2010 WL 9588981 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

John Jackson ROBBINS, Jr., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

No. 2009-CA-002178-MR.
November 29, 2010.

Appeal from Jefferson Circuit Court Case No. 07-CR-2001

Brief of Appellant

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Introduction

This appeal [1] concerns a Circuit Judge's refusal to abide by the requirements of RCr 11.42 and set aside a criminal conviction and judgment incarcerating an adult son for ten years on charges of **abuse**/neglect, exploitation of, and theft from his **elderly** mother. The charges never had any basis in fact and had been bitterly disputed by the mother. Appellant's conviction was procured unlawfully by refusing to identify any acts that he had committed or when he had done them, and by barring all contact between him and his mother so she could be kept from coming to court and the prosecution of her son could be done ostensibly on her behalf but against her wishes. The Commonwealth, with what appears to have been assistance from Appellant's trial counsel, exploited his fear of what such a stealth prosecution could lead to in order to leverage him into entering an *Alford* plea which he mistakenly viewed as a compromise that would cause him to be probated.

The Hon. Irv Maze was presented with an array of serious constitutional violations, all of which he disposed of without even mentioning that they existed when he entered his Opinion and Order denying Appellant's RCr 11.42 motion on October 19, 2009. Judge Maze's Opinion consisted largely of a transcript of Appellant's plea colloquy. While ignoring all other substantive claims, the Opinion did mention that ineffective assistance of counsel had been asserted but declined to mention or address any of the arguments in support of the claim which he denied without affording any opportunity for an evidentiary hearing.

Statement in Support of Oral Argument

Oral argument is desired for two reasons. First, what has occurred in this case is so extreme that members of the appellate panel may need to question counsel to feel reassured that the facts as alleged in this brief really did occur. Second, because the case raises some very fundamental issues of due process (e.g., whether it is permissible to prosecute a defendant without ever letting him know what he has done and how his actions violated the charging statutes; whether it is permissible to ground a prosecution on a police detective's highly idiosyncratic legal theory that possession of a standard power of attorney document makes a son strictly liable for his mother's "quality of life"), U.S. Supreme Court decisions normally beyond the purview of state appeals are central to the outcome. The panel may wish to ask questions regarding the reach of these opinions.

***1 Statement of the Case**

John Jackson Robbins, Jr. and Harriet Messer Robbins were an adult son and **elderly** mother who lived together, Harriet was an intelligent, mentally competent, [2] 81 year-old woman with limited mobility. She relied on John to run errands, keep them supplied with food and do their banking. She and John were joint owners of their home, shared bank accounts and exchanged Power of Attorney documents. See Appellant's Appendix annexed hereto, ("APX") at 38.

The legal validity of this POA document is not disputed; nor is the fact that it explicitly authorized John "to receive and receipt for any money which may now or hereafter be due to [Harriet Robbins]" and "to draw, make and sign in my name any and all checks, promissory notes, contracts or agreements." *Id.* The POA was freely given because Harriet expected John to be inheriting all assets soon anyway and the Commonwealth has never alleged either deception or intimidation by John. Nevertheless, the POA failed to accomplish its intended result and led indirectly to John being sentenced to ten years in prison.

This occurred because the Commonwealth's Attorney invented two new legal offenses: theft notwithstanding consent of the owner, and exploitation based solely on a recipient having used assets "for his own purposes."

***2** John Robbins and his mother had approximately $1.5 million in assets between them, nearly all of which was due to go to John upon her death. She authorized his purchase of a second home near Barren Lake and at no time complained, either to him or the authorities, about any of his expenditures. (APX 10-11, APX 56-60). John made numerous two-day trips to the home near Barren Lake and at those times his mother was cared for by an unrelated caretaker, about whose care there has been no complaint.

On November 23, 2006 while John was at the homeout of town three things occurred within a period of several hours. First, John was telephoned by the caretaker to advise that Harriet was suffering a flare up of a chronic inherited condition of cellulitis that was not painful but produced swelling and blisters on her legs. Utilities were turned off unexpectedly for a couple hours and Louisville police arrived to forcibly eject Harriet from her home, initially taking her to Baptist East Hospital for treatment. See Affidavit of Rebecca Schone dated September 17, 2010,¶¶7-11, and of John Robbins dated September 21, 2010, both contained in appendix to brief in Appeal No. 2010-CR-001969.

On June 14, 2007 John Robbins was indicted on charges of **abuse** or neglect of an adult, exploitation of an adult and theft, KRS §§ 209.990(2), 209.990(5) and 514.030 (APX 44-48). His indictment contained twelve substantive counts, nine of which received no bill because they were simply repetitions of the third count. Aside from the PFO enhancement contained in count thirteen, it thus had only three counts. As can readily be seen when they are repeated verbatim, they told Defendant Robbins nothing about what he had done or when he had done it-other than that it occurred on some ***3** unknown day or days within a 360, 400 or 420-day period.

COUNT ONE KRS 209.990(2)

That between July 7, 2005 and November 27, 2006, in Jefferson County, Kentucky, the above named defendant, JOHN JACKSON ROBBINS, JR., committed the offense of Knowing **Abuse** or Neglect of an Adult when he knowingly **abused** or neglected Harriet Robbins, an adult as defined in KRS 209.020(4).

COUNT TWO KRS 209.990(5)

That between February 1, 2006 and January 25, 2007, in Jefferson County, Kentucky the above named defendant, JOHN JACKSON ROBBINS, JR., committed the offense of Knowing Exploitation of an Adult by a Caretaker Over $300 when he knowingly exploited Harriet Robbins, an adult as defined in KRS 209.020(4) and the exploitation resulted in a total loss to the adult more than $300 in **financial** or other resources.

COUNT THREE KRS 514.030

That between February 1, 2006 and April 1, 2007 in Jefferson County, Kentucky, the above named defendant, JOHN JACKSON ROBBINS, JR., committed the offense of Theft By Unlawful Taking by taking or exercising control of property of a value of $300 or more belonging to Harriet Robbins with intent to deprive the owner thereof.

Eleven days after the indictment was filed the Jefferson Circuit Court ordered the Commonwealth to provide a bill of particulars pursuant to RCr 6.22 and to allow the Defendant to receive a recording or transcript of grand jury proceedings pursuant to RCr 5.16(3). (APX 50-51). Neither was ever provided; the Court's orders were simply defied. The only other information provided to John Robbins regarding **abuse** or neglect was the prosecution's Statement of the Facts of the Case which stated that he had "permitted the victim's medical condition to worsen without seeking appropriate care for her, leaving her with multiple sores on her legs ..." (Read into record during plea colloquy and reproduced in the transcript created by Judge Maze, *See* APX at 28). These sores on Harriet Robbins' legs were not bed sores arising from either inadequate ***4** hygiene or failure to move a

non-ambulatory patient. They were a hereditary condition of cellulitis that was neither painful nor life-threatening, but flared up occasionally and "look[ed] terrible," which in this one instance happened when John Robbins was out of town and Harriet was being tended to by a hired caretaker. *See* Robbins and Schone Affidavits contained in Appendix to companion brief.

Insofar as John was ever told anything about why he was being prosecuted for **abuse**/neglect under KRS 209.990(2) it was in the prosecution's "statement of the facts of the case" which was read verbatim at his plea colloquy. It stated in full:

In Jefferson County between February 6, 2006 and April 6, 2007 Defendant had assumed the role of caretaker for the victim Harriet Robbins (81 years old and physically and mentally disabled). During that time, Defendant **financially** exploited the victim by utilizing her funds for his own purposes by various bank withdrawals, issuing checks and cashing annuities, unlawfully taking $114,889.34. Also during this time, Defendant knowingly permitted the victim's medical condition to worsen without seeking appropriate care for her, leaving her with multiple sores on her legs and without utilities. Defendant was previously convicted of a felony and released from service within five (5) years prior to this offense.

Neither the source of the $114,889.34 figure nor the basis on which withdrawals were being deemed "unlawful" was ever explained. Because John and Harriet had exchanged power of attorney documents, had some joint accounts, and Harriet relied on John to do the banking and shopping for both of them, the withdrawals were lawful in the eyes of bank personnel, Harriet and John.

On July 14, 2007, a month after John and Harriet were barred from having contact with one another-Harriet attempted to communicate with the Court by giving a recorded interview to John's trial counsel. The interview, the recording of which was filed as part of this appeal and is contained in the Appendix to Appellant's brief in the companion appeal, shows her to be cogent, alert and competent, as well as perplexed ***5** by the suggestion that her son could be charged with **abuse** or neglect of her.

Question: "But he has never hit you or pushed you or anything?"

H. Robbins: "Never ever. He has never been that kind of ... never, never(laughs).

Question: "How would you characterize your relationship with John?"

H. Robbins: "Well, I just love John."

Question: "How would you characterize his relationship with you?"

H. Robbins: "He loves me too."

Question: "Do you ever remember his doing anything intentionally to hurt you?"

H. Robbins: "Oh no, uh-uh, absolutely not. (Pause) My mother said, she told all her friends that she had never seen a child love its mother like John loved his....At any rate, it has been reciprocal, this love between the mother and the child. John has always been a really affectionate child."

Question: "Harriet, who is the beneficiary of your will?"

H. Robbins: "John is. John is the only family that I have. Whatever I have John will get it. John's father and I have been divorced since John was practically a baby."

The **abuse**/neglect charge appears to have originated in a policeman's observations that Harriet Robbins' legs were swollen and blistered. But about this Harriet said in the interview:

This is like a family trait. My dad's legs looked like this. This is not physical **abuse**. They look terrible... What I'm trying to point out is that John has never physically **abused**[3] me, and it sounds to me like they've tried to indicate that he has.

On December 16, 2007 Harriet again tried to reach the Court with a letter (APX ***6** 64, 58-60) stating:

For many months now someone in the courts has prevented John from contacting me, and I am extremely unhappy and hurt by this. I never wanted a no-contact order against John, and this order is ruining our relationship. I want to see John at every possible opportunity. I may not have too many years left, at my age, 82. May I please be allowed to see John?

I want to make myself perfectly clear. Anyone who hurts John, is hurting me to the core, and I will hold them to account. John is my only love in the world, and I need him now more than ever.

The letter specifically stated:

John did his best to take care of me and keep me in my home, where I want to be. John cooked, cleaned and kept me company. When he was out, he always kept in touch by cell phone. On my own, I refused to go to a nursing home, or to doctors. My ex-husband was a doctor, and doctors have never done me much good. John fixed meals for me for many years. John has always made me the priority in his life. When I die, I wanted everything I have to go to John, and this has been in my will for forty years or more. I always lend money to John when he needs it, and he was my power of attorney. I will gladly pay his personal legal expenses because I want John to be home with me.

Eventually when the prosecution's 1,326 pages of discovery were finally filed for the first time with the Court during post-conviction proceedings they showed that doctors at Baptist East Hospital had confirmed the correctness of Harriet's statements, that the sores were due to bilateral cellulitis, not any kind of **abuse** or neglect. Shortly after this Jefferson County Adult Protective Services concluded that Harriet had not been to see her doctor as often she should have and characterized her situation as one of "strictly self-neglect." APX 39. This conclusion was changed after

Detective Fogle determined after reviewing the power of attorney document dated February 21, 2006, that John Robbins had assumed the responsibility of healthcare surrogate. (See document in case file.) Therefore, John Robbins was responsible for Ms. Robbins' quality of life. ***7** (APX 39, 42). Thus the detective construed the authority to make medical care decisions in the event of emergency as a kind of acceptance of strict liability for an 81 year-old's "quality of life," such that the holder of the POA could be sentenced to prison if this quality of life declined due to disabilities of aging. (APX 42).

John Robbins' alleged economic crimes against his mother, deemed "theft" and "exploitation," also had a distinct ring of implausibility. Throughout the entire prosecution and post-conviction phases the Commonwealth never disputed the fact that Harriet had consented to John's bank withdrawals but maintained he should be prosecuted anyway because the Commonwealth's Attorney considered a "victim's" freely given consent to be irrelevant to charges of theft and exploitation

In very clear terms the Commonwealth's Attorney's response stated:

The charges in this case were brought by the Commonwealth and the wishes of the mother were irrelevant to the continued prosecution of [John Robbins] for his criminal actions. The Commonwealth is charged with protecting the citizens of this community, even from themselves. The knowledge about [John Robbins'] mother could have had absolutely no affect (sic) on the proceedings..."

Response at 9 (included in Appendix to companion appeal).

In place of the more commonly accepted legal standard for "theft," which requires non-consent of the owner, and the more commonly accepted legal standard for "exploitation," which requires that funds be obtained "by stealth or intimidation," the Commonwealth broadened the reach of these two statutes, KRS 514.030 and KRS 209.990(5), to assert that they would be violated whenever a defendant "**financially** exploited the victim by utilizing her funds for his own purposes" and thereby took "advantage of the victim." Id. at 13.

***8** Not being able to set forth a legally valid case, the Commonwealth relied on its stealth strategy of keeping John in the dark about what he had done and what his mother was saying about him. Once they secured an Alford plea from him, which he mistakenly believed would cause him to be probated and be able to see his mother, the Commonwealth's Attorney argued vigorously about the "horrible" things John had done, always being careful to avoid mentioning any specific act. See presentation of ACA Todd Lewis at sentencing hearing held on March 8, 2008. This led to John being sentenced to ten years incarceration, which he eventually moved to have set aside on multiple grounds in a petition pursuant to RCr 11.42.

The Hon. Irv Maze received John Robbins' verified RCr 11.42 petition and several supporting memoranda. He scheduled oral argument and then shortly before the scheduled date, canceled the argument and denied the petition. He did so in an opinion that consisted largely of a transcript of the plea colloquy. (*See* APX 20-33, APX 20-22 briefly recites a portion of case history, APX 22-32 consists of transcript.) The opinion made no mention of either Appellant's claim that this stealth prosecution was unlawful and unconstitutional or Appellant's argument that he had never been validly charged with an actual criminal offense. It acknowledged the existence of a claim of ineffective assistance of counsel, but avoided mentioning any of the specific allegations on which the claim was based (APX 33). The opinion denied the petition without affording any kind of opportunity for an evidentiary hearing (APX 32), and was quickly followed by denial of Petitioner's CR 59.05 motion to reconsider in an order stating nothing other than that the motion was being denied (APX 35). A timely appeal followed.

This appeal seeks to overturn these two Orders (APX 20-34, 35) as well as Judge ***9** Maze's earlier decision (APX 36-37) to overrule the Court's still pending Order granting access to grand jury proceedings and requiring a bill of particulars pursuant to RCr 5.16(3) and RCr 6.22 (APX 50-51). Because there is an uncontested record that beyond doubt does not even begin to meet the most basic requirements for a criminal prosecution, it is doubtful that any remand will even be needed other than to order Mr. Robbins immediate release from prison. If remand for further proceedings is required, the Court of Appeals should make clear that Judge Maze's order denying all discovery (APX 36-37) constitutes an **abuse** of discretion for two reasons. First, the court had already ordered that the same documents be provided, and, second, where a stealth prosecution has been conducted so that the defendant cannot even know the acts for which he is being prosecuted, it is especially important for the Commonwealth to tender a bill of particulars.

Argument

I. The Jefferson Circuit Court Erred in Denying Appellant's RCr 11.42 Petition Because the Type of Stealth Prosecution that the Commonwealth Conducted Is Not Constitutionally Permissible.

A. It Was Impossible as a Matter of Law for John Robbins to Have Entered a Knowing and Intelligent Guilty Plea Because He Was Never Informed of Anything He Had Done to Warrant Criminal Prosecution of Him.

Because the Commonwealth violated the requirement of RCr 6.10(2) that the indictment contain "a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged," and compounded this error by defying the Court's Order of June 25, 2007 that it provide a bill of ***10** particulars, Defendant John Robbins never received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Smith v. O'Grady*, 312 U.S. 329, 334.(1941); *Brady v. United States*, 397 U.S. 742, 748(1970); *Haring v. Prosise*, 462 U.S. 306, 319 (1983).

For a defendant to be fairly apprized of any offense for which he is being tried he would need to know (1) what acts he engaged in, (2) when he performed these acts, (3) against whom he performed them, and (4) on what basis the Commonwealth is asserting that he had the necessary level of intent to make these acts criminal, and (5) how these acts caused the necessary degree of injury or loss to make the acts criminal. Considering the record as a whole-the indictment, the preliminary hearing that was never held, the bill of particulars that was never filed, the colloquies conducted by the Court before accepting the plea and when rendering judgment, and the prosecution's "statement of facts of the case," which did nothing more than aver generally the existence of bank withdrawals and John Robbins "allowing" diseases normally associated with aging to progress, no meaningful answers are provided to questions (1), (2), (4) and (5).

Appellant's indictment is devoid of information that would enable a reasonable person to deduce or discern that he had committed any acts warranting criminal prosecution. This is true for two reasons. First, no acts or failures to act are specified. The charges are simply tautologies that repeat the statutory language and say in effect, John Robbins violated X because he violated X. Second, no dates are given that might ***11** allow a defendant to recall what happened on a certain day. For each charge there is simply a time window of between twelve and eighteen months during which something, which remains unidentified, happened. With regard to the theft charge the indictment says that on some unknown day or days occurring sometime during a fourteen month period John Robbins took or exercised control of property belonging to his mother. John Robbins lived with his mother, they had joint accounts and exchanged Power of Attorney documents allowing each to withdraw money from the other's accounts. Thus the theft charge amounts to an allegation that John Robbins lived with his mother, did most of the banking for both of them and over the course of fourteen months spent more than $ 300 out of the approximately $1.5 million that he and his mother had.

The exploitation charge has a time window of twelve months, but there is no specification of how Harriet Robbins was exploited. No allegation is made of any stealth or intimidation-nothing to suggest anything other than, as Harriet Robbins herself has claimed, she was simply sharing family assets with her son. Because she at all times had well over a million dollars and was planning to leave it all to John soon anyway, the exploitation charge-based on a claim that he used over $300 for his own purposes"-has a distinct ring of implausibility in addition to being unfathomable.

The Commonwealth's refusal to comply with orders that it provide a bill of particulars and recording of grand jury proceedings meant that any and all clarification of charges had to come from the Commonwealth's statement of the facts of the case, see verbatim reproduction at 4, supra. The only respect in which the above statement of "facts of the case," clarified anything is that it finally made clear that John Robbins was being charged with "neglect" rather than "**abuse**" of his mother. But it continued not to ***12** say anything about what the neglect was. It averred generally that he "knowingly permitted the victim's medical condition to worsen without seeking appropriate care for her." It does not say what the "condition" was, when or how long she had it, how much medical care she did or did not receive, and what John Robbins' role was in facilitating or discouraging her from receiving care.

The prosecution's statement of "facts of the case" attempts to create the impression that there were specific **abuses** when it refers to John Robbins "leaving [his mother] with multiple sores on her legs and without utilities." But it says nothing more than that. The likely reason for this terseness is that utilities had been turned off on one occasion for a couple hours when John Robbins was out of town and they were quickly turned back on as soon as he was informed of the problem. Also, the sores were the result of a hereditary condition, not any kind of **abuse** or neglect.

B. To Prosecute Someone Without Disclosing the Acts for Which He Is Being Prosecuted Is a Fundamental Violation of Due Process: hence Any Guilty Plea So Obtained Must Be Set Aside.

In *McCarthy v. United States*, 394 U.S. 459, 467 (1969) the United States Supreme Court explained why a trial judge must satisfy himself or herself that a factual basis exists for a guilty plea before accepting it. He or she
must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the

law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

***13** (Citations omitted.) A year later the Court in *Brady v. United States*, 397 U.S. 742, 747-748 (1970) held that "both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 n.2 (Ky. 2001) (quoting *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990), citing *Brady v. United States*). A defendant who is induced to plead guilty without even knowing which of his acts and on what dates constituted the alleged criminal conduct is perse not acting competently or intelligently. For this reason the "validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from the totality of circumstances surrounding the plea." *Bronk v. Commonwealth*, 58 S.W.3d at 486 n.3; *Centers v. Commonwealth*, 799 S.W.2d at 54 n.2.

As explained in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (establishing requirement that record "affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."):
For this waiver [of rights to jury trial, to confront accusers and against self-incrimination] to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). 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."

Since then the Supreme Court has continued to emphasize the importance of a factual basis stated on the record. *See, e.g.*, *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) *Haring v. Prosise*, 462 U.S. 306, 319 (1983); ***14** *Bousley v. United States*, 523 U.S. 614, 618 (1998).

C. Regardless of Whether a Defendant Can Be Induced to Say He Understands the Charges, A Guilty or Alford Plea Entered Without Knowledge of the Conduct for which the Defendant Was Being Charged is, as a matter of law, Not a Knowing and Intelligent Plea.

The fact that none of the three substantive charges had legal validity goes to the heart of the RCr 11.42 petition. But all this has escaped the Court's attention because the Court has focused simply on statements made at the plea colloquy, which led Judge Maze to conclude:

> It is clear to this Court that the record [of the plea colloquy] indicates conclusively that the finding of Judge Montano was exactly on point, namely, that the defendant Robbins's plea was knowingly and voluntarily given. His statements and demeanor at the plea colloquy belie any contention that he was coerced into pleading guilty. Finally the Court notes as did the previous Court, Defendant Robbins was a college graduate and was certainly familiar with the plea process. Accordingly, an evidentiary hearing is not required in this case and the Court so finds.

(APX 32). However, the problem is that John Robbins, although certainly literate, was kept completely in the dark about everything that was in the discovery, which was never filed until after he had been sentenced. He was also kept from knowing about his mother's sad and tragically futile attempts to come to his defense, and about some gross deficiencies of the indictment that failed to be corrected because no bill of particulars was ever filed. See notation of no contact order at APX 49. Regardless of whether John Robbins believed his plea was knowing and intelligent at the time he gave it, there is simply no way, given the surrounding circumstances, that it could have been a knowing and intelligent plea.

***15** Both the trial court and Judge Maze have failed to heed the United States Supreme Court's admonition in *McCarthy v. United States*, 394 U.S. 459 (1969) that courts must make sure that "the conduct which the defendant admits constitutes the offense charged in the indictment."

The controlling case law is clear that whether a plea was voluntary, knowing and intelligent cannot be based simply on a judge getting a defendant to repeat these words, but must be based on all the surrounding circumstances-hence the need for an evidentiary hearing if the issue of the plea's validity remains open after the Court has examined the court file. With John Robbins the Commonwealth proceeded all the way to conviction despite an absence of clearly articulated, sustainable charges at every stage of the proceeding. See *Bronk v. Commonwealth*, 58 S.W.3d 482 (2001); *Centers v. Commonwealth*, 799 S.W.2d 51, 54-55 n.2 ("The validity of guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea.") *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (1978); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-728 (1987); *Caldwell v. Commonwealth*, 503 S.W.2d 485, 490 (Ky. 1972) ("Boykin apparently stands for the proposition that a silent record on the voluntariness of the guilty plea could not be supplied nunc pro tunc through the office of a subsequent inquiry, either to ascertain the fact or to correct the record."). *Also see Bousley v. United States*, 523 U.S. 614, 618 (1998) (A plea is "not intelligent if neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged.").

***16 D. A Defense Counsel's Stipulation that a Factual Basis for Charges Exists Is of No Legal Effect Unless It Is Accompanied by a Clear Statement of the Factual Basis or a Defendant's Explicit Waiver of His Right to Be Informed of the Factual Basis.**

In the instant case John Robbins' trial counsel cut off the judge's questions about a factual basis for the charges by declaring that he would stipulate to one. He did so without either identifying the factual basis or obtaining from John Robbins an explicit waiver of his right to be informed of such basis. The Kansas Supreme Court confronted this precise situation in *State of Kansas v. Shaw*, 910 P.2d 809 (1996), and wrote:

> The State contends that a stipulation by defense counsel that a factual basis exists for the plea is by itself sufficient to form the factual basis required by [*Boykin v. Alabama* and a Kansas statute similar to Kentucky's RCr 8.08]. We disagree. A constitutional or statutory protection afforded a criminal defendant may be waived by the defendant when done so freely and voluntarily with full knowledge of the possible consequences. **However, a stipulation by defense counsel that a factual basis exists, without any indication that the defendant has waived the statutory requirement that the court be satisfied that there is a factual basis for the plea, does not provide a sufficient factual basis for establishing that all the elements of the crime exist.**

910 P.2d at 811-814 (citations omitted, emphasis supplied). See also Webster v. State, 764 P.2d 884 (Okla. Crim. App. 1988) (invalidating attempt to circumvent factual basis requirement with an attorney's bare stipulation that a factual basis exists and holding that "a factual basis is required before a trial court may accept a plea of nolo contendere"). *Webster* also cites decisions from seven other states affirming the requirement of a demonstrated factual basis. *Id.*

***17 II. The Jefferson Circuit Court Erred in Denying Appellant's RCr 11.42 Petition Because John Robbins Was Never Validly Charged with a Public Offense.**

RCr 8.18 makes clear that "the failure of the indictment or information to charge a public offense shall be noticed by the court at any time during the proceedings." Such a defect is nonwaivable and, once it has been noticed, the Court is required to set aside the conviction without regard any guilty plea or suspicion it has about the defendant. In the instant case there are two reasons why John Robbins was never charged with an actual criminal offense.

A. John Robbins Was Never Charged with a Public Offense Because He Was Never Informed of Any Acts He Had Committed that Violated the Laws Under Which He Was Charged.

To state a public offense the Commonwealth must do more than quote a criminal statute. It must also identify with reasonable specificity the defendant's behavior that constituted the offense and embodied each of the elements of the crime. RCr 6.10(2) states that an "indictment or information shall contain, and **shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense** with which the defendant is charged." (Emphasis supplied.) "Essential facts" are those that will allow a defendant to understand what he did, when he did it, how it caused injury or loss, and how his behavior met the requirements under the pertinent criminal statute.

Where the terms of the statute do not themselves state the acts necessary to constitute the offense, it is not sufficient for the indictment merely to follow the words of ***18** the statute. Queen v. Commonwealth, 434 S.W.2d 318 (Ky. 1968). Normally information as to time, location, particular acts or injuries, and some explanation of how defendant's conduct satisfied the requisite elements of the offense is needed. See, e.g., James v. Commonwealth, S.W.2d 92 (Ky. 1972).

The test of whether an indictment is merely defective, such that failure to object to it by motion prior to entering a plea will waive the defect, or void, such that the court has a continuing obligation to set aside the plea, is whether the indictment "informs the accused of the specific offense which is charged and does not mislead the accused." *Parrish v. Commonwealth,* 121 S.W.3d 198, 203 (Ky. 2003). Thus the Commonwealth's failure to identify any criminal acts of John Robbins on the one hand invalidates his *Alford* plea by showing that it could not possibly have been knowing and intelligent, and on the other hand, invalidates the judgment against him by rendering it void for failure to state a public offense.

B. John Robbins Was Never Charged with a Public Offense Because the Underlying Theories Behind the Prosecution that Were Eventually Revealed Were Invalid and Did Not Charge Any Actual Violation of the Laws Under Which He Was Charged.

The following table illustrates the difference between the actual statutory offenses of theft, exploitation and **abuse**/neglect of the **elderly**, and the factual basis for each that was eventually proffered by the Commonwealth:

Crime or Charge	Elements of Actual Crime	Facts to Which JR Pled
Theft, KRS 514.030	(1) Took money (2) Not legally authorized to take it and did not have permission of the owner	(1) Withdrew $114,889.34 (2) Was legally authorized to take it and had permission of the co-owner, but included withdrawals "for his own purposes"
Exploitation, KRS 209.990(5)	(1) Took money (2) By deception or intimidation (3) Thereby depriving the owner of ability to use it	(1) Withdrew $114,889.34 (2) No deception or intimidation but included withdrawals "for his own purposes" (3) Nothing alleged
Abuse/neglect of **elderly**, KRS 209.990(2)	(1) Committed specific acts of **abuse** or used position to deprive of needed services or supplies (2) and thereby caused harm to the **elder**	(1) Did not commit any acts of **abuse** or deprivation but "allowed" mother's condition to worsen (2) No allegation of harm caused by JR

***19** For the crime of theft by unlawful taking, proof of nonconsent of the owner to the taking is necessary to constitute the offense. *Lanham v. Commonwealth,* 63 S.W.2d 585 (Ky. 1933). Nothing is asserted in either the indictment or the prosecution's statement of the facts of the case to suggest that Mrs. Robbins did not consent to John's use of money, and in fact she did consent-by commingling assets, by living in a house owned jointly by the two of them, by executing a power of attorney giving John lawful access to all bank accounts, *see Maloney v. Commonwealth,* 95 S.W.2d 578 (Ky. 1936) (joint owner of tangible property cannot be guilty of theft of that property); *Stark v. Commonwealth,* 295 S.W.2d 337 (Ky. 1956), by having John make most of the household expenditures, and by repeatedly telling John that he should go ahead and ***20** spend money on himself because the money would all be his soon anyway, (¶ 6, APX 6-7). Not only did the Court and the attorneys have no evidence of nonconsent for the withdrawals of money, the attorneys at least were provided with clear evidence to the contrary in Mrs. Robbins' letter of December 16, 2007. (APX 64).

According to the statutory definition of "exploitation," KRS 209.020(9), the term

> means obtaining or using another person's resources, including but not limited to funds, assets or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources.

Because throughout the entire history of this prosecution there has been no specific allegation of either deception or intimidation on the part of John, no valid charge of "exploitation" has been made against him. Also, taking the prosecution's unsubstantiated figure of approximately $114,000 as true, withdrawal of 7% of money that a mother and son jointly used can hardly be construed as proof that he had the intent to deprive his mother of the ability to use their money.

For "neglect" the Commonwealth's statement says only that John Robbins "knowingly permitted the victim's medical condition to worsen without seeking appropriate care for her." The statutory definition of "neglect" found at KRS 209.020(16) is:

> "Neglect" means a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult.

The Commonwealth has never maintained, and in fact it is not true, that Harriet Robbins lacked the capacity to decide to go the hospital or a physician and could not telephone a taxi or ambulance to take her. In fact, she had those capacities but simply was loathe to ***21** seek medical care, which is why Jefferson County Adult Protective Services originally classified the case as one of self-neglect. See discussion at 6-7, supra. The Commonwealth has also failed to allege that John Robbins deprived his mother of "services by a caretaker that are necessary to maintain [her] health and welfare." Nowhere is it suggested that John did anything to discourage or prevent her from seeing a doctor, or that the caretakers he provided for her were inadequate.

Thus it appears that the maximum case of **abuse**/neglect against John Robbins consisted of the following: his mother was a headstrong woman who insisted on making her own decisions about medical care, continuing to smoke and drink wine. John arguably should have been more forceful in trying to overrule or control her. However, until she had her flare up of cellulitis, which occurred while John was out of town and a hired aide was watching Harriet, there ?? required medical care. To deem such ?? statute would constitute a radical extension ??

?? overrule his mother's reluctance to go to a doctor, (b) stated when and why he had that duty, and (c) stated that he failed to perform this duty. The same is true if the Commonwealth's theory is that John had a duty to be present continuously in the home and not rely on others to help care for his mother. Most likely this pivotal issue of legal ***22** duty has been evaded by the Commonwealth because none ever existed. Harriet Robbins made her own decisions about her health care and it was only during the period of November 25-27, 2006 when John was not present that her decisions were clearly wrong. (Schone Aff., ¶¶ 7-9, in appendix to companion brief). Insofar as the Commonwealth were to try to blame the helper who was present with Harriet on November 27, 2006 this would not be a basis for criminal charges against John because "the offense of **abuse** of an

adult by a caretaker simply does not encompass a situation in which the caretaker permits, rather than instigates, a third person to cause injury." *Morris v. Commonwealth*, 783 S.W.2d 889, 890 (Ky. App. 1990).

The Commonwealth's stretching the three statutes to encompass the hitherto nonexistent, oxymoronic offenses, *theft notwithstanding consent of owner, exploitation by receipt of freely offered gifts that benefit the recipient, and **abuse**/neglect derived from a power of attorney document generating global responsibility for an aging parent's quality of life* constitutes a major violation of due process because these interpretations are unprecedented and it is unlikely that a reasonable person could foresee that the statutes would be used in this way.

III. The Jefferson Circuit Court Erred in Denying Appellant's RCr 11.42 Petition Without an Evidentiary Hearing Because RCr 11.42 Subsections (5) and (6) Clearly Required that He Be Accorded One On His Claim that He Did Not Receive Effective Assistance of Counsel.

John Robbins' RCr 11.42 petition made numerous allegations that clearly stated a prima facie case of ineffective assistance of counsel. The specific allegations and the ***23** legal authorities establishing such a prima facie case were explained in Appellant's Part B Memorandum filed in the Circuit Court and included in Appellant's Appendix (APX 65 et seq.) The Commonwealth chose not to file a specific point by point answer to the RCr 11.42 petition, but instead submitted a general memorandum that simply avoided or overlooked most of specific allegations. This left the Circuit Court with several "material issue[s] of fact that [could] not be determined on the face of the record," which in turn meant that it was obligated to "grant a prompt hearing." RCr 11.42(5). Judge Maze never did this, but simply acted as though John Robbins' allegations could be disregarded. Thus Judge Maze violated both subsection 5 and subsection 6 ("At the conclusion of the hearing or hearings the Court shall make findings determinative of the material issues of fact and enter a final order accordingly.") Compare allegations of the Part B Memorandum regarding the trial counsel's withholding of exculpatory evidence from his client, misrepresenting the law, misrepresenting what was contained in the discovery which he did not allow his client to see, pressuring the client to plead guilty and failing to raise clearly meritorious defenses with Judge Maze's Opinion and Order denying the RCr 11.42 petition which simply failed to address any of these issues.

The Opinion and Order merely stated that "many grounds have been raised by the movant," and dismissed all of them with the statement, "it is the finding of this Court that the record identified above does not indicate his counsel was ineffective." (APX 33). However, the only "record" identified in the Opinion and Order is the plea colloquy (APX 22-32). Having such a narrow focus will almost always cause a court to overlook any ineffective assistance of counsel, no matter how egregious, because attorneys usually do not admit to it on the record when their client is pleading guilty.

***24** The many grounds for finding ineffective assistance can be boiled down to the two that are most extreme and unequivocal. First, trial counsel had several extremely promising options for getting the charges dismissed, but he gave them all away to the prosecution by: (1) Not following up on the Court's Order that a bill of particulars be provided, (2) Not following up on the Court's Order that a copy of the grand jury tape recording be provided, (3) Not examining the 1,326 pages of discovery with sufficient care to know that it contained nothing to inculpate and largely exonerated his client, (4) Not letting either his client or the Court know that the ostensible crime victim was making repeated efforts to let the Court know that the defendant had done nothing to harm her and that all his expenditures had been with her permission, and (5) Failing to move to dismiss the charges based on the Commonwealth's failure to identify any specific acts by Appellant as well as its failure to satisfy the elements of the statutes, the purported violations of which furnished the ostensible basis for prosecution.

Second, it appears from everything in the record that defense counsel and the prosecution colluded to misrepresent to the Court and Appellant that there was a viable case and that they could simply "stipulate" to the existence of a factual basis for charges against him. Because the case was actually very weak, this willingness to stipulate to a factual basis (APX 29) when none could be proven clearly establishes a *prima facie* case of ineffective assistance of counsel. The same is true of Appellant's allegation that his trial attorney kept exculpatory evidence from him client in order to pressure him to enter the *Alford* plea.

Another triable claim is the allegation of a due process violation consisting of the fact that (1) John Robbins' mother was the ostensible crime victim, (2) the validity of two ***25** of the charges turned on whether she consented to or opposed his bank withdrawals, and the third depended at least partly on whether he was preventing her from seeing a doctor or she made those decisions herself, (3) thus the case should have turned on her answers to these questions, (4) but because the prosecution and defense counsel wanted John Robbins to plead guilty, they and the Court together kept John from knowing what his mother would say on the stand so that they could make it seem like she would give damaging testimony.

The allegation that a private attorney and state actors colluded to trick an innocent defendant into entering an Alford plea by using an unwarranted “no-contact” order to keep him from knowing that the victim believed and would testify that he was innocent clearly raises a triable issue of due process violation as well as ineffective assistance of counsel. While it is possible that Mr. Dathorne would offer some justification for his conduct, an evidentiary hearing would be needed to hear it. The approach taken in Judge Maze's Opinion and Order of pretending that none of this happened because it was not mentioned during the plea colloquy is not legally viable.

Conclusion

The specific relief being requested is identified in the conclusion of the companion brief filed for the appeal docketed 10-CA-001969.

Footnotes

1 Judge Maze's repeated denials of relief under RCr 11.42 and CR 60.02(a) in the instant case, *Commonwealth v. Robbins* (Jefferson Co. 07-CR-2001), have generated two appeals that will be heard together. This brief in support of the instant appeal docketed as 2009-CA-002178 addresses the different legal errors committed by Judge Maze. The brief in support of the companion appeal docketed as 2010-CA-001969 argues for Appellant's immediate release due to the legal impossibility of sustaining Appellant's conviction based on the existing record of the case.

2 The companion appeal, docketed as 10-CA-0069, has a CD of an approximately ten-minute recording of Harriet Robbins answering questions about her relationship with her son, John. Her presentation does not rule out the possibility of mild memory loss due to the beginning stages of some age-related disorder, but it proves beyond doubt that she was cognizant and able to respond intelligently to all questions. Unfortunately Harriet Robbins passed away on or about August 13, 2008, never being able to see her son, and brokenhearted that her attempts to halt his prosecution had been unable to prevent him from being sentenced to ten years in prison. The Hon. Irv Maze refused to listen to this CD or allow it to be played in his court. The first copy of the CD to be filed somehow was corrupted after being filed and this resulted in approximately three months of delay for the instant appeal, which was finally resolved by the filing of a CR 60.02(a) motion with another copy of the disk.

3 At this time Harriet apparently did not know about the “no contact” order and feared that John was simply declining to visit her in the nursing home.