

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000894-MR

JAMES A. MOORE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: TAYLOR AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

STUMBO, JUDGE: James A. Moore appeals from an Opinion and Judgment overruling his motion for RCr 11.42 relief from judgment. Moore argues that he is entitled to have his criminal judgment reversed and remanded because his counsel incorrectly advised him that he would have to serve only 20% of a sentence set out

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

in a plea agreement, and because the judgment does not accurately reflect the terms of the plea. For the reasons stated below, we affirm the order on appeal.

On October 25, 2005, the Muhlenberg County grand jury indicted Moore on one count of first-degree robbery and with being a second-degree persistent felony offender. The indictment arose after an investigation into an allegation that Moore used a knife to commit a robbery. Moore was appointed counsel, and subsequently agreed to accept a plea agreement that provided he would plead guilty to the robbery charge in exchange for dismissal of the persistent felony offender charge. The plea was entered on November 21, 2005.

On December 5, 2005, the Muhlenberg Circuit Court rendered a Judgment and Final Sentencing accepting the plea and imposing a sentence of 12 years in prison. On June 9, 2006, Moore filed a *pro se* motion to modify the judgment. As a basis for the motion, Moore argued that his guilty plea was not made voluntarily because it was based on his trial counsel's erroneous statement that he would be eligible for parole after 27 months. Moore claimed that after being placed with the Department of Corrections, he learned that he would have to serve 85% of the 12-year sentence. The motion was denied by way of an order rendered on June 9, 2006, and no appeal was taken.

On January 7, 2008, Moore filed a *pro se* "Motion for Specific Performance of Plea agreement pursuant to RCr 11.42." He claimed therein that the judgment failed to properly reflect the terms of the plea agreement, to wit, that Moore would be eligible for parole after serving 20% of his sentence. He argued

that the Department of Corrections was not properly executing the plea agreement because the circuit court failed to properly memorialize it in the judgment, and he sought remand for the entry of a new judgment rendered in accordance with the plea.

On January 8, 2008, the Muhlenberg Circuit Court rendered an Opinion and Judgment Overruling Motion Under RCr 11.42, wherein the court determined that Moore's plea was intelligently and voluntarily rendered pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The court additionally found that the judgment accurately reflected the terms of the plea, and that Moore was entitled to neither a hearing on the motion nor the relief sought. This appeal followed.

Moore now argues *pro se* that the Muhlenberg Circuit Court committed reversible error in denying his motion for RCr 11.42 relief. He contends that he failed to receive the effective assistance of counsel to which he was entitled when counsel incorrectly advised him that he would have to serve only 20% of his sentence. He also argues that he is entitled to specific performance of the plea agreement, the terms of which he contends were not accurately set out in the judgment. He seeks an order reversing the judgment.

We have closely examined the written arguments and the record, and find no basis for reversing the order denying Moore's motion for RCr 11.42 relief. We must first note that while Moore now claims that he received ineffective assistance of counsel, this argument was not raised in his January 7, 2008 motion

for RCr 11.42 relief. Similarly, the claim of ineffective assistance of counsel was not addressed or otherwise adjudicated in the circuit court's January 8, 2008 order denying the relief sought and from which Moore now appeals. Both the motion and the order addressed Moore's claim of entitlement to "specific performance" of the plea, as well as Moore's contention that the judgment did not accurately reflect the terms of the plea. An appellant may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). *Arguendo*, even if the claim of ineffective assistance had been raised in Moore's January 7, 2008 motion or addressed in the court's January 8, 2008 order, we would find no basis in the record for concluding that counsel's performance fell outside the wide range of professionally competent assistance, nor that but for the alleged error Moore would not have pled guilty. See generally, *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986), *citing Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985).

The focus of Moore's January 7, 2008 motion was that his plea was not made voluntarily and intelligently because he was not specifically told that his twelve-year sentence for first-degree robbery fell under the 85% parole eligibility requirement of the violent offender statute. His instant argument centers on his claim of entitlement to specific performance of the plea agreement. We have undertaken the same analysis employed by the circuit court in its adjudication of Moore's claim, and find no error in the circuit court's denial of Moore's motion for RCr 11.42 relief.

As noted by the circuit court, the record demonstrates that the requirements for an intelligent, voluntary and knowingly made guilty plea have been met. See generally, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). As part of the plea colloquy, the trial court repeatedly questioned Moore to ensure that he understood everything set out in the guilty plea. Moore stated that he read and understood the waiver and guilty plea forms. He stated under oath that he understood the crime, that he committed the acts with which he was charged, and that he desired to plead guilty. The court addressed each paragraph of the guilty plea to ensure that Moore understood the plea. Nothing in the record demonstrates either that Moore was entitled to parole eligibility after service of 20% of his sentence, or that his trial counsel made any promises to him on this issue.

We also find persuasive the case of *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky. App. 1982), where - like Moore - the movant claimed that his plea was involuntarily made because he was not informed that he would not be eligible for parole for ten years. A panel of this Court held therein that such a failure was not a violation of due process and did not form the basis for RCr 11.42 relief. We stated that,

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. *U.S. v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). *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 and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.

Turner, at 500.

The record and the law establish that Moore's guilty plea was entered intelligently, knowingly, and voluntarily; that the judgment of conviction and sentence accurately reflect the terms of the plea; and, that the alleged failure of counsel to inform Moore of parole eligibility is not a basis for RCr 11.42 relief from judgment. Accordingly, we find no error.

For the foregoing reasons, we affirm the Opinion and Judgment Overruling Motion Under RCr 11.42 of the Muhlenberg Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James A. Moore, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Office of Criminal Appeals
Frankfort, Kentucky