

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000788-MR

GREGORY A. STOKES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 02-CR-00981

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

MOORE, JUDGE: Gregory A. Stokes, proceeding *pro se*, appeals the order of the Fayette Circuit Court denying his RCr<sup>1</sup> 11.42 Motion to Vacate, Set Aside, or Correct his Sentence. After a careful review of the record, we affirm because Stokes's claim that he received the ineffective assistance of counsel regarding his parole eligibility lacks merit, and his remaining claim was not raised in the circuit court.

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<sup>1</sup> Kentucky Rule of Criminal Procedure.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Stokes entered guilty pleas to the charges of first-degree manslaughter and first-degree robbery. He received a sentence of twenty years of imprisonment for the manslaughter conviction and ten years of imprisonment for the robbery conviction. The sentences were ordered to be served consecutively. Additionally, the circuit court informed Stokes that he was a violent offender and, therefore, he would have to serve eighty-five percent of his sentence before becoming eligible for parole.

Stokes filed his *pro se* RCr 11.42 motion in the circuit court, asserting as follows: (a) he received the ineffective assistance of trial counsel when counsel misadvised him regarding parole eligibility and the amount of time he would have to spend incarcerated; (b) he received the ineffective assistance of counsel when counsel failed to file a motion to amend the charge from murder to manslaughter and having Stokes plead guilty to the maximum penalty; (c) his guilty plea was involuntarily entered because it was induced by coercion from the court and trial counsel, with multiple threats of the death penalty and references to “lethal injection” and “electrocution”; (d) his guilty plea did not satisfy the elements of manslaughter and should have been rejected by the court; and (e) his final judgment does not state that the victim suffered death or serious physical injury.

Counsel was appointed for Stokes, and Stokes requested two extensions of time to supplement his *pro se* RCr 11.42 motion. The circuit court granted both requests for time extensions. Therefore, Stokes was given a total of

approximately five months of extensions. Counsel then notified the court that it did not intend to supplement Stokes's RCr 11.42 motion.

The circuit court determined that because the allegations could be resolved from the face of the record, no evidentiary hearing was necessary. The court then denied Stokes's RCr 11.42 motion.

Stokes now appeals, contending as follows: (a) he received the ineffective assistance of trial counsel and his due process rights were violated when counsel failed to investigate before advising Stokes to enter a guilty plea; and (b) he received the ineffective assistance of trial counsel and his due process and equal protection rights were violated when counsel misadvised him regarding his parole eligibility and the actual amount of time he would spend incarcerated, and when counsel failed to object to the imposition of a sentence not in accordance with the plea agreement.

## II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v.*

*Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

### III. ANALYSIS

#### A. INEFFECTIVE ASSISTANCE OF COUNSEL/ FAILURE TO INVESTIGATE

Stokes first alleges that he received the ineffective assistance of trial counsel and his due process rights were violated when counsel failed to investigate before advising Stokes to enter a guilty plea. However, Stokes did not raise this claim in the circuit court proceedings. Therefore, we will not consider it for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”).

Moreover, even if we do consider this claim, it lacks merit. Stokes merely alleges in his appellate brief that “[a] viable defense *may have* existed had [trial counsel] executed her duties and pursued an investigation into Stokes’s co-defendants accepting a plea agreement that would have made them ‘star witnesses’ against Stokes.” (Emphasis added). He does not provide specifics regarding what trial counsel would have discovered and what defense he would have had based on what her investigation would have revealed. We will not grant RCr 11.42 relief based on mere speculation and conclusory allegations. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 745 (Ky. 1993). Therefore, even if this claim had not been barred from appellate review, it lacks merit.

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL/ PAROLE ELIGIBILITY

Stokes next contends that he received the ineffective assistance of trial counsel and his due process and equal protection rights were violated when: (1) counsel misadvised him regarding his parole eligibility and the actual amount of time he would spend incarcerated; and (2) when counsel failed to object to the imposition of a sentence not in accordance with the plea agreement.

We first note that Stokes did not assert the equal protection part of this claim, nor the part concerning counsel's alleged failure to object to the imposition of a sentence not in accordance with the plea agreement, in the circuit court. Therefore, we will not consider those parts of this claim on appeal. *See Kennedy*, 544 S.W.2d at 222.

Stokes asserts that his counsel was ineffective in advising him regarding his parole eligibility and the amount of time he would have to serve because: (1) counsel advised him that the plea agreement was for "twenty years, period"; and (2) counsel advised him that he would only be required to serve seventeen years before being eligible for parole.

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.

*Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001).

During his plea colloquy, Stokes informed the court that his counsel had spoken with him about the plea deal, but that he did not understand all of it. The court told him it was important for him to understand what he was facing, and if he did not want to proceed with the guilty plea, he should not do so. Stokes told the court that defense counsel had advised him of the penalties for the various charges against him, if he was convicted of those charges. The court informed Stokes that if he was convicted of the charge of capital murder, he could be sentenced to death. Stokes acknowledged he understood that was the risk he would take if he went to trial. The court then noted that in its plea offer, the Commonwealth had recommended that the charge be amended from capital murder to first-degree manslaughter, and Stokes acknowledged that he understood.

The court directed defense counsel to explain to Stokes on the record what the possible penalties were for first-degree manslaughter. Defense counsel told Stokes that manslaughter in the first degree requires an “intentional state of mind, as opposed to the wanton state of mind.” Counsel advised Stokes on the record that first-degree manslaughter carries a penalty of ten to twenty years of imprisonment and that the Commonwealth was recommending the maximum. Stokes acknowledged he understood. Counsel also advised him on the record that his robbery charge carried a penalty of ten to twenty years of imprisonment. Defense counsel then informed Stokes that both convictions qualified him as a violent offender, requiring him to serve eighty-five percent of his time. Counsel asked Stokes if he understood all of that, to which he responded affirmatively.

The court told Stokes that he needed to decide whether pleading guilty was in his best interest. The court directed defense counsel to tell Stokes, on the record, what penalties he may face if he decided to proceed with the trial. Counsel told Stokes that for a murder conviction with the aggravated circumstance of first-degree robbery, he might be given the death penalty, or he might be sentenced to life without parole, life without the possibility of parole for twenty-five years, life imprisonment, or imprisonment for a period of twenty to fifty years. Defense counsel then informed Stokes on the record as follows: “[W]ith a manslaughter conviction, which is what they have recommended for you now, there is no possibility that you’re gonna get the death penalty. We’re talking about twenty years, period. Twenty years under the violent offender category.”

The court then asked Stokes what he wanted to do. Stokes asked: “And it’s twenty years no matter what?” The court responded: “Essentially yes . . . Under the violent offender statute, you have to serve eighty-five percent of it before you’re eligible for parole.” Defense counsel added: “We talked about that, it’s seventeen years, and your two and a half years that you’ve already spent in jail would be credited to that.” The court stated:

And, Mr. Stokes, the court has the authority to run these two sentences consecutive, which is one after the other, for a total of thirty, or more, within the penalty range, but if [the court] gave you more, you wouldn’t have to take it. You could withdraw your guilty plea and go on to trial. But do you understand that it’s the court’s discretion how to run these sentences?

Stokes responded that he did understand. The court reminded Stokes that trial was scheduled to begin the following day. Stokes then entered his guilty plea.

As previously noted, Stokes asserts on appeal that his counsel rendered ineffective assistance by advising him regarding his parole eligibility and the amount of time he would have to serve because: (1) counsel advised him that the plea agreement was for “twenty years, period”; and (2) counsel advised him that he would be required to serve only seventeen years before being eligible for parole.

Although counsel advised Stokes on the record that his sentence would be “twenty years, period,” it is clear from our review of the video recorded plea colloquy that counsel was referring only to Stokes’s possible manslaughter conviction at that time. As we set forth, *supra*, the context of what defense counsel was saying at the time she made this statement was as follows: “[W]ith a manslaughter conviction, which is what they have recommended for you now, there is no possibility that you’re gonna get the death penalty. We’re talking about twenty years, period. Twenty years under the violent offender category.” Therefore, it is obvious that counsel was only referring to a possible manslaughter conviction when she said the penalty would be “twenty years, period.” Therefore, this part of Stokes’s claim that counsel performed deficiently lacks merit.

Finally, as for Stokes’s claim that counsel was ineffective when counsel advised him that he would be required to serve seventeen years before being eligible for parole, upon review of the plea colloquy, counsel’s full statement



concerning the seventeen years Stokes would have to serve was as follows: “We talked about that, it’s seventeen years, and your two and a half years that you’ve already spent in jail would be credited to that.” Therefore, although it may not have been clear that defense counsel was referring only to the possible manslaughter conviction -- and not to the total sentence -- which would have also included a sentence for first-degree robbery, the court immediately clarified what defense counsel had said by stating:

And, Mr. Stokes, the court has the authority to run these two sentences consecutive, which is one after the other, for a total of thirty, or more, within the penalty range, but if [the court] gave you more, you wouldn’t have to take it. You could withdraw your guilty plea and go on to trial.

Therefore, even if Stokes could establish that counsel performed deficiently when she stated that he would have to serve seventeen years, he cannot show that but for counsel’s deficient performance, he would not have entered a guilty plea and he would have proceeded to trial, as required to establish his ineffective assistance of counsel claim. *See Bronk*, 58 S.W.3d at 486-87. Stokes cannot show that he would have proceeded to trial because immediately after counsel made her statement, the court clarified that if it chose to run the two sentences consecutively, Stokes would face thirty years or more for both charges. Stokes acknowledged that he understood this. Consequently, Stokes’s ineffective assistance of counsel claim lacks merit.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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