

RENDERED: MAY 26, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2005-CA-000994-MR

STEPHEN E. JAMES

APPELLANT

APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE  
INDICTMENT NO. 02-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: On April 24, 2002, Stephen E. James was involved in an automobile accident with another vehicle carrying Ralph and Leah Denham. Thereafter, he was indicted on one count of wanton murder,<sup>1</sup> two counts each of first degree assault<sup>2</sup> and first-degree wanton endangerment,<sup>3</sup> and one count of operating a

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<sup>1</sup> KRS 507.020(b). Leah Denham was pregnant at the time of the accident, and she suffered a miscarriage as a result of her injuries. The murder charge related to the death of her unborn child. But prior to the guilty plea, the trial court dismissed the murder charge after the Commonwealth conceded that the applicable law would not support a conviction.

<sup>2</sup> KRS 508.010(b).

<sup>3</sup> KRS 508.060.

motor vehicle while under the influence of alcohol or drugs (first offense).<sup>4</sup> On April 25, 2003, James entered a guilty plea to the assault and wanton-endangerment charges. Pursuant to the Commonwealth's recommendation, the trial court sentenced James to five years for each count of wanton endangerment, and eleven years for each count of assault, to run concurrently for a total of eleven years.

On December 29, 2003, James filed a *pro se* motion to alter, amend, or vacate the judgment pursuant to RCr 11.42 or CR 60.02. He also filed a motion for appointment of counsel. He alleged that his trial counsel failed to advise him that he would be sentenced as a violent offender under KRS 439.3401. That statute requires James to serve at least eighty-five percent of his sentence before becoming eligible for parole. James asserts that he would not have accepted the guilty plea had his trial counsel advised him of this fact. The trial court denied the motions without conducting an evidentiary hearing or appointing counsel. James now appeals.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency

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<sup>4</sup> KRS 189A.010.

caused actual prejudice affecting the outcome of the proceeding.<sup>5</sup> The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.<sup>6</sup> In the context of a guilty plea, a movant must also show 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 appellant would not have pled guilty but would have insisted on going to trial.<sup>7</sup>

As a general rule, failure to inform a defendant of parole eligibility does not render a guilty plea involuntary under the rule of Boykin v. Alabama.<sup>8</sup>

Boykin does not mandate that a defendant must be informed of a "right" to parole. This is especially true since, unlike the rights specified in Boykin, parole is not a constitutional right. . . . Boykin does require a knowing, voluntary and intelligent waiver of all important constitutional rights. However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea

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

<sup>6</sup> Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999).

<sup>7</sup> Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Phon v. Commonwealth, 51 S.W.3d 456, 459-460 (Ky. 2001).

<sup>8</sup> 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

and all possible alternative courses of action.<sup>9</sup>

Federal case law from our own circuit holds that "gross misadvice" concerning parole eligibility may constitute ineffective assistance of counsel.<sup>10</sup> However, James does not allege that his trial counsel actively misinformed him about his parole eligibility. He simply asserts that his trial counsel failed to inform him about his parole eligibility. Thus, the alleged failure of trial counsel to advise James about his parole eligibility does not render his guilty plea involuntary.

Furthermore, James admits that the trial court advised him at the sentencing hearing that he would be sentenced as a violent offender and would not be eligible for probation. Although he contends that the information came as a surprise to him, he did not express any such surprise or make any further inquiry to the trial court. Moreover, a review of the record clearly establishes that James's guilty plea satisfied the requirements of Boykin. Finally, because the record refutes James's allegations of ineffective assistance of counsel, the trial court did not err by denying his motion to appoint counsel.<sup>11</sup>

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<sup>9</sup> Turner v. Commonwealth, 647 S.W.2d 500, 500-501 (Ky. App. 1982) (citation omitted).

<sup>10</sup> See Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988).

<sup>11</sup> Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

Accordingly, the orders of the Lincoln Circuit Court  
are affirmed.

ALL CONCUR.

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