

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002937-MR

TIM JOE COLEMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
ACTION NO. 93-CR-755

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, CHIEF JUDGE; GARDNER AND MILLER, JUDGES.

GARDNER, JUDGE: Tim Joe Coleman (Coleman) appeals from an order of the Fayette Circuit Court denying his motion for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. He maintains that he received ineffective assistance of counsel and that his guilty plea was invalid, because he was told he would receive a twenty year sentence rather than the sixty year sentence that the court imposed. This Court affirms the circuit court's order.

In August 1994, Coleman pled guilty to one count of rape in the first degree, one count of robbery in the first degree, one count of theft by unlawful taking over \$300, three counts of theft by unlawful taking under \$300, one count of sexual misconduct and of being a persistent felony offender in the first degree (PFO I). The Commonwealth recommended Coleman receive a sentence of fifteen years as a result of the PFO I charge, five years for sexual abuse enhanced to ten years, ten years for robbery enhanced to twenty years, five years for theft by unlawful taking over \$300 enhanced to ten years, twelve months for sexual misconduct and for each count of theft by unlawful taking of property under \$300. The record does not reflect that the Commonwealth recommended that the sentences run concurrently.

Coleman signed a waiver of further proceedings with petition to enter a guilty plea. The court after advising Coleman of his rights pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), accepted Coleman's plea as intelligent, voluntary and knowing. At the sentencing, the court accepted the Commonwealth's recommendation. The court ordered the felony sentences to run consecutively, for a total of sixty years.

In July 1997, Coleman filed a motion for relief pursuant to RCr 11.42 and a motion for an evidentiary hearing. He requested that the court amend his sentence from sixty years to twenty years. In November 1997, the circuit court denied his motion for an evidentiary hearing as well as his motion for RCr

11.42 relief. Coleman has appealed from the circuit court's order.

Coleman argues that he received ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution, because his counsel told him before he entered a guilty plea that he would receive a twenty year sentence, and further that he did not knowingly enter into the agreement, because nothing in the agreement states that he would receive more than twenty years. He also maintains that the court should have held a formal hearing regarding his RCr 11.42 motion. The record refutes Coleman's arguments.

The Sixth and Fourteenth Amendments to the United States Constitution mandate that a defendant in a criminal case receive effective assistance of counsel. United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985). To prove a counsel's ineffectiveness, a movant must show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as counsel was not performing as guaranteed by the sixth amendment, and (2) that the deficient performance prejudiced the defense so seriously affecting the process that the defendant would not have pled guilty, but would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shelton v. Commonwealth, Ky. App., 928

S.W.2d 817, 818 (1996); Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 226 (1986); Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863, 864 (1986).

A guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The trial court must determine that a defendant's guilty plea is intelligent and voluntary, and this determination must appear in the record. Boykin v. Alabama, 89 S.Ct. at 1712; Centers v. Commonwealth, 799 S.W.2d at 54. The validity of a guilty plea is determined from considering the totality of circumstances surrounding it. Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990); Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). "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." Jewell v. Commonwealth, Ky., 725 S.W.2d 593, 594 (1987), quoting Turner v. Commonwealth, Ky. App., 647 S.W.2d 500, 501 (1983). Boykin v. Alabama, supra, does not require that a defendant be informed of the range of sentences which may be imposed. Id.

RCr 11.42(5) directs that if a material issue of fact has been raised that cannot be determined on the face of the record, the court shall grant a prompt hearing. If the record refutes the allegations raised in the motion to vacate or set

aside the sentence, the motion may be dismissed without an evidentiary hearing. Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993); Maye v. Commonwealth, Ky., 386 S.W.2d 731 (1965); Hopewell v. Commonwealth, 687 S.W.2d at 154; Trice v. Commonwealth, Ky. App., 632 S.W.2d 458 (1982). See Brewster v. Commonwealth, 723 S.W.2d at 865.

In the case at bar, the record refutes Coleman's contentions so no hearing was required. Neither the waiver of further proceedings with petition to enter a guilty plea form signed by Coleman, nor any other documents show that the Commonwealth ever promised Coleman that it would recommend a twenty year sentence for him. In fact, the guilty plea form shows that based upon all of the charges to which Coleman was pleading guilty including his PFO I status, he could have received a life term. The record reveals that Coleman's guilty plea was entered into knowingly and voluntarily, and the circuit court thoroughly questioned him about his plea. The record also shows that Coleman received effective assistance of counsel. He has pointed to nothing in the record which shows that his counsel told him that he would only receive a twenty year sentence.

For the foregoing reasons, this Court affirms the order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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