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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001358-MR

TIMOTHY GATES

APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 05-CR-00314

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

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

WINE, JUDGE: On August 30, 2005, a Hopkins County grand jury returned an indictment charging Timothy Gates with four counts of first-degree sodomy, KRS 510.070, and four counts of first-degree sexual abuse, KRS 510.110. Thereafter, Gates accepted the Commonwealth's offer to plead guilty to three of the sodomy counts and the four sexual abuse counts. In exchange for his guilty plea, the Commonwealth recommended a total sentence of twenty years' imprisonment, which the trial court imposed.

Thereafter, Gates filed a motion to alter, amend or vacate his conviction and sentence pursuant to RCr 11.42. He alleged that his trial counsel provided ineffective assistance by advising him to plead guilty. After considering the Commonwealth's response, the trial court denied the motion without appointing counsel or conducting an evidentiary hearing. Gates requested and was granted the appointment of counsel on this appeal, but the Department of Public Advocacy declined to represent him, stating that the appeal was not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. KRS 31.110(2)(c). *See also Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). This *pro se* appeal followed.

On appeal, as before the trial court, Gates asserts that his counsel's assistance was deficient. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The standard for

assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S. Ct. at 2065. An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

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 pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky.App. 2001). The Commonwealth makes much of Gates' guilty plea colloquy, during which he stated that his guilty plea was "freely, knowingly, intelligently and voluntarily made," that he understood the charges against him and the defenses, and that he was satisfied with the performance of his counsel. We agree with the Commonwealth that the guilty plea proceedings complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). But while such pronouncements in open court raise a strong presumption that counsel's assistance was constitutionally sufficient, that presumption may be overcome. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

While before the trial court, Gates raised numerous grounds for his allegation that his trial counsel provided ineffective assistance. But on appeal, he alleges only that his trial counsel misadvised him that he would be eligible for parole after serving four years. Gates did not raise this matter as an issue in his brief before the trial court, but he did mention it in his statement of the facts. We have some question whether

this was sufficient to adequately preserve the issue for appeal. But given Gates' status as a *pro se* litigant, we shall consider the issue on the merits.

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, supra*. Parole is not a constitutional right, as are the rights specified in *Boykin*. Further, while *Boykin* requires a knowing, voluntary, and intelligent waiver of all important constitutional rights, 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).

Federal case law from our own circuit holds that "gross misadvice" concerning parole eligibility may constitute ineffective assistance of counsel. *See Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988). But in *Sparks*, the petitioner alleged that his counsel told him that he faced a possible penalty of life without parole unless he pleaded guilty. 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. *Id.* at 885.

The facts of this case are considerably different from those in *Sparks*. Gates asserts that his trial counsel advised him that he would be eligible for parole after

-serving four years. However, Gates does not substantiate this allegation with an affidavit or reference to the record. And while there is some evidence in the record which could support this allegation, it is not sufficient to entitle Gates to an evidentiary hearing on this issue.

At his sentencing hearing, Gates' counsel asked the trial court for a specific finding in the judgment that Gates was not a violent offender within the meaning of KRS 439.3401(1). The Commonwealth did not specifically object to such a finding, but noted that Gates could be considered a violent offender under the statute given the nature of the offenses. The trial court declined to make the requested finding, and the Department of Corrections subsequently classified Gates as a violent offender and thus not eligible for parole until he serves 85% of his sentence. KRS 439.3401(3).

Under the circumstances, we cannot find that Gates has substantiated his claim that his trial counsel gave him "gross misadvice" about his parole eligibility. There is no evidence of record Gates' counsel actively misadvised him about his parole eligibility. From our review of the sentencing hearing, it appears that counsel was aware of the application of KRS 439.3401 and attempted to address it with the trial court. Yet, even the Commonwealth was uncertain whether Gates would be classified as a violent offender. Even if Gates' counsel informed him that he would be eligible for parole after four years, we cannot find that this mistake rises to the level of "gross misadvice."

Accordingly, the order of the Hopkins Circuit Court denying Gates' motion pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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