

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002616-MR

LU SEAN BROWN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NOS. 02-CR-000462, 02-CR-001328, & 02-CR-001666

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Lu Sean Brown (Brown), appeals the order of the Jefferson Circuit Court denying him RCr 11.42 relief without granting an evidentiary hearing. The court's ruling is affirmed.

While on approved release from a jail term on unrelated charges, Brown allegedly kidnapped three young women in their car, sexually abused them, and took money and jewelry from them. The women escaped and flagged down a police officer. The officer apprehended Brown shortly thereafter. Brown pleaded

guilty to the charges against him. On the charge of sexually abusing two of the women, Brown pleaded guilty to two counts of sexual abuse in the first degree. Brown entered a plea in accordance with North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A one year sentence was imposed for each count of sexual abuse.

Brown's total sentence was ten years. The sexual abuse sentences were set to run concurrently with the other sentences imposed for his other convictions. The ten year sentence included sentences for theft by unlawful taking, kidnapping, robbery in the second degree, and several misdemeanor charges. Brown also pled guilty to possession of a forged instrument, and escape in the second degree.

On September 8, 2003, more than a year after he was sentenced, Brown filed a post-conviction motion with the circuit court. Brown contended that the one year sentences imposed for the charges of sexual abuse in the first degree had been served by that date. Brown had not taken part in a Sex Offender Treatment Program by that date. Brown asserted that because his sentence on the sexual abuse charges was only one year, the Department of Corrections was wrong in requiring Brown to complete the Sex Offender Treatment Program prior to making him eligible for parole or good time credits. Brown contended that he should not have to complete the sex offender program before

being eligible for parole or good time. The Department of Corrections informed the court that it was correctly imposing the requirement that the sex offender program be completed. The circuit court denied Brown's motion.

Brown then filed a motion pursuant to RCr 11.42, contending that his plea of guilty was involuntary and invalid as his attorney had given him improper advice. In the motion Brown contended that counsel was not aware that by pleading guilty to the sexual offender charges, Brown would be required to complete sex offender treatment before parole or good time credit. Brown asserted that counsel mistakenly advised Brown that after he had served twenty percent of his sentence, he would be eligible for parole or probation. KRS 197.045 requires an individual convicted of a sex crime to complete the sex offender treatment program before that person may become eligible for parole, or be credited for any good time. This Court has held that the law's requirements are not an improper enhancement of a sex offender's sentence. Garland v. Commonwealth, 997 S.W.2d 487 (Ky.App. 1999).

Brown asserts that the sexual offender program lasts for two years, and that his sentence on those offenses was complete long before the program could have been completed. He claims that counsel did not inform him of the mandatory two year sexual offender program. Brown asserts that counsel did not

inform him that to complete the sex offender program, a participant must admit his guilt. Razor v. Commonwealth, 960 S.W.2d 472 (Ky.App. 1998). Brown does not admit his guilt on the sexual abuse charges. Brown asserts that but for the erroneous advice of counsel in that regard, he would not have pleaded guilty to those offenses. A guilty plea may be rendered invalid where the defendant received constitutionally ineffective assistance of counsel. Cuyler v. Sullivan, 466 U.S. 335, 344 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). Brown argues that his guilty plea should be considered invalid because of counsel's failure to advise him regarding his future parole status.

To prove that his constitutional rights were affected by ineffective assistance of counsel, a defendant must show that counsel's actions were outside the "wide range of prevailing professional norms based on an objective standard of reasonableness." Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). The defendant must then demonstrate that "but for" counsel's errors, the result of the proceeding would have been different. Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998). With regard to pleas of guilty, the defendant must show that but for counsel's errors, he would not have pleaded guilty but would have gone to trial. Taylor v. Commonwealth, 721 S.W.2d 726 (Ky. 1986). The Commonwealth contends that such

proof must be made before a defendant can claim prejudicial error in the proceedings. The Commonwealth argues that the law does not require counsel to inform a defendant of all the parole eligibility laws. Turner v. Commonwealth, 647 S.W.2d 500, 501 (Ky.App. 1982), holding that failure of counsel to inform the defendant of a mandatory sentence to be served before he was eligible for parole was not grounds for reversal of the guilty plea and sentence. For this reason, the Commonwealth argues that counsel's performance was not constitutionally deficient.

The Commonwealth points out that if Brown had not pled guilty, he would have faced a trial and a potential sentence in excess of fifty years on all charges. The Commonwealth asserts that the record contains a great deal of evidence of Brown's guilt to the charged offenses. Under the plea entered, Brown may have been eligible for parole within two years of sentencing, rather than ten years or more.

The Kentucky Supreme Court has expressly declined to adopt a rule requiring counsel to advise a defendant of the possible range of sentences which may result from his plea of guilty. See: Jewell v. Commonwealth, 725 S.W.2d 593, 594 (Ky. 1987). The law is clear in holding that a defendant is not entitled to be informed of every possible consequence to his plea. Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990). For this reason, no reversible error has been shown even

if counsel failed to discuss the effect of a sex offense on the sentence imposed.

Brown contends that the trial court committed reversible error by failing to grant him an evidentiary hearing on his post-conviction motion. A movant is entitled to an evidentiary hearing only where the allegations cannot be resolved by reviewing the record. "A hearing is required if there is a material issue of fact that cannot be conclusively resolved . . . by an examination of the record." Fraser v. Commonwealth, 59 S.W.3d 448, 452-53 (Ky. 2001). The record contains evidence of Brown's guilty plea, and the court's questioning him as to whether the plea was knowing and voluntary. The record and related case law also show that counsel was not required to inform Brown of all consequences of his guilty plea. Under such circumstances, the court's denial of the requested hearing does not constitute reversible error.

This Court reviews a denial of a motion under RCr 11.42 to determine "whether the motion on its face states grounds that are not conclusively refuted by the record . . . which, if true, would invalidate the conviction." Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). The law is clear in holding that counsel's actions as alleged by Brown, would not invalidate Brown's conviction. Under such circumstances, no

reversible error is found and the trial court's order must be affirmed.

ALL CONCUR.

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