to the trial court docket.[6]

The court addresses the due process claims first. Our Supreme Court has stated: "In *Boykin v. Alabama*, [395 U.S. 238, 242–44 (1969)], the United States Supreme Court held that, because a plea of guilty effectively functions as a waiver of important constitutional rights, it must be made knowingly and voluntarily... For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege... Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts... An essential part of understanding the law as it applies to the facts is knowing the maximum amount of time that the defendant could spend in confinement...." (Citations

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[5]Although the petitioner did not appeal from the judgment entered against him, the respondent (hereinafter the state) does not allege or argue that there was a procedural bypass. See Practice Book § 23-30 (b). Therefore, the issues are properly before the court on the merits.

[6]At the habeas trial, the court advised the petitioner that the relief he seeks could result in the case going back to the trial docket and the imposition of a greater sentence than the one he received. The petitioner understood this point and stated that he wished to go forward with the habeas petition.

omitted; internal quotation marks omitted.) *Duperry v. Solnit*, 261 Conn. 309, 320–21, 803 A.2d 287 (2002).

In Connecticut, Practice Book § 39-19 (4) provides that "[t]he judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands ... (4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction ...." Our courts have held or strongly implied that, when a court fails to inform or misinforms the defendant of the maximum penalty on the charges against him, a plea induced by that misinformation is involuntary. See *State v. James*, 197 Conn. 358, 365–66, 497 A.2d 402 (1985) (failure to inform defendant of maximum penalty raises "grave questions ... pertaining to the voluntary nature of the plea and consequently its constitutional validity."); *State v. Cassidy*, 62 Conn. App. 418, 421, 771 A.2d 240 (2001) (court agreed that defendant's plea was "involuntary" because "the court misinformed him of the [maximum] penalty on the charges against him [and] that his plea was induced by that misinformation ....")

A. The 2019 Cases

There is no dispute that Judge Calistro did not inquire of the petitioner whether he understood that he was entering guilty pleas on the 2019 cases under *Garvin* and that, if he did not comply with certain conditions, he could be subject to the maximum sentence of

seven years. Nor has there ever been in this case any clarification on the record of what those conditions were. The court assumes now that one condition was no new arrests, but the record is silent on this issue. Instead, Judge Calistro merely informed the petitioner – inaccurately, as it turned out – that "the State cannot seek more than one year incarceration" and "the State can seek up to one year incarceration." The petitioner stated that he understood these terms of the agreement.

The Appellate Court has held that a defendant's actual knowledge about the maximum sentence, obtained generally when his attorney advises him of such, can represent "substantial compliance" with the Practice Book rule and can remedy the court's failure to ensure that the defendant understands the maximum sentence. See *State v. Carmelo T.*, 110 Conn. App. 543, 552-53, 955 A.2d 687, cert. denied, 289 Conn. 950, 960 A.2d 1037 (2008). The state relies on this argument. Here, Morytko testified at the habeas trial that he did advise the petitioner of the *Garvin* consequences at the time of his plea. The petitioner, however, testified that Morytko did not.

The court resolves this controversy by looking at the contemporaneous memos that Morytko wrote to his file about the case. Morytko's memo dated September 18, 2019 – the date of the plea – literally reads that the petitioner "is to be given a sense of five years to bend it after one with three years probation has a maximum." (Ex. 22.) The court interprets this memo, which may have been dictated, as stating "a sentence of five years, to suspend it after one year, with three years probation as a maximum," which is exactly what Judge

Calistro put on the record. Two years later, in a memo dated October 5, 2021, but which Morytko apparently emailed to his office on December 17, 2021, Morytko wrote that the petitioner "owed five years for the violation of the plea" for "three more files." (Ex. 23.) Although there is no basis to say that the petitioner owed five years, the memo is still noteworthy in that it does not mention *Garvin* or a possible seven year sentence. It was not until December 1, 2021, the day of sentencing, that Morytko noted in a memo to file: "Five year cap on his previous plea under Garland [sic] allows the Court to sentence him to seven years, his maximum exposure to charges he pled to, when there is a new arrest." (Ex. 24.) In short, Morytko's failure to mention *Garvin* or a possible seven year sentence in his contemporaneous memos until the day of sentencing convinces the court that Morytko did not discuss this important topic with his client prior to his plea.[7]

The court also rejects the state's argument that the petitioner actually received a five year sentence called for by the original plea agreement and did not in fact receive a *Garvin* sentence. It is true that the petitioner received concurrent terms of five years, one year, and one year for a net effective sentence of five years in the 2019 cases, rather than the seven year maximum possible under *Garvin*. But the five year suspended sentence in the original plea agreement could become a five year prison sentence only if the petitioner violated probation. Although the petitioner may have violated the conditions of his release by committing additional offenses, he never violated probation. In fact, the petitioner was never

[7]The petitioner would not likely have known about *Garvin* pleas on his own, as he had no prior criminal record.

placed on probation. His violations all occurred prior to his sentence.

Thus, the court concludes that, at the time of the petitioner's guilty pleas in the 2019 cases, the court did not ensure that the petitioner understood the maximum possible sentence of seven years under a *Garvin* plea and that the petitioner did not have actual knowledge of this maximum sentence. Accordingly, the court did not comply, even substantially, with Practice Book § 39-19. As a result, the petitioner's guilty pleas in the 2019 cases should be considered involuntary and obtained in violation of due process. See *Duperry v. Solnit*, supra, 261 Conn. 320–21; *State v. James*, supra, 197 Conn. 365–66; *State v. Cassidy*, supra, 62 Conn. App. 421. The court accordingly orders the 2019 guilty pleas to be vacated.

B. The 2021 Cases

Judge Dayton complied with Practice Book § 39-19 in asking the petitioner whether his lawyer had "[explained] to [him] the charges to which [he was] pleading and the terms of the plea agreement?" and whether the lawyer had "[explained] the maximum penalty [he] could face?" The petitioner answered "Yes." The court credits Salzbrunn's testimony at the habeas hearing that he told the petitioner prior to his plea that the maximum sentence he could receive on the 2021 charges that the state was prosecuting was twenty-five years. Thus, it is fair to conclude that the petitioner understood that he could receive up to twenty-five years in prison on the 2021 cases.

But § 39-19 also requires the court to determine that, "if there are several charges," the defendant must understand "the maximum sentence possible from consecutive sentences

...." Practice Book §39-19 (4). Thus, because of the possibility of consecutive sentences, the court had an obligation on December 1, 2021 to determine whether the petitioner understood the maximum possible sentence he could receive when sentenced on both the 2021 and the 2019 charges.

Judge Dayton stated on the record that, in the 2019 cases, the petitioner was "placed on a five-year cap and given a seven-year *Garvin.*" Neither part of this statement was accurate. The cap on imprisonment for the 2019 cases was one year, not five (unless he violated probation, which never happened), and there was no *Garvin* plea in 2019.[8]

If the court imposed the maximum sentence based on this misunderstanding, the petitioner could have received a maximum sentence of twenty-five years in the 2021 cases plus seven years in the 2019 cases, for a total of thirty-two years. In reality, however, the petitioner could legally receive only a maximum sentence of twenty-five years in the 2021 cases plus one year in the 2019 cases, or a total of twenty-six years. The petitioner had no way of knowing that, legally, he could receive only one year for the 2019 cases in addition to the term of imprisonment he would receive for the 2021 charges because no one had told him about the deficient *Garvin* plea. In short, the court could not have complied with § 39-19 and determined that the petitioner understood the maximum possible sentence from all of the charges when neither the court nor the petitioner correctly understood that maximum

[8]The only evidence as to how Judge Dayton became misinformed was testimony by Salzbrunn that Judge Dayton looked at her notes on the computer and observed that there was a "seven-year *Garvin.*"

possible sentence.

Although the noncompliance with § 39-19 may seem purely technical, the practical result in this case is quite stark. The petitioner pleaded guilty to the 2021 charges believing that, no matter what, he necessarily would have to serve seven years under *Garvin* for the 2019 charges and that the plea agreement resolving all cases, including the 2021 cases, for a total of fifteen years suspended after seven years would thus result in no or little additional time in prison. The reality is that, legally, the petitioner was facing only one year of prison on the 2019 cases and that the global resolution of fifteen years suspended after seven involved six additional years in prison. The petitioner understandably testified that he would not have pleaded guilty to the 2021 charges had he understood this reality.

The court's noncompliance with Practice Book § 39-19 means that the petitioner's plea to the 2021 charges was involuntary and taken in violation of due process. See *Duperry v. Solnit*, supra, 261 Conn. 320–21; *State v. James*, supra, 197 Conn. 365–66; *State v. Cassidy*, supra, 62 Conn. App. 421. The court accordingly orders the 2021 guilty pleas to be vacated.[9]

[9]In view of this conclusion, the court need not reach the ineffective assistance of counsel claims.

III. CONCLUSION

The court grants the petition for habeas corpus relief, vacates the judgments on the 2019 and 2021 cases, and orders the cases returned to Superior Court, Geographical Area #2, Bridgeport, for further proceedings.

It is so ordered.

Schuman, JTR

Carl J. Schuman
Judge Trial Referee, Superior Court

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