RENDERED: MAY 14, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000353-MR

JAMES C. SAVAGE — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00174

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, NICKELL, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: James Savage appeals *pro se* from the Muhlenberg Circuit Court's denial of his post-conviction motion under Kentucky Rule of Criminal Procedure (RCr) 11.42. Savage's RCr 11.42 motion sought to set aside his guilty pleas to first-degree robbery, being a first-degree persistent felony offender, and possession of a handgun by a convicted felon. Upon careful review, we affirm.

On October 19, 2007, James Savage was indicted for the following offenses: (1) first-degree robbery; (2) theft by unlawful taking, $300 or more; (3) being a first-degree persistent felony offender; and (4) possession of a handgun by a convicted felon. Savage was apprehended by police while fleeing from a pharmacy. According to witnesses, Savage had allegedly robbed the store at gunpoint. A gun and drugs from the store were in Savage's possession at the time of arrest.

Prior to indictment, Brian Crick, a public defender, was appointed to represent Savage. On January 17, 2008, Mike Ruschell, another public defender, was substituted as counsel for Savage. Thereafter, on January 29, 2008, Savage entered guilty pleas to all of the charges set forth above except the theft charge. The theft charge merged into the robbery offense and therefore, it was dismissed "due to insufficiency of evidence." A final judgment was entered against Savage on February 4, 2008.

On January 20, 2009, Savage filed a RCr 11.42 motion to set aside his guilty pleas and convictions. In this motion, Savage alleged that ineffective assistance of counsel caused him to enter involuntary guilty pleas. He further alleged that his defense counsel were ineffective because they failed to conduct a pretrial investigation, prepare a possible defense, or research the law. Savage's RCr 11.42 motion was overruled without an evidentiary hearing on February 3, 2009. An appeal to this Court now follows.

On appeal, Savage contends the trial court denied him due process by failing to conduct an evidentiary hearing and by denying his RCr 11.42 motion to set aside his convictions. When a movant's allegations are conclusively refuted on the face of the record, no evidentiary hearing is required. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986). Thus, the question before this Court is whether the record conclusively refutes the allegations set forth in Savage's RCr 11.42 motion. *Id.*

In his motion, Savage alleged ineffective assistance of his trial counsel. "A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 defendant would not have pleaded guilty, but would have insisted on going to trial." *Id.* at 727-728 (quoting *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985)).

Savage alleges the following instances of deficient performance by his trial counsel: (1) counsel failed to conduct any pretrial investigation or to prepare and develop possible defenses; (2) counsel failed to research the law relevant to Savage's charges; and (3) Brian Crick, his first appointed counsel, made an affirmative and gross misstatement regarding parole eligibility.

As to the alleged failure to conduct a pretrial investigation, to prepare and develop possible defenses, and to research the law relevant to Savage's charges, the record contains both a plea colloquy and a signed guilty plea motion whereby Savage states that his counsel was fully informed about the case, that counsel discussed the charges and any possible defenses to these charges with him, and that he was satisfied that his counsel had explained the same to him. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) ("Solemn declarations in open court carry a strong presumption of verity.") (quotation omitted).

Moreover, there is a letter from Savage's first appointed counsel, Brian Crick, which explained to Savage in detail the charges pending against him and why Crick believed that no defenses were available in Savage's case. When this evidence is considered in its totality, we agree with the trial court that Savage's allegations regarding failure to conduct a pretrial investigation, to prepare and develop possible defenses, or to research the law are conclusively refuted on the face of this record.

In any event, deficient performance without any showing of "prejudice" is not sufficient to establish ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 59-60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Here, Savage's allegations as to how he was prejudiced by his attorneys' alleged failure to investigate, develop potential defenses, or research the law are without merit.

Savage argues that Brian Crick, his first counsel, failed to advise him that double jeopardy prevented him from being convicted of both first-degree robbery and theft. *See Jordan v. Commonwealth*, 703 S.W.2d 870, 874 (Ky. 1985). As the theft charge was dismissed, Savage could not have been prejudiced thereby. He also argues that Crick misled him as to the jury's authority in sentencing. However, Savage fails to explain how this prejudiced him.

Savage, a convicted felon, was apprehended crawling out of the drive-through window of a pharmacy with drugs and a gun in his possession. Savage's plea resulted in a twenty-five (25) year sentence, just five (5) years more than the statutory minimum. Savage does not dispute these facts, nor does he offer any mitigations or possible defenses that may have prevented him from entering his guilty pleas. Discerning no demonstration of prejudice, Savage's claims regarding his attorneys' alleged failure to investigate, develop potential defenses, or research the law are rejected as being without merit.

As to Savage's claim that he was grossly misadvised regarding parole eligibility, the record contains a letter from Savage's first counsel, Brian Crick. In this letter, Crick advised Savage that if he was convicted of the charged offenses, Savage would have to serve eighty-five percent (85%) of any sentence imposed. Thus, according to Crick, Savage would serve anywhere between seventeen (17) years, presuming he was sentenced to the statutory minimum of twenty (20) years, and forty-two (42) years, presuming he was sentenced to the statutory maximum of fifty (50) years, in prison before having any chance at parole. Crick further states,

"In my opinion, you are more likely to get closer to the maximum sentence allowed once the evidence is presented."

Savage argues that this is gross misadvice because he would have been eligible for parole in no more than twenty (20) years, regardless of the length of sentence he may have received at trial. *Hughes v. Commonwealth*, 87 S.W.3d 850, 855-56 (Ky. 2002) (violent offender sentenced to a term of years would be eligible for parole after serving either eighty-five percent (85%) of the sentence imposed or twenty (20) years, whichever was less). Savage contends that if he had known there was no chance that he would have to serve more than twenty (20) years in prison before being eligible for parole, he never would have accepted the plea deal that was offered by the Commonwealth. Rather, he would have taken his chances at trial.

The Commonwealth counters that while Savage may have initially been misadvised as to his parole eligibility, the record demonstrates that this misadvice was corrected by the time of the plea colloquy. It reflects the following:

> COURT: Mr. Savage . . . the offense you plead guilty to, first degree robbery is a, defined as a, violent offense subject to the eighty-five percent (85%) parole eligibility rule. Is that the way you understand it Mr. Ruschell?
>
> RUSCHELL (COUNSEL): Yes, that's what we discussed.
>
> COURT: And have you discussed that with Mr. Savage?
>
> COUNSEL: Yes, your honor.
>
> COURT: Mr. Vick, am I correct on that?

VICK (PROSECUTOR): Yes, you are your honor.

COURT: Alright then. Mr. Savage, have you and Mr. Ruschell discussed that?

SAVAGE: Yes, sir.

COURT: And I take it then that you understand all about that?

SAVAGE: Yes, sir.

COURT: Well, alright. Then the other case, escape and PFO first, that is the traditional twenty percent (20%) rule?

PROSECUTOR: That would be correct your honor. That's a concurrence of. That would really not have any major impact.

COURT: Doesn't have any impact.

PROSECUTOR: He is, I think. He was on parole and now has been reinstated, and they are aware, and that is part of the negotiation. He has additional time he must serve before he commences to serving this sentence.

COURT: Okay. Is that also correct, Mr. Ruschell?

COUNSEL: Well, it was our understanding. But we have since talked to Mr. Paxton [from the office of Probation and Parole] and the indication is *he will meet the [parole] board in twenty (20) years, no matter what*, and then the issue will be whether he serves.

COURT: Mr. Savage, you understand what Mr. Ruschell is talking about?

SAVAGE: Yes, sir.

COURT: So apparently, you do have some, what they call, time on the shelf, or whatever.

SAVAGE: Yes, sir.

COURT: But this sentence of twenty (20), yeah, twenty (20) years of eighty-five (85), twenty-five (25) year sentence with the eighty-five percent (85%) rule will probably surpass whatever is on the shelf. Is that the way it's deemed?

COUNSEL: I guess Mr. Paxton can best. He called Frankfort and he . . .

PAXTON: *Twenty years is the maximum that anybody waits to see the Board.* So this will be when he sees them next, is in twenty (20) years. At that time, they can consider paroling him or making him serve a deferment or serve out, but twenty (20) years will be the least he would have to wait.

COURT: Mr. Savage, do you understand all that?

SAVAGE: Yes, sir.

COURT: Okay, very good. Then we will see everybody back in this case this coming Monday . . . .

(Emphasis added).

Savage argues that the above discussion was only in the context of the twenty-five (25) year sentence he was receiving for first-degree robbery. He contends it was not sufficient to correct Crick's misstatement regarding how long he would have to wait to have a parole hearing if he had been sentenced to the maximum term. We disagree. Both Paxton and Savage's counsel confirmed that Savage would have a parole hearing in twenty (20) years, regardless of the length of any sentences he may receive. Savage affirmed his understanding of this fact twice.

In *Edmonds v. Commonwealth*, the Kentucky Supreme Court addressed a similar issue wherein the defendant alleged that he had been misinformed by his defense counsel as to when he could be released on parole. 189 S.W.3d 558, 567 (Ky. 2006). Our Supreme Court held as follows: "Although a defendant should be able to rely on representations by his attorney, reliance on a statement that is flatly contradicted by subsequent statements made by that same attorney, the trial court, and the Commonwealth during the plea negotiations and the *Boykin* colloquy is not reasonable and does not render the plea involuntary." *Id.* at 568; *see also United States v. Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) ("[I]f the information given by the court at the [plea] hearing corrects or clarifies the earlier erroneous information given by the defendant's attorney and the defendant admits to understanding the court's advice, the criminal justice system must be able to rely on the subsequent dialogue between the court and defendant.").

Upon review of this record, we are convinced that the plea colloquy conclusively demonstrates that any misstatement that was transmitted to Savage regarding the amount of time he might have to serve prior to being eligible for parole was corrected and clarified by the time of Savage's plea hearing. Savage twice affirmed that he had discussed and understood the parole guidelines set forth at the hearing. We therefore discern no error in the trial court's ruling that this record conclusively reflects Savage's plea to be knowing, intelligent and voluntary and not a result of any gross misadvice of his attorneys.

Accordingly, the February 3, 2009, order of the Muhlenberg Circuit Court denying Savage's post-conviction motion under RCr 11.42 is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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