

RENDERED: April 25, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001423-MR

DAVID ALAN CAVINS

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
INDICTMENT NOS. 00-CR-00058 and 00-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: This appeal by David Alan Cavins is from an order denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Cavins contends that appointed trial counsel misinformed him that pursuant to his plea both, rather than one, of the pending persistent felony offender (PFO) charges against him would be

dismissed and, further, misinformed him regarding his eligibility for parole under the plea agreement.

Cavins's appeal involves two Grant Circuit Court cases. In Indictment 00-CR-00058, Cavins was charged with (1) third-degree burglary (Kentucky Revised Statutes (KRS) 511.040); (2) receiving stolen property value of \$300.00 or more (KRS 514.110(3));¹ (3) second-degree burglary (KRS 511.030); and (4) first-degree PFO (KRS 532.080).

In Indictment 00-CR-00091 Cavins was charged with (1) first-degree possession of a controlled substance (cocaine) (KRS 218A.1415); (2) first-degree possession of a controlled substance (methamphetamine) (KRS 218A.1415); (3) cultivation of five or more plants of marijuana (KRS 218A.1423); (4) second-degree possession of a controlled substance (delta-9-tetrahydrocannabinol) (KRS 218A.1416); (5) possession of drug paraphernalia (KRS 218A.500); and (6) first-degree PFO (KRS 532.080).

After originally entering a plea of not guilty in both cases, on October 18, 2000, in response to the Commonwealth's Offer on a Plea of Guilty, Cavins changed his plea to guilty in both cases. Following a hearing, the circuit court accepted the plea agreement. Under the plea agreement Cavins received a

¹ Counts I and II alleged that the crimes were committed alone or in complicity with another (KRS 502.020).

total sentence of fifteen years to serve. On November 27, 2000, the circuit court entered final judgment and a sentence of imprisonment consistent with the plea agreement.

On April 26, 2002, Cavins moved for post-conviction relief pursuant to RCr 11.42 alleging ineffective assistance of counsel. On May 13, 2002, the circuit court denied the motion without holding an evidentiary hearing.² This appeal followed.

Cavins maintains that he received ineffective assistance because his counsel informed him that under the plea agreement both PFO charges would be dismissed and, as a result, he would be eligible for parole after serving three years. Because only one of the PFO charges was dismissed under the agreement, and because the agreement included a conviction for a Class C felony, i.e., second-degree burglary,³ Cavins will not be eligible for parole until after serving ten years of his sentence.⁴

In order to establish ineffective assistance of counsel, a defendant must establish that: (1) counsel's

² The order denying the motion includes the phrase "a hearing having been held," but also states, "Defendants Motion for Evidentiary Hearing is denied." It is apparent from a review of the record that an evidentiary hearing was not held on the motion to vacate and that the reference in the order to a hearing was erroneous.

³ See KRS 511.030(2).

⁴ See 501 Ky. Adm. Reg. (KAR) 1:030 § (3)(1)(a).

performance was deficient, and (2) the deficiency resulted in actual prejudice affecting the outcome.⁵ Where an appellant challenges a guilty plea based on ineffective counsel, he must show that counsel made serious errors outside the wide range of professionally competent assistance.⁶ Additionally, he must demonstrate 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 pled guilty but would have insisted on going to trial.⁷ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.⁸

As previously noted, after originally entering a plea of not guilty under both indictments, in response to the Commonwealth's Offer on a Plea of Guilty, Cavins changed his

⁵ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

⁶ McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970).

⁷ Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18, 23 (1999).

⁸ Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

plea to guilty under both indictments. The Commonwealth's recommendations were as follows:

00-CR-0005: On guilty pleas, the Commonwealth will recommend five (5) years and fine of \$1,000 on Cts. 1 and 2 and ten (10) years and a fine of \$1,000 on Ct. 3. On a guilty plea to Ct. 4, the Commonwealth will recommend that Cts. 1, 2 and 3 be enhanced to fifteen (15) years with said sentences to run concurrent to each other for effectively one (1) fifteen (15) years sentence and a fine of \$1,000.

00-CR-00091: On guilty pleas, the Commonwealth will recommend five (5) years and a fine of \$1,000 on Cts. 1, 2 and 3; and twelve (12) months on Cts. 4 and 5 with said sentences to run concurrent to each other for effectively one (1) five (5) year sentence and a fine of \$1,000. On a guilty plea to Cts. 1 through 5 the Commonwealth will move to dismiss Ct. 6. (Emphasis supplied).

On October 18, 2000, a hearing was held on the plea agreement at which the following colloquy occurred:

PROSECUTOR: Judge, in this case we are dealing with two separate indictments: 00-CR-58 and 00-CR-91. The Commonwealth will recommend on the 58 indictment,

burglary in the third degree, the Commonwealth is going to recommend five years. Receiving stolen property and then the burglary in the second degree, the Commonwealth is going to recommend five years and then ten years on the burglary in the second degree and then, with a plea to the persistent felony offender on that indictment, the Commonwealth is going to recommend that those sentences be enhanced to fifteen years, with all of them to run concurrent to one another.

Now, in the other indictment, there are three D felonies, the Commonwealth is going to recommend five years on those. There are some A misdemeanors, the Commonwealth is going to recommend twelve months on those. On pleas of guilty to those counts that I just mentioned, the Commonwealth is going to move to dismiss count six, which is the persistent felony offender in the first degree.

The Commonwealth is going to recommend all of the sentences run concurrent to one another for one fifteen-year sentence and a fine of a thousand dollars.

TRIAL COURT: Thank you. Your understanding of the plea agreement, Ms. Smith [Defense counsel][?]

DEFENSE COUNSEL: Yes, sir.

TRIAL COURT: Is that your understanding, Mr. Cavins?

MR. CAVINS: Yes, sir.

Based upon both the plea agreement itself and the statements made at the hearing, it is clear that the agreement provided that only one, not both, of the PFO charges would be dropped. At the hearing Cavins unambiguously stated that the agreement as recited by the prosecutor conformed to his understanding of the agreement. As a result, Cavins's claim that he did not realize that but one, not both, of the PFO charges would be dismissed is refuted by the record.

Cavins's alleged misunderstanding regarding parole eligibility is directly connected to his alleged misunderstanding regarding the disposition of the PFO charges. Since his claim regarding the disposition of the PFO charges is refuted by the record, his claim regarding parole eligibility is likewise refuted by the record.

To the extent that Cavins claims that he was separately misled by his counsel regarding parole eligibility, his claim must likewise fail on the basis that even if he were accurately informed of his actual parole eligibility, i.e., ten years, there is not a reasonable probability that he would not have pled guilty but would have insisted on going to trial.

Under Indictment 00-CR-00058, Cavins was charged with two Class D and one Class C felonies. As enhanced under the PFO statute,⁹ Cavins risked three convictions carrying an enhanced sentence of ten to twenty years each.¹⁰ However, because of the aggregate of consecutive term limitations imposed under KRS 532.110(c), the maximum aggregate term Cavins could have received under Indictment 00-CR-00058 was 20 years.

Similarly, under Indictment 00-CR-00091, Cavins was charged with three Class D felonies each carrying a PFO enhanced sentence of ten to twenty years. KRS 532.110(c) likewise caps the maximum sentence in Indictment 00-CR-00091 at 20 years.

Hence, Cavins was subject to a maximum term in each case of twenty years. Had he gone to trial and received the maximum term in each case, at the conclusion of the second trial, the trial court would have had the discretion of running the two twenty year terms consecutively pursuant to KRS 532.110(2). Thus, when Cavins entered into the plea agreement, he was at risk of a forty-year sentence with a minimum parole eligibility of ten years. Under the plea agreement, Cavins received a sentence of fifteen years with a minimum parole eligibility of ten years. Based upon the police reports in the

⁹ There is no dispute that at the time of his indictments Cavins met the definition of first-degree PFO pursuant to KRS 532.080(6).

¹⁰ See KRS 532.080(6)(b).

two cases, there was a high probability of risk of conviction on all six felonies in the two cases.

Since a conviction of a Class C felony and first-degree PFO was highly probable, with the attendant parole ramifications, if he had been properly informed of the parole rules, Cavins would have had little incentive to risk conviction of six felonies thereby chancing a total sentence of forty years, when he could plea bargain for a total sentence of fifteen years, which represents a sentence of only five years above the minimum possible sentence if convicted of first-degree PFO and only one felony.

Even if his counsel misinformed Cavins that he would be eligible for parole in three years rather than ten, Cavins has not satisfied the requirement under Hill v. Lockhart¹¹ that he demonstrate that the misinformation regarding parole eligibility so seriously affected the outcome of the plea process that, but for the error, there is a reasonable probability that he would not have pled guilty but would have insisted on going to trial.

Citing Boykin v. Alabama,¹² Cavins also claims that the circuit court erred by not conducting a hearing to determine

¹¹ Supra, n. 7.

¹² 395 U.S. 238, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969).

whether his guilty plea was knowingly, intelligently and voluntarily entered.

Cavins has also failed to demonstrate that his guilty plea was not entered knowingly and voluntarily. A plea of guilty to criminal charges must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant.¹³ The United States Supreme Court has held that both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants.¹⁴ Since pleading guilty involves the waiver of a number of constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record.¹⁵

¹³ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

¹⁴ Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

¹⁵ Boykin v. Alabama, *supra*, n. 12; D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292, 294 (2001); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990).

In this case, the circuit court held a hearing on the plea agreement and engaged in a thorough Boykin colloquy with Cavins. The court addressed a list of each of the constitutional rights that Cavins was waiving by pleading guilty, and Cavins acknowledged his understanding of those rights and the fact that he was waiving them. In short, the record clearly refutes Cavins's claim that his guilty plea was not knowingly and voluntarily entered.

Finally, since all allegations raised by Cavins are refuted by the record, he is not entitled to an evidentiary hearing on his RCr 11.42 motion.¹⁶

The order denying Cavins's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁶ Ky. R. Crim. Proc. (RCr) 11.42(5); Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).