

RENDERED: OCTOBER 24, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2007-CA-000549-MR

DAVID STIGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NOS. 03-CR-000060, 03-CR-000109 & 03-CR-003264

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR  
JUDGE.

CLAYTON, JUDGE: This appeal arises from a Jefferson Circuit Court order  
denying David Stiger's Kentucky Rules of Civil Procedure (RCr) 11.42 motion to

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<sup>1</sup>Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

vacate, alter, or amend his conviction. Stiger claims that his attorney failed to properly advise him concerning parole eligibility which led to his decision to plead guilty. Stiger also claims that the Jefferson Circuit Court erred in failing to appoint defense counsel and in denying his request for an evidentiary hearing. For those reasons Stiger requests that this Court reverse the Jefferson Circuit Court's order.

On January 8, 2003, David Stiger was indicted on four (4) counts of first-degree robbery, one (1) count of first-degree burglary, one (1) count of first-degree unlawful imprisonment, and one (1) count of impersonating a police officer. On the same day, Stiger was indicted on a separate case which included one (1) count of first-degree robbery and one (1) count of first-degree burglary. In addition, Stiger was also indicted for being a first-degree persistent felony offender (PFO 1).

On December 16, 2003, Stiger entered a guilty plea in exchange for the Commonwealth's offer of ten (10) years imprisonment on each burglary and robbery charge and five (5) years imprisonment on unlawful imprisonment and impersonating a police officer, all charges to run concurrently for a total of ten (10) years enhanced to twenty (20) years by the persistent felony offender charge. During the guilty plea, the Jefferson Circuit Court thoroughly questioned Stiger and found that he knowingly, voluntarily and intelligently pled guilty. The matter was continued for final sentencing on January 26, 2004. The final judgment of conviction and sentence was entered on January 30, 2004.

Now Stiger appeals denial of his RCr 11.42 motion on three (3) grounds: (1) Stiger claims that defense counsel was ineffective because counsel did not advise him as to parole eligibility; (2) Stiger claims that this failure rendered his plea involuntary; and (3) Stiger claims that the trial court erred by denying his request for an evidentiary hearing. We disagree on all grounds and shall discuss each argument in turn.

First, Stiger argues that defense counsel was ineffective by failing to inform him that he would be ineligible for parole until he served 85% of the sentence. Instead, Stiger claims that he believed that if he accepted the Commonwealth's offer that the persistent felony offender charge would be dismissed.<sup>2</sup> Stiger claims that defense counsel's failure to advise him regarding parole eligibility caused him to take a plea that he otherwise would not have taken.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that the deficiency prejudiced the case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Further, courts must examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Commonwealth of Kentucky*, 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

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<sup>2</sup> Although Stiger now claims he did not knowingly pled guilty to the PFO 1 charge, in his RCr 11.42 motion filed in the Jefferson Circuit Court, Stiger admitted that he knowingly pled guilty to the PFO 1 charge. Instead, Stiger then only claimed that he did not understand the parole eligibility consequences.

would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Stiger relies on the United States Sixth Circuit Court of Appeals' opinion in *Sparks v. Sowers*, 852 F.2d 882, 885 (6<sup>th</sup> Cir. 1988), which held that "gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." Stiger argues that his attorney's failure to advise him as to parole eligibility rises to the level of ineffective assistance of counsel. We disagree.

The Kentucky Supreme Court in *Commonwealth v. Padilla*, 253 S.W.3d 482, 484-85 (Ky. 2008), recently held that defense counsel's failure to advise a client of collateral matters does not constitute ineffective assistance of counsel. Although the Court recognized the Sixth Circuit ruling in *Sparks*, the Court also recognized the divergent opinion maintained by other jurisdictions. The Court provided:

As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

*Id.* at 485. See also *Turner v. Commonwealth*, 647 S.W.2d 500, 502 (Ky. App. 1982) (Failure of trial court to advise defendant of a mandatory service of sentence prior to eligibility for parole is not grounds for RCr 11.42 relief.)

Second, Stiger alleges that defense counsel's mistakes were so egregious that they rendered his plea involuntary under *Boykin v. Alabama*, 395

U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which requires pleas to be knowingly, voluntarily and intelligently made.

However, 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 500-01 (Ky. App. 1982) 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 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.

Although he was uninformed as to the potential sentence consequences, Stiger pled guilty of his own free will. The circuit court conducted a thorough plea colloquy with Stiger in which he acknowledged that he voluntarily pled guilty to the charges, including PFO 1. Stiger entered his plea knowingly, intelligently, and voluntarily, albeit with the incomplete information about all potential consequences.

Third, Stiger maintains that the circuit court erred by denying his request for an evidentiary hearing on his motion for RCr 11.42 as well as his request for counsel to represent him during the proceedings. We disagree. An evidentiary hearing is not required on the motion if the issues raised are refuted by the record of the trial court. *Strickland*, 466 U.S. at 687. Instead, a hearing is only required if the motion "raises a material issue of fact that cannot be determined on

the face of the record[.]” RCr 11.42(5). Since parole eligibility is a collateral issue, Stiger was not entitled to a hearing. *Padilla*, 253 S.W.3d at 484-85.

Further RCr 11.42(5)<sup>3</sup> only requires that an indigent appellant be provided counsel during an RCr 11.42 proceeding when he or she is indigent and also entitled to a hearing. *Commonwealth v. Stamps*, 672 S.W.2d 336, 339 (Ky. 1984). Because Stiger is not entitled to a hearing, we find that the trial court was not required to appoint counsel.

Accordingly, we affirm the order for the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David Stiger, *Pro Se*  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Tami Allen Stetler  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>3</sup> RCr 11.42(5) provides: Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.