RENDERED: April 10, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1064-MR

MELVIN GREG SLONE APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 79-CR-006(2)

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** **

BEFORE: DYCHE, MILLER and SCHRODER, JUDGES.

MILLER, JUDGE. Melvin Slone brings this pro se appeal from a July 25, 1997 order of the Lee Circuit Court denying in part and granting in part his motion to alter, amend or vacate sentence brought pursuant to Ky. R. Crim. P. (RCr) 11.42. We affirm.

In May 1979, the Lee County Grand Jury indicted Slone and a second person on one count of capital murder (Ky. Rev. Stat. (KRS) 507.020(1)(b)), one count of first-degree burglary (KRS 511.020(1)(a)), one count of first-degree robbery (KRS 515.020(1)(a)), and one count of theft by unlawful taking over $100 (KRS 514.030). A charge of complicity was included in each of the substantive offenses. Slone originally pled not guilty and was tried before a jury in March 1980. The jury returned a

verdict finding Slone guilty of murder, burglary, and robbery, and fixed a sentence of ten years for burglary and twenty years for robbery. At that time, the trial was recessed before proceeding on the bifurcated sentencing procedure associated with the murder offense. During the recess, Slone reached an agreement with the Commonwealth to accept its offer to recommend a life sentence on the murder charge and waive sentencing by the jury. The jury was discharged when Slone appeared in court with counsel on April 1, 1980, and entered a guilty plea to murder, first-degree burglary, and first-degree robbery with the Commonwealth recommending a life sentence on the murder charge, ten years on the burglary charge, and twenty years on the robbery charge. The trial court postponed final sentencing for preparation of a Presentence Investigation Report. On May 9, 1980, the trial court entered a final judgment on the guilty plea to the offenses, sentenced Slone consistent with the Commonwealth's recommendation, but ordered the sentences to run consecutively. On July 30, 1980, the trial court amended the final judgment by ordering the sentences to run concurrently rather than consecutively.

On February 11, 1997, Slone filed an RCr 11.42 motion to vacate the conviction based on ineffective assistance of counsel, double jeopardy, and improper sentencing. On April 25, 1997, the circuit court issued an opinion and order without an evidentiary hearing granting the motion to the extent that the sentences for first-degree robbery and first-degree burglary were

to run concurrently with the life sentence for murder, but denying the motion in all other respects. This appeal followed.

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral objections to the judgments entered against them. RCr 11.42(2) permits the trial judge to summarily dismiss the motion without a hearing for movant's failure to make a substantial showing of entitlement to relief. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Our review involves whether the record refutes appellant's allegations and whether his unrefuted allegations, if true, would invalidate his conviction. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

Slone argues that his conviction violated the prohibition against double jeopardy. This argument is predicated on the description of the offenses in the indictment. Count One states that Slone committed murder "by shooting Herman McIntosh with a pistol during the course of robbing the said Herman McIntosh . . . ." Count Two states that Slone "committed burglary in the first degree by unlawfully entering the dwelling house of Herman McIntosh . . . ." Count Three states that Slone "committed the offense of theft by taking a 1977 Chevrolet pick-up owned by Herman McIntosh, of the value of $100.00 or more . . . ." Count Four states that Slone "committed first degree robbery by using physical force upon and causing physical injury to Herman McIntosh while in the course of committing a theft at the dwelling house of Herman McIntosh . . . ." Slone contends

the descriptions of the offenses are so vague that it is unclear whether the murder and robbery convictions involved the same physical force and whether the robbery conviction involved the same property identified in the burglary or theft count. In addition, he argues that the incident involved a single course of conduct as defined in KRS 505.020. Slone concludes that his robbery conviction was invalid because it may have been included in either the murder or burglary offense.

Slone's double jeopardy argument represents a misperception of the law of double jeopardy and the law relative to the indictment. Under the old Criminal Code, the indictment had to contain every essential element of the crime charged. See Fitzgerald v. Commonwealth, Ky., 403 S.W.2d 21 (1966); Duncan v. Commonwealth, Ky., 330 S.W.2d 419 (1959). Promulgation of the new Rules of Criminal Procedure in 1963, however, substantially liberalized the traditional requirements applicable to indictments by adoption of a notice pleading approach. See Wylie v. Commonwealth, Ky., 556 S.W.2d 1 (1977), and Finch v. Commonwealth, Ky., 419 S.W.2d 146 (1967). As stated by the Court in Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996):

> The notice pleading of the Rules of Criminal Procedure, unlike the fact pleading it replaced, does not require exact, precise details. It is unnecessary under RCr 6.10 "to restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the applicable statute, unmistakably accomplishes this end result." Runyon v. Commonwealth, Ky., 393 S.W.2d 877, 880 (1965). An indictment is sufficient if it fairly informs the accused of the nature of

> the charged crime, without detailing the formerly "essential" factual elements. Finch, supra, 419 S.W.2d at 147, and "if it informs the accused of the specific offense with which he is charged and does not mislead him." Wylie, supra, 556 S.W.2d at 2.

The indictment is an initiating document designed to establish jurisdiction in the circuit court and charge an offense. See Nicholas v. Thomas, 382 S.W.2d 871 (1964); RCr 6.02 and 6.10. With notice pleading, if the defense needs details to prepare adequately, the defendant should request them through a bill of particulars. Thomas, supra, at 450; RCr 6.22.

Slone's assertion that Count Four involving the robbery offense violated double jeopardy because it fails to state a charge is without merit. All that is required to "charge an offense," as required by RCr 8.18, is to name the offense. Thomas, supra, at 449. On the other hand, double jeopardy involves conviction or punishment for two offenses with the same essential elements. See Commonwealth v. Black, Ky., 907 S.W.2d 762 (1995). In Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1997), the Kentucky Supreme Court abandoned the "single impulse" test for double jeopardy adopted in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), in favor of the "same elements" test established in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Under the Blockburger approach, double jeopardy does not occur when a person is convicted of two crimes arising from the same course of conduct, as long as each statute "requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S. Ct. at 182.

Consequently, the focus is on the statutory elements of the offenses and the evidence used to prove those elements.

A review of the statutory elements of murder, burglary and robbery, and of the evidence in the case indicates that Slone was not subjected to double jeopardy. Under KRS 507.020, murder requires an element different from burglary and robbery, that being the death of the victim. Under KRS 511.020, first-degree burglary contains an element distinct from murder or robbery: unlawful entry into a building with the intent to commit a crime. Under KRS 515.020, first-degree robbery requires proof of an element different from murder or burglary: the commission of a theft against a person. See Jordan v. Commonwealth, Ky., 703 S.W.2d 870 (1986) (holding that robbery and burglary are different offenses for purposes of double jeopardy); Kinser v. Commonwealth, Ky., 741 S.W.2d 648 (1987) (holding that murder, first-degree robbery, and first-degree burglary are separate offenses for purposes of double jeopardy). The record indicates that Slone was convicted of killing Herman McIntosh after unlawfully entering his residence and threatening the use of force to steal money from him. Slone's focus on the language of the indictment ignores the actual evidence and the reference in the jury instruction on robbery that required the jury to find that Slone stole money from Herman McIntosh. Slone's attempt to create a double jeopardy violation based on an ambiguity or failure of the indictment to specifically identify the item taken in the robbery is without merit.

Slone contends that he received ineffective assistance of counsel because his attorney allowed him to enter a guilty plea without first determining if he fully understood the nature of the charges and the consequences of pleading guilty. Slone relies on Boykin v. Alabama, 395 U.S. 238, 89 C. Ct. 1709, 23 L. Ed. 2d 274 (1969), in maintaining that it cannot be assumed that he entered the guilty plea knowingly, voluntarily, and intelligently because there is no record of the guilty plea proceeding. Slone argues that counsel's error substantially prejudiced him in violation of the federal constitution.

The Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, so this right focuses on whether the proceeding at issue was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 112 L. Ed. 2d 180 (1993). A court must indulge in a strong presumption that counsel is competent, and the burden rests upon the appellant to overcome the presumption by demonstrating a constitutional violation. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986); and Brewster v. Commonwealth, Ky., 723 S.W.2d 863, 865 (1986). Similarly, the appellant bears the burden of showing that he suffered actual prejudice in that there is a reasonable probability that absent counsel's unprofessional errors, the result of the proceeding would have been different. Strickland,

supra, and Commonwealth v. Gilpin, Ky., 777 S.W.2d 603 (1989). Absent extreme circumstances evidencing a virtual breakdown in the adversarial process, an appellant can prevail upon a claim of ineffective assistance only by pointing to specific errors made by counsel. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

In addition, RCr 11.42(2) requires that the movant:

> state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

It is well-established that conclusory allegations of ineffective assistance of counsel are insufficient to justify post-conviction relief. See, e.g., Bartley v. Commonwealth, Ky., 463 S.W.2d 321 (1970), and Brooks v. Commonwealth, Ky., 447 S.W.2d 614 (1969). The courts have repeatedly held that an allegation of ineffective assistance of counsel does not state grounds for relief under RCr 11.42 unless the petition presents sufficient facts to show the representation was inadequate. Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970), and Mullins v. Commonwealth, Ky., 454 S.W.2d 689 (1970).

Under the circumstances of the case sub judice, Slone's allegation that counsel failed to advise him of the nature of the charges and consequences of pleading guilty are simply too vague. Slone had received a full trial on the merits and a jury had found him guilty of murder, burglary and robbery. Slone has not presented any information that counsel failed to provide.

Moreover, Slone has not described any misperception he may have had regarding the guilty plea. The nature of the charges was fully explored during the trial, and the consequences of pleading guilty did not differ significantly from a conviction on a jury verdict. Slone's conclusory allegation simply does not sufficiently identify how counsel's conduct was deficient.

Similarly, Slone has not demonstrated prejudice because of any failure by counsel to explain the nature of the charges or consequences of pleading guilty. He cannot assert that he would have gone to trial on the merits rather than having pled guilty because of counsel's errors. Slone did waive his statutory right to have his sentence for capital murder set by the jury. See Wilson v. Commonwealth, Ky., 765 S.W.2d 23 (1989) (holding that a defendant may waive statutory right to have sentence for capital murder set by jury); Bevins v. Commonwealth, 712 S.W.2d 932 (1986), cert. denied, 479 U.S. 1070, 107 S. Ct. 963, 93 L. Ed. 2d 1010 (1987); KRS 29A.270(1); and RCr 9.84(2). There is, however, no federal or state constitutional right to jury sentencing as opposed to a jury trial on guilt or innocence. Commonwealth v. Johnson, Ky., 910 S.W.2d 229 (1995); Ky. Const. § 7. The only available sentences for capital murder in 1980 were death or life imprisonment. To avoid the death penalty, Slone waived jury sentencing on the murder charge pursuant to an agreement with the Commonwealth to recommend life imprisonment. He has not identified any errors of counsel during the trial nor has he presented any facts to suggest that the jury verdicts and

accompanying sentences would have been different because of errors made by defense counsel. In addition, Slone received the minimum sentence on the capital murder offense. Consequently, he has not demonstrated actual prejudice.

Slone's reliance on Boykin, supra, is misplaced. The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among the alternative courses of action available to a defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 163 (1970), and Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992). Because a guilty plea involves the waiver of several constitutional rights--including the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers--a waiver of these rights cannot be presumed from a silent record. Boykin, supra. The validity of a guilty plea, however, is determined from the totality of the circumstances surrounding it rather than by reference to some magical incantation of specific key words recited at the time it was taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978), and Centers v. Commonwealth, Ky. App., 799 S.W. 2d 51, 54 (1990). "Boykin, supra, did not hold that a defendant who fully understood his constitutional rights before entry of a plea of guilty is entitled to have his judgment vacated solely because the record fails to show that a proper colloquy occurred." Conklin v. Commonwealth, Ky., 799 S.W.2d 582, 584 (1990).

The record in this case indicates that Slone entered his guilty plea only after the jury had returned a guilty verdict for murder, first-degree burglary, and first-degree robbery, and after the jury had fixed sentences of ten years on the burglary offense and twenty years on the robbery offense. At that time, the trial was recessed before conducting the sentencing proceeding on the capital murder charge. Slone entered his guilty plea several days later. In effect, Slone had already received the constitutional right to a jury trial, the right not to incriminate himself, and the right to confront his accusers. As discussed earlier, he waived the statutory right to jury sentencing, but the jury had already convicted him of murder and of the aggravating factors of burglary and robbery. He received the minimum sentence of life by plea agreement with the prosecution. Under these circumstances, we believe Slone's guilty plea was made freely with an intelligent, knowing understanding of the consequences thereof. See Sparks v. Commonwealth, Ky., App., 721 S.W.2d 726 (1986) (holding that the record revealed a valid guilty plea after a partial trial).

Slone's final argument concerns a claim of ineffective assistance because counsel failed to object to the consecutive sentences of life for murder, ten years for burglary and twenty years for robbery. He asserts that the consecutive sentencing was illegal in May 1980 when final sentencing occurred and that counsel's failure to challenge the sentences constituted deficient performance. He also alleges that the erroneous

sentencing had an adverse effect on prison classification, prison program participation, and the potential granting of parole during his incarceration. In July 1980, after Slone filed a motion to modify or amend the sentence, the trial judge issued an amended final judgment and sentence ordering that the sentences run concurrently. Slone maintains that this amendment order was improper because the circuit court had no jurisdiction to issue same.

Even assuming that failure to object to the consecutive sentencing constituted ineffective assistance, Slone has not demonstrated any resulting injury. The circuit court granted the RCr 11.42 motion to the extent of ordering the sentences to run concurrently. The court agreed with Slone that the original trial judge lacked jurisdiction to amend the judgment in July 1980 because it occurred several months after the initial final judgment. See Commonwealth v. Marcum, Ky., 873 S.W.2d 207 (1994) (holding that circuit court retains jurisdiction to amend judgment for only ten days following entry of final judgment). Slone has not presented evidence to support his claim of an adverse impact from the sentencing on his prison status, especially given that the original trial judge issued an order amending the sentences only three months after the judgment. In any event, Slone has received all the relief to which he is entitled under RCr 11.42.

For the foregoing reasons, we affirm the order of the Lee Circuit Court.

ALL CONCUR.

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