

RENDERED: NOVEMBER 21, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000954-MR

KENDRIC DEWAYNE SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 03-CR-00231 AND 03-CR-00231-002

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Kendric Dewayne Smith appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons set forth herein, we affirm.

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

On March 18, 2004, Smith was indicted for first-degree robbery; first-degree burglary; first-degree rape; two counts of first-degree sodomy; second-degree unlawful transaction with a minor; and possession of a handgun by a convicted felon. The seven-count indictment stemmed from an incident where Smith, armed with a handgun, and his co-defendants entered the residence of a female and burglarized the home. Smith then raped and sodomized the female.

After his two co-defendants agreed to testify against him, Smith appeared before the trial court and entered into a plea agreement with the Commonwealth. Under the terms of the agreement, Smith pled guilty to burglary, rape, and sodomy, all in the first degree. After reading the recommended sentences, the trial court informed Smith that it would determine whether his sentences were to be served consecutively or concurrently. At the conclusion of the hearing, Smith testified that he understood and desired to enter the plea.

On May 13, 2005, Smith and his counsel appeared at the sentencing hearing and presented an argument in mitigation. Although acknowledging that his client was not eligible for probation or parole until he served eighty-five percent of his sentence, Smith's counsel requested that the trial court use its discretion to sentence Smith to a concurrent rather than a consecutive term of imprisonment.

Counsel stated that his client had shown remorse and was taking responsibility for his transgressions. After stating that his client understood that

the trial court could deny the request, counsel argued that Smith's only chance of having a life after prison was to receive a concurrent sentence. After denying this request, the trial court ordered that Smith's sentences run consecutively for a total sentence of forty-years' imprisonment.

On September 27, 2006, Smith filed a motion for post-conviction relief pursuant to RCr 11.42 alleging ineffective assistance of counsel. On April 11, 2007, without conducting a hearing, the trial court denied the motion for post-conviction relief. This appeal followed.

Smith contends that his guilty plea was not knowingly, voluntarily, and intelligently made because his counsel rendered ineffective assistance. He contends that his counsel advised him that he was accepting a fifteen-year sentence when; in fact, he was receiving a forty-year sentence. He further contends that counsel misinformed him that he would be eligible for parole after serving twenty percent of his sentence. Thus, he contends that he was impermissibly misled into accepting a much greater sentence than he believed. We disagree.

The standard of review for claims of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* standard, however, is modified when a defendant waives a jury trial and pleads guilty to a criminal offense. Under the modified standard, a defendant can establish ineffective assistance of counsel by showing: (1) that defense counsel's performance fell outside the wide range of professionally competent assistance; and (2) that defense counsel's deficient

performance created a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial absent counsel's deficient performance. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

An attorney's performance is not judged in a vacuum but is judged by the degree that counsel's performance deviates from the quality of representation customarily provided by the legal profession. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990). Additionally, in reviewing ineffective assistance claims, the sworn declarations in open court of a defendant and his defense counsel carry a strong presumption of veracity. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Smith's claim that his guilty plea was not knowingly, voluntarily, and intelligently made is refuted by the record. During his plea hearing, the trial court informed Smith that it had the discretion to determine whether his sentences were to be served consecutively or concurrently. Further, during sentencing, defense counsel, while standing next to Smith, stated that Smith would have to serve eighty-five percent of the imposed sentence but asked the trial court not to run his sentences consecutively because it would deprive Smith of any future.

From the evidence in the record, Smith's allegation stands in stark contrast to the affirmative statements made by the trial court and his counsel. On numerous occasions, Smith was put on notice that he potentially faced a forty-year sentence. Moreover, during the sentencing hearing, Smith's counsel stated that Smith understood that he could have his sentences run consecutively. Regarding

Smith's parole eligibility, Smith's counsel, standing directly beside his client, stated that Smith had to serve eighty-five percent of the sentence imposed, and Smith voiced no objection. Based on these facts, Smith's claim is conclusively refuted by the record.

Smith next contends that the Commonwealth's failure to follow its sentencing recommendation rendered his guilty plea involuntary and unknowing. Under the terms of the Commonwealth's offer, Smith contends that he was to receive a total sentence of fifteen-years' imprisonment and would become eligible for parole after serving twenty percent of this sentence. Therefore, he contends that the Commonwealth's failure to abide by its agreement resulted in him receiving a greater sentence than agreed, and rendered his plea constitutionally invalid. We disagree.

In his written plea agreement, Smith pled guilty to burglary, rape, and sodomy, all in the first degree. On the first page of the agreement, it clearly states that "the Court may order the sentence on each count to run either concurrently or consecutively with each other." When Smith entered the plea, the Commonwealth in open court stated that it recommended ten years for the burglary and fifteen years for each of the remaining charges, rape and sodomy.

The trial court then informed Smith that it had the discretion to run his sentences consecutively or concurrently with each other. Additionally, Smith's counsel's statement regarding the eighty-five percent parole eligibility requirement contradicts Smith's twenty percent parole eligibility claim. Accordingly, the

record refutes that the Commonwealth offered Smith a fifteen-year sentence with parole eligibility after the service of twenty percent of the sentence imposed.

For the foregoing reasons, the Fayette Circuit Court's order denying Smith's motion for post-conviction relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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