RENDERED: JULY 25, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000053-MR

VANCE CARTER GREEN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
ACTION NO. 05-CR-00248

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: This appeal arises from a Hardin Circuit Court order denying Vance Green's RCr 11.42 motion to vacate, alter, or amend his conviction. Green claims that his attorney's misadvice led to his decision to

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

plead guilty and requests that this Court reverse the Hardin Circuit Court order. We disagree and affirm the order of the Hardin Circuit Court.

On June 3, 2005, Vance Green was indicted by a Hardin County grand jury for receiving stolen property (RSP) over $300, possession of marijuana (POM), and possession of drug paraphernalia (PDP). At the time of his arrest, Green was on parole for a prior conviction. On the day he was indicted, Green entered into a plea agreement with the Commonwealth which provided that Green would be sentenced to three years on RSP and twelve months on POM, both running concurrently for a total of three years. In addition, the Commonwealth agreed to dismiss the PDP charge and recommend that Green receive probation.

On June 14, 2005, Green appeared before the Hardin Circuit Court to enter his plea. During the plea colloquy, Green's counsel advised him and the court that the plea agreement was unlawful. Defense counsel advised that under the law, Green was ineligible for probation because he was on parole. Despite receiving this information, Green persisted in entering a guilty plea in exchange for the Commonwealth's recommendation of three years imprisonment to run consecutively with Green's current time. Final judgment was entered June 21, 2005.

Green's counsel incorrectly advised that probation was prohibited. Under KRS 533.030 (2), Green was eligible for probation because he pled to a Class D felony. Parole only effects probation eligibility when the defendant pleads guilty to a felony that is a Class C or greater felony. Upon learning of his

counsel's error, Green filed an RCr 11.42 motion in the Hardin Circuit Court to vacate, alter or amend his conviction based upon ineffective assistance of counsel. The court denied his motion. This appeal follows.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and the deficiency prejudiced the case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, courts must examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). With respect to a guilty plea, however, a movant must also show that counsel's performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Green argues that his counsel's misadvice constituted an unreasonable deficiency outside the professional norm, which prejudiced his case. Furthermore, we note that the RCr 11.42 motion filed with the Hardin Circuit Court argues the error caused him to accept an offer that he otherwise would not have taken. We agree that counsel's misadvice constitutes deficient performance. However, Green fails to show that he would not have accepted the guilty plea and would have insisted on going to trial but for the erroneous advice.

The United States Sixth Circuit Court of Appeals, in *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Circuit, 1988), held that ". . . . gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." In

this 6th Circuit opinion, Sparks made the following allegations concerning his guilty plea:

> [o]n March 15, 1984, the third day of petitioner's trial, after defense counsel had already advised petitioner that if he didn't plead guilty he would get life without parole, petitioner was informed that his mother was in the hospital in critical condition. Petitioner's counsel then advised him that if he didn't plead guilty he may never see his mother again. At this point petitioner was confused and under duress and finally agreed to plead guilty for a recommendation of thirty-five (35) years.

Sparks, at 882.

Following the denial of his petition for writ of habeus corpus, Sparks alleged on appeal to the 6th Circuit that, but for the misadvice, he would not have pled guilty and would have continued with the trial. The attorney's advice was incorrect because Sparks would have been eligible for parole. Therefore, an evidentiary hearing on the ineffective assistance of counsel claim was granted.

Although this Court is not bound by the 6th Circuit's decision is *Sparks*, we find the reasoning persuasive. However, here Green cannot argue that he would not have pled guilty and would have proceeded to trial. If defense counsel had not incorrectly advised Green and the court that Green was ineligible for probation, Green would have proceeded with the plea agreement in which the Commonwealth recommended probation.

Green also alleges that defense counsel's mistake was so egregious that it rendered his plea involuntary under *Boykin v. Alabama*, 395 U.S. 238

(1969), which requires pleas to be "freely, knowingly, intelligently, and voluntarily made". Although Green entered the plea under the assumption that he was ineligible for probation, the record indicates that Green entered his plea advised of all *Boykin* rights.

Kentucky courts have consistently held that there is no constitutional right to probation. *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. App. 1986). Instead, "it is clear in this Commonwealth that probation is a privilege rather than a right." *Brown v. Commonwealth*, 564 S.W.2d 21 (Ky. App. 1977). Simply because the first agreement included a recommendation of probation did not guarantee that the Court would grant Green probation.

Although he was misinformed as to the potential sentence consequences, he pled guilty of his own free will. The failure of counsel or the court to inform him of all possible consequences of his plea will not render the plea involuntary. This Court, in *Turner v. Commonwealth*, 647 S.W.2d 500, 501 (1983) stated:

> . . . . 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 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.

Green entered his plea knowingly, intelligently, and voluntarily, albeit with the incorrect information about all potential consequences.

Because Green cannot show that he would not have pled guilty and that he would have insisted on proceeding to trial if he had not been misinformed, the trial court properly denied his RCr 11.42 motion. Accordingly, we affirm the order of the Hardin Circuit Court.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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