

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001070-MR

JAMES E. CLOUD

APPELLANT

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: On March 5, 2003, the Bell County grand jury indicted James E. Cloud on one count each of robbery in the first degree,² and being a persistent felony offender in the second degree.³ On January 27, 2004, Cloud accepted the Commonwealth's offer to plead guilty to the robbery charge in exchange for a dismissal of the persistent felony offender

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² KRS 515.020, a class B felony.

³ KRS 532.080(2).

charge. On March 1, 2004, the trial court sentenced Cloud to twenty years' imprisonment in accord with the Commonwealth's recommendation. Thereafter, Cloud filed *pro se* motions to set aside his sentence pursuant to RCr 11.42 and to appoint counsel. The trial court denied the motions without conducting an evidentiary hearing or appointing counsel. This appeal followed.

Cloud first argues that his trial counsel erroneously informed him that he would be eligible for parole after four years. But since he pleaded guilty to a crime which caused serious physical injury to the victim, Cloud will not be eligible for parole until he has served 85% of his sentence.⁴ Cloud asserts that he would not have accepted the Commonwealth's offer had his trial counsel given him the correct information. Because the record does not clearly refute this allegation, Cloud contends that he was entitled to an evidentiary hearing and appointed counsel to pursue his claim of ineffective assistance by his trial counsel.⁵

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

⁴ KRS 439.3401.

⁵ Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

caused actual prejudice affecting the outcome of the proceeding.⁶ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.⁷ 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.⁸

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.⁹

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

⁶ 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).

⁷ Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999).

⁸ 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).

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

and all possible alternative courses of action.¹⁰

Cloud relies heavily on Sparks v. Sowards,¹¹ in which the Sixth Circuit held that "gross misadvice" concerning parole eligibility may constitute ineffective assistance of counsel. In Sparks, the petitioner alleged that his counsel told him that he faced a possible penalty of life without parole unless he pleaded guilty. However, no such sentence existed at that time. Furthermore, had the petitioner been convicted by a jury and sentenced to life imprisonment, he would have been eligible for parole after serving eight years. The Sixth Circuit concluded that the petitioner's allegations were sufficient to show both deficient performance by trial counsel and actual prejudice.¹²

In this case, the record does not clearly refute Cloud's allegation that his trial counsel actively misinformed him about his parole eligibility. Thus, there is a factual issue whether his trial counsel's performance was deficient. However, Cloud fails to support his allegation that he would not have accepted the guilty plea if his trial counsel had correctly informed him about his parole eligibility.

¹⁰ Turner v. Commonwealth, 647 S.W.2d 500, 500-501 (Ky.App. 1982) (citation omitted).

¹¹ 852 F.2d 882 (6th Cir. 1988).

¹² Id. at 885.

During his plea colloquy, Cloud told the court that he had been fully informed of the Commonwealth's evidence against him. The prosecutor also outlined the evidence against Cloud, and stated that a co-defendant who had previously pleaded guilty was scheduled to testify at trial. Cloud admitted that the evidence would support a finding that he participated in the robbery.

By accepting the guilty plea, Cloud avoided a conviction as a second-degree persistent felon and a possible life sentence. Cloud does not allege that there was any mitigating evidence which would have supported a lesser sentence or earlier parole eligibility than he received from his guilty plea agreement. Consequently, he cannot show that he was prejudiced by any deficient performance of his trial counsel.

Cloud next argues that his trial counsel failed to advise him of another plea offer by the Commonwealth. During a pre-trial conference on June 16, 2003, the Commonwealth offered to recommend a sentence of fifteen years in exchange for Cloud's guilty plea to first-degree robbery. The trial court told Cloud that he had to make a decision that day. After consulting with his attorney, Cloud rejected the offer and the matter was scheduled for trial on January 27, 2004.

Cloud alleges that on the morning of January 23, 2004, his trial counsel met with him at the jail. Counsel informed

Cloud that twenty years was the best deal he could get.

Following sentencing, however, Cloud discovered a letter from the prosecutor stating that the fifteen-year offer would remain open until close of business on January 23. Cloud contends that he was prejudiced by his trial counsel's failure to inform him that the offer remained open.

The record clearly refutes this allegation. The trial court had previously ordered Cloud to appear at his counsel's office for a final consultation on January 21, 2004. When Cloud failed to keep the appointment, the trial court issued a bench warrant for his arrest. The record shows that Cloud was arrested on that warrant at 6:52 p.m. on January 23. Any open plea offer would have expired by that time.

Cloud also asserts that his trial counsel should have advised him of the open plea offer before January 23. Cloud alleges that he attempted to meet with his counsel on several occasions prior to that time, but counsel was too busy to meet with him. However, it does not appear that Cloud raised this allegation before the trial court. Moreover, the record clearly shows that Cloud had a court-ordered appointment with his trial counsel on January 21. Since Cloud failed to keep that appointment, he cannot reasonably complain about his trial counsel's failure to advise him about the open plea by the Commonwealth.

Accordingly, the order of the Bell Circuit Court denying Cloud's RCr 11.42 motion is affirmed.

ALL CONCUR.

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