RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000407-MR

TERRY G. MASSEY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 02-CR-00446

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Terry G. Massey, *pro se*, appeals from an order of the Warren Circuit Court that denied his motion made pursuant to CR[1] 60.02(e) and (f). Massey sought to vacate or set aside an earlier order that had denied a previous motion filed pursuant to RCr[2] 11.42. Both motions were based on the identical claim that Massey had entered an involuntary guilty plea due to ineffective assistance of counsel. Massey contended that his counsel had misinformed him regarding his parole eligibility,

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Rules of Criminal Procedure.

assuring him that he would be paroled in two-years' time. However, the violent offenders' statute, KRS[3] 439.3401, requires that he serve eighty-five percent of his ten-year sentence -- or eight and one-half years -- prior to becoming eligible for parole.

On June 15, 2002, Massey had been drinking heavily when he drove through a stop sign in Bowling Green, Kentucky. He struck another car and seriously injured two of the three occupants, including a five-year-old boy whose scalp was nearly severed. Massey was indicted on numerous charges: two counts of assault in the first degree, wanton endangerment in the first degree, operating a motor vehicle while under the influence of alcohol, driving without an operator's license, disregarding a stop sign, driving without insurance, failing to wear a seat belt, leaving the scene of an accident, and possessing an open alcohol container.

Massey entered a plea of not guilty to the charges, was released on bond, and was ordered by the court to begin a recovery program for alcoholism at the New Start Halfway House. A trial date was scheduled, but on January 29, 2003, Massey entered a plea of guilty to all the charges (except the charge of having no insurance, which was dismissed). The Commonwealth made no recommendation as to his sentence. At the sentencing

[3] Kentucky Revised Statutes.

hearing on March 11, 2003, Massey was ordered to serve ten (10) years, the minimum term for assault in the first degree, a class B felony. See KRS 508.010(2), KRS 532.060(2)(b). The sentences for all the other offenses were ordered to run concurrently. He was also informed that because he was a violent offender (as defined in KRS 439.3401 to include any person who has pled guilty to a class B felony involving serious physical injury to the victim), he would not be eligible for parole until he had served eighty-five percent (or 8.5 years) of his sentence.

On September 2, 2003, Massey filed a timely motion to vacate, set aside, or correct judgment pursuant to RCr 11.42, alleging that his guilty plea had been involuntary based on ineffective assistance of counsel. He explained that while he was living at the halfway house, he had reported to drug court every week and that a regular report on his progress was provided to the court by halfway house officials. He claimed that Judge Lewis advised him and the other halfway house residents that "if you do what I tell you to do and listen to the people at the Halfway House, I will give you probation if you are convicted." Massey also claimed that the halfway house supervisor told Massey, his mother, and his wife that his sentence would be probated as long as he stayed free of drugs or alcohol while he was in the program.

When his defense attorney, Ralph Beck, contacted him in January 2003 about a plea agreement, Beck allegedly told Massey that in almost all cases where Judge Lewis ordered a recovery program and drug court, he probated the sentences. Massey asked Beck when he would be released if he did not get probation. Beck replied that on a ten-year sentence, Massey would be eligible for parole in two years and that the parole board would probably release him since he was a first-time offender. Massey contended that he entered his plea of guilty on the basis of what Beck had erroneously led him to believe in this telephone conversation. Massey also requested an evidentiary hearing on his motion.

The circuit court denied the motion in an order entered on November 21, 2003. The court observed that:

> during the sentencing hearing in this matter . . . it was mentioned at least thirteen (13) times that this defendant had pled guilty to charges **that bring him under the violent offender statute**, that he was not eligible for probation or parole, and would not be until he had served **at least eighty-five percent of his sentence**. (Emphasis added.)

The court also ruled that the matter could be decided based on the record and refused to grant an evidentiary hearing.

Massey did not appeal the denial of his motion. Instead, on January 13, 2005, he filed a motion to vacate or set aside the order pursuant to CR 60.02(e) and (f), making

arguments identical to those presented in the earlier RCr 11.42 motion. On February 17, 2005, the circuit court entered an order denying this motion for relief, noting that Massey had failed to pursue the proper remedy of appealing the order denying the first motion. Furthermore, the court found that Massey did not present any argument on which the court could base a finding that the judgment of the court was no longer equitable or any other reason of an extraordinary nature justifying relief. The court also denied his motion for an evidentiary hearing. This appeal followed.

The record reveals that Massey's plea colloquy was properly conducted. In addition to establishing that Massey understood the rights that he was waiving by pleading guilty, the judge meticulously explained that two counts of assault in the first degree constituted class B felonies carrying a minimum sentence of ten (and a maximum of twenty years) in a state penitentiary. He asked Beck whether he had gone over the maximum and minimum sentences for each offense with his client. He also inquired as to whether Massey understood that the penalty would be set by the judge at sentencing and that the victims would be allowed to testify at that time.

He then addressed Massey, asking whether he understood that he had delegated to the judge his right to sentencing by a jury: "you have decided that I [rather than a jury] will decide

the penalty." He also asked Massey whether he understood that "you still might be sentenced [by the court] to forty-five years in prison; that's the maximum sentence, do you understand that?" He asked whether anyone had promised Massey anything in return for his guilty plea and whether Massey was satisfied that his attorney had obtained for him the best deal that he could under the circumstances, emphasizing that "we don't know the final deal." He inquired as to whether Massey knew that "the final deal will be no more than forty-five years and a fine." Massey answered all of these questions in the affirmative.

Failure to inform a defendant of parole eligibility does not render a guilty plea involuntary under the rule of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

> *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). . . . [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 v. Commonwealth, 647 S.W.2d 500, 500- 501 (Ky. App. 1982).

Massey emphasizes that he was actively **misinformed** by Beck and that his mistaken belief motivated his decision to plead guilty. Federal case law from our own circuit holds that "gross misadvice" concerning parole eligibility may constitute ineffective assistance of counsel. See Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988).

The circuit court noted in its first order that Massey was repeatedly advised at the sentencing hearing that he would have to serve eighty-five percent of whatever sentence he received. Beck also asked the court to consider reducing the two charges of first-degree assault to second-degree assault, a class C felony, so that Massey would be eligible for parole sooner. The judge refused to "back up on" the agreement or to go back and change the deal, stating "I told him this day was coming the whole time." Massey had already entered his plea of guilty at this point.

We have carefully examined the record in this case and are not persuaded that the court erred in its Boykin colloquy. While there is a question as to advice of counsel and whether Massey was so misinformed as to render his plea involuntary, the record on its face establishes that the violent offender statute and its mandatory eighty-five percent rule were mentioned "at

least thirteen times" during his sentencing hearing. Massey did not interrupt the colloquy to inquire about the impact of the statute on his sentence.

Most importantly, we are not at liberty to disregard the procedure carefully established with respect to Boykin matters. Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983), has set forth the procedural sequence as follows:

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42.

The circuit court properly held that Massey should have appealed the first order denying his RCr 11.42 motion rather than resubmitting it in the form of a motion pursuant to CR 60.02. It is well-established that "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). Therefore, Massey's claim of ineffective assistance of counsel under CR 60.02 was procedurally barred as it had already been raised in his RCr

11.42 motion. His only remedy would have been to pursue an appeal from the denial of his RCr 11.42 motion.

The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Terry G. Massey
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky