

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000957-MR

LEONARD GROVES, JR.

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00512

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

WINE, JUDGE: On September 28, 2004, a Hardin County grand jury indicted Leonard Groves, Jr. (“Groves”) on one count of robbery in the first degree, five counts of first-degree wanton endangerment, misdemeanor possession of marijuana, three other misdemeanors or violations, and being a persistent felony offender in the first degree (“PFO I”). Prior to trial, Groves wrote a letter to the prosecutor asking that he be given a twenty-year sentence to be probated. “I need a chance and I know if I get out scott free or go to trial they will kill me. If I mess up for something I did, I’ll do the **20, 85%**, but

give me a chance.” (Emphasis added). Groves expressed concern in the letter that some of his criminal companions might do him harm. On May 20, 2005, Groves pled guilty to the felony counts in return for dismissal of the PFO I and misdemeanor counts and an agreed-upon sentence of twenty years to serve in the penitentiary.

Subsequently, on June 21, 2005, Groves wrote a letter to the trial court asking that his plea be amended because he was charged with first-degree robbery and several wanton endangerment charges which, he asserted, constituted double jeopardy under KRS 515.020. Groves sent additional letters thereafter to the trial court, submitting that he had dismissed his attorney, Ronald Hines (“Hines”). Groves submitted in his letter that he was unhappy with Hines’s performance and asked that his guilty plea be set aside. The court denied the motion and Groves was sentenced on June 28, 2005. After he was sent to the penitentiary, Groves learned his parole eligibility was 85%. He wrote the trial judge and explained that he believed the plea was for 20% parole eligibility.

The court appointed counsel for Groves who then filed motions pursuant to RCr 11.42 and CR 60.02 to set aside the judgment. In said motions, Groves alleged ineffective assistance of counsel because: (1) Hines failed to advise him that he would not be eligible for parole until he served 85 percent of his twenty-year sentence and (2) Hines misled him as to the admissibility of exculpatory evidence.

The trial court held an evidentiary hearing on December 6, 2005, where Groves testified he would not have pled guilty if he had known that he was not eligible for parole until he had served 85 percent of his sentence. Groves testified that Hines had

informed him that he would be eligible to see the parole board after serving 20 percent of his sentence. Groves added that he would have insisted on going to trial if he had known his actual parole eligibility. The trial court made detailed findings of fact and conclusions of law, including that Hines misadvised Groves as to his parole eligibility. Ultimately, the trial court denied the motions. This appeal followed.

In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding.

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). The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelphrey*, 998 S.W.2d 460, 463 (Ky. 1999). In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *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, 459-60 (Ky.App. 2001).

Generally, counsel's failure to inform a defendant as to his parole eligibility prior to entering a guilty plea does not render the plea involuntary under the rule of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Parole is not

a constitutional right, as are the rights specified in *Boykin*. Further, *Boykin* requires a knowing, voluntary, and intelligent waiver of all important constitutional rights. However, the knowing, voluntary, and intelligent waiver does not specifically include a requirement that the defendant be informed of every single possible outcome upon pleading guilty. A guilty plea entered by a defendant of his own free will does not become invalid because he did not know all the possible consequences of the plea or all the possible alternative courses of action. *Turner v. Commonwealth*, 647 S.W.2d 500, 501 (Ky.App. 1982).

During the plea hearing on May 20, 2005, Hines informed the court that Groves was pleading guilty in order to expedite things and get on with his life. While Hines indicated to the court that he had some doubt as to the guilt or innocence of his client, he indicated that the evidence against Groves was overwhelming. Hines also told the court that Groves wanted to plead guilty because the Commonwealth's offer was a good deal. In addition, Hines informed the trial court that Groves was pleading guilty against his advice. Hines further stated that, despite Groves pleading guilty, the Commonwealth had agreed to further investigate the forensic evidence from the crime scene and would revisit the charges against Groves pending the results of the tests for fingerprints from a door facing, a door, a gun, and DNA from a shirt.

In response, the trial court informed Hines and Groves that the plea was not conditional and once Groves entered a guilty plea, there would be no opportunity to revisit the evidence. Further, the trial court informed Groves that there would be no

opportunity for probation in his case. In fact, during the plea colloquy, the court was made aware that there was language in the plea agreement about probation and specifically crossed out the language. Groves initialed the correction and signed the plea agreement. The court asked if there were any further issues about probation or parole. Having been advised he was not eligible for probation, Groves never raised the issue of parole eligibility, even though he admittedly knew it was 85%, not 20%, as allegedly represented by his counsel. In fact, there was no mention of parole during the guilty plea proceedings and Groves acknowledged to the court that he understood it was a twenty-year sentence to serve.

Still, Groves argues he relied on the misadvice of his attorney to his detriment in deciding that he did not want to go to trial because Hines told him that he would see the parole board in four years if he accepted the Commonwealth's offer. Groves testified at the evidentiary hearing that he did not remember having any discussions with Hines that he would have to serve 85 % of his sentence pursuant to KRS 439.3401.

Groves insists that had he known he would have to serve 85 %, or 17 years, pursuant to KRS 439.3401(3), he would have wanted to proceed to trial. Groves's mother testified that Hines told her that Groves would only have to serve four years before seeing the parole board. Hines had no recollection of ever speaking with either Groves or his mother about parole eligibility, but he remembered overhearing Groves's mother and girlfriend discussing the issue.

Groves contends this misadvice rises to the level of “gross misadvice” as found in *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). In *Sparks*, the court held that “gross misadvice” concerning parole eligibility may constitute ineffective assistance of counsel. However, during the plea colloquy, the trial court reviewed with Groves the rights which he was waiving by pleading guilty, including the right to a jury trial. Further, Groves answered in the affirmative when asked if he was satisfied with the representation he had received from his counsel. Groves also represented to the court, under oath, that there were no promises or representations made to him other than the 20 years to serve that was written in the plea agreement.

Groves admits that he made these responses at the guilty plea proceedings. But in a letter to the court received August 12, 2005, he indicates that Hines told him to lie to the court and say that he was not promised a deal when in fact he was promised “20% probation” by Hines. As did the trial court, we find this argument unconvincing because the record clearly shows Groves pleading guilty against the advice of Hines. Further, Groves, a twice-convicted felon, now admits he willingly perjured himself during the plea to secure a minimum sentence on charges of first-degree robbery and PFO I.

The effect of entering a voluntary guilty plea is to waive all defenses except that the indictment does not charge an offense. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990). Accordingly, Groves waived all defenses unless the plea was involuntary. *Id.*

“A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel.” *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004). And, “[i]n such an instance, the trial court is to consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel.” (Internal citations and quotation marks omitted). *Id.* Here, the trial court held an evidentiary hearing to consider all the material facts. Those facts included that the evidence against Groves was overwhelming, that Groves had pled guilty against the advice of his trial counsel, the fact that the written plea agreement said nothing about parole eligibility and that Groves lied to the court when he did not advise Hines promised he would be released after serving a total of 20% of the sentence.

It does appear that Hines told Groves that if the forensic evidence came back incriminating an individual other than Hines, then he could get probation. However, the trial court specifically informed Groves that no evidence could be tested after he entered his guilty plea and that was not an option in his case. Groves chose to continue with his guilty plea despite receiving this information.

But the trial court also determined, by a preponderance of the evidence, that Hines had misinformed Groves of the applicability of the 20 percent rule to his parole eligibility. But while the trial court found that Groves had satisfied the first part of the *Strickland* test, the court concluded that the deficient performance did not lead to a

“reasonable likelihood” that Groves would not have pled guilty. *Strickland, supra*. We agree.

Based on the trial court’s findings, it seems clear that Hines’s assistance was deficient. Groves now argues he would have insisted on going to trial but for Hines’s deficient performance. However, as noted above, the sentencing court corrected Hines’s and Groves’s misunderstanding about the performance of further tests on the evidence and Hines’s eligibility for probation. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 568 (Ky. 2006). In addition, Groves acquiesced to Hines’s statements that the evidence was overwhelming and that Groves was pleading guilty against the advice of counsel. And notwithstanding Groves’s current allegations, Groves informed the sentencing court that no promises had been made to him outside of the terms of the plea offer. He also indicated that he understood that he was pleading solely to what was written and signed, by him, in the plea agreement – which was 20 years to serve – and no mention of parole eligibility.

Such pronouncements in open court raise a strong presumption that counsel’s assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Pelphrey*, 998 S.W.2d at 463. Based on these statements during his guilty plea, the trial court found Groves’s current allegations to be unconvincing. A court reviewing a post-hearing RCr 11.42 ruling “must defer to the determination of the facts and witness credibility made by the trial judge.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). Given the record, the trial court did not clearly err in finding that

Groves's guilty plea satisfied the requirements of *Boykin*. Since the record refutes Groves's allegations of ineffective assistance of counsel, the trial court did not err by denying his RCr 11.42 and CR 60.02 motions.

As to Groves's allegations that the charges against him violated double jeopardy pursuant to KRS 515.020, we find this argument without merit having found his plea was voluntary. *Centers*, 799 S.W.2d at 55.

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

ALL CONCUR.

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