

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001573-MR

JOSEPH LEE MONTGOMERY

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NOS. 06-CR-00477 AND 06-CR-00478

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Joseph Lee Montgomery appeals the order of the Hardin Circuit Court denying his RCr¹ 11.42 motion to vacate, set aside, or correct the circuit court's judgment. After a careful review of the record, we affirm because

¹ Kentucky Rule of Criminal Procedure.

Montgomery has failed to show that he received the ineffective assistance of trial counsel.

I. **FACTUAL AND PROCEDURAL BACKGROUND**

Montgomery was indicted in Hardin Circuit Court case number 06-CR-00478 of second-degree burglary, fourth-degree assault, and being a first-degree persistent felony offender (PFO-1st). He was also indicted in Hardin Circuit Court case number 06-CR-00477 of first-degree possession of a controlled substance, second-degree criminal trespass, possession of drug paraphernalia, and PFO-1st.

Montgomery signed a motion to enter a guilty plea that pertained to both cases. Regarding punishment, his motion stated as follows:

I understand that if I plead **“GUILTY,”** the Court may impose any punishment within the range provided by law and that although it may consider the Commonwealth’s recommendation, the Court may reject it. The legal penalty ranges are set forth on the attached **“Commonwealth’s Offer on a Plea of Guilty (AOC-491.1)”** which I have reviewed and signed.

(TR, 06-CR-00477, at 32).

The Commonwealth’s Offer on a Plea of Guilty recommended sentences for each charge and specified that its recommendations for certain sentences were enhanced due to PFO-1st charges.

A plea colloquy was held, and Montgomery entered a guilty plea in accordance with his Motion to Enter a Guilty Plea and the Commonwealth’s Offer

on a Plea of Guilty. The court entered judgments and orders imposing sentences in both cases. In case number 06-CR-00478, the judgment stated that Montgomery was guilty of second-degree burglary (PFO-1st) and fourth-degree assault. He was sentenced in that case as follows:

Ten (10) years, to serve, on the charge of Second-Degree Burglary (PFO 1st) and Twelve (12) months, to serve, on the charge of Fourth-Degree Assault, all under the custody of the Department of Corrections, all to run concurrently, one with the other, for a total of Ten (10) years, to serve, and concurrently with case 06-CR-00477, but consecutively to any other sentence the Defendant may have or receive from any other court proceeding, in this jurisdiction or any other, with the Defendant to forfeit any and all seized property and/or assets, and with credit for time served in this matter, that being One-hundred sixty-seven (167) days, as of December 5, 2006.

(Emphasis removed).

In case number 06-CR-00477, the court's judgment and order imposing sentence were subsequently amended to correct a clerical error. The amended judgment and order imposing sentence stated that Montgomery was guilty of first-degree possession of a controlled substance (PFO-1st); second-degree criminal trespass and possession of drug paraphernalia. He was sentenced in that case as follows:

Ten (10) years, to serve, on the charge of First-Degree Possession of a Controlled Substance (PFO 1st); Ninety (90) days, to serve, on the charge of Second-Degree Criminal Trespass and Twelve (12) months, to serve, on the charge of Possession of Drug Paraphernalia, all under the custody of the Department of Corrections, all to run concurrently, one with the other, for a total of Ten (10) years, to serve, and concurrently with case 06-CR-00478, but consecutively to any other sentence the Defendant may have or receive from any other

court proceeding, in this jurisdiction or any other, with the Defendant to forfeit any and all seized property and/or assets, and with the Defendant having no credit for time served in this matter, as of December 5, 2006.

(Emphasis removed).

Montgomery subsequently moved to vacate, set aside, or correct the court's judgment pursuant to RCr 11.42. In his motion, he contended, *inter alia*, that he had received the ineffective assistance of trial counsel because counsel had failed to fully explain the plea agreement and had misled Montgomery regarding the offenses to which he was pleading guilty.

An evidentiary hearing was held concerning Montgomery's RCr 11.42 motion, in which both Montgomery and his trial counsel testified. Thereafter, the circuit court denied Montgomery's RCr 11.42 motion, finding that Montgomery had previously been convicted twice of felony offenses and that he was, therefore, knowledgeable about "criminal court procedure." The court also found that

[a]ll written documentation (the Commonwealth's Plea Offer dated October 10, 2006 and the Commonwealth's Offer on a Plea of Guilty dated December 5, 2006) were all signed by [Montgomery] along with trial counsel clearly indicating that the charges in this case included a First-Degree Persistent Felony Offender status with no proposed amendment and that the total sentence to serve in both cases was ten years.

The circuit court noted that

[n]o documents in the Court file or any documents produced at the Evidentiary Hearing in this matter contain any reference to a PFO Second status. [Montgomery's] testimony that he believed he signed such a document while at the Hardin County

Detention Center prior to the entry of his plea in these cases is not credible.

The court's order stated that during the plea colloquy, Montgomery had been asked if "any promises or representations had been made to him other than serving ten years to which [Montgomery] responded 'no.'" Further, Montgomery's trial counsel had approximately ten years of experience in criminal law in Kentucky and trial counsel testified that he had reviewed with Montgomery "the nature of the charges in both cases, the maximum and minimum penalties for each of the charges and parole eligibility."

Trial counsel also testified during the evidentiary hearing that at the time of Montgomery's guilty plea, counsel

was aware that under Kentucky Law an individual charged with the offenses such as [Montgomery] with a PFO 1st enhancement would have a parole eligibility of "ten years flat" or a minimum of ten years to serve. [Trial counsel] further testified that this would have been the advice that he gave to [Montgomery] concerning his parole eligibility in the case.

The circuit court noted that trial counsel also

testified that his file in this case reflected that he discussed with [Montgomery] enrollment in the Substance Abuse Program (SAP). [Trial counsel] could not recall specifically if the SAP discussion and request for referral by the Trial Court was at the request of [Montgomery] in order to "change his life" or the request of [Montgomery's] girlfriend. Either way, [trial counsel] testified that he advised [Montgomery] that SAP completion could be helpful to him in achieving credit toward his parole eligibility.

The court found that Montgomery

testified that he was advised by [trial counsel] that if he took a ten year to serve sentence that he would be eligible for parole in two years and that completion of SAP would “let me go home.” [Montgomery’s] testimony is inconsistent and contrary to all of the documentation which contains [his] signature and the guilty plea colloquy in this case and thus the Court does not find [Montgomery’s] statements credible.

Therefore, the circuit court concluded that Montgomery’s ineffective assistance of trial counsel claim lacked merit and denied his RCr 11.42 motion.

Montgomery now appeals, contending that the circuit court erred in denying his motion because he received the ineffective assistance of trial counsel when counsel failed to correctly advise Montgomery of the charges and consequences of his guilty plea.

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

Montgomery alleges that the circuit court erred in denying his RCr 11.42 motion because he received the ineffective assistance of trial counsel when

counsel failed to correctly advise Montgomery of the charges and consequences of his guilty plea. Specifically, Montgomery contends that trial counsel told him he was pleading guilty to PFO-2nd, rather than PFO-1st, and that counsel advised Montgomery that he would be eligible for parole after serving only twenty percent of his sentence.

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).

As for Montgomery's claim that counsel told him he was pleading guilty to PFO-2nd, rather than PFO-1st, the trial court found that all of the documentation in the case record referred to PFO-1st. Upon review of the record, we agree that all of the written documentation, including the Commonwealth's Offer on a Plea of Guilty, upon which Montgomery's Motion to Enter a Guilty Plea was based, mentions only PFO-1st. Additionally, upon review of the plea colloquy, it is evident that Montgomery was aware that he was pleading guilty to PFO-1st because the court reviewed all of the charges against Montgomery, and Montgomery acknowledged that he was pleading guilty to them, including PFO-

1st. There was no mention of a PFO-2nd charge during the plea colloquy.

Therefore, the circuit court did not err in this finding.

Regarding Montgomery's assertion that trial counsel told him he would be eligible for parole after completing only twenty percent of his sentence if he completed SAP training, it appears from Montgomery's appellate brief that this allegedly mistaken advice stemmed from the advice where counsel allegedly informed Montgomery that he was pleading to PFO-2nd, rather than PFO-1st. Montgomery's appellate brief alleges that counsel "misrepresented the charges he was pleading to and misadvised him as to the sentence he would be serving when he was advised by [counsel] that he was pleading to second-degree PFO and with parole eligibility after only serving two (2) years of his ten-year sentence." Thus, it appears that Montgomery's alleged belief that he would be eligible for parole in two years was based on his alleged belief that he was pleading guilty to PFO-2nd, which was a claim the trial court found not credible.

What the trial court did find credible, however, was that counsel "correctly advised [Montgomery] that he would be parole eligible only after serving 'ten years flat.'" We cannot second-guess a trial court's credibility determination. Therefore, we cannot say that the trial court erred in this finding.

Thus, Montgomery failed to prove that his counsel gave him incorrect advice. Consequently, because Montgomery failed to establish that his trial counsel performed deficiently, his claim that he received the ineffective assistance of trial counsel likewise fails.

Finally, we pause to note that although Montgomery asks us to address issues concerning whether “an attorney’s mistaken advice on a collateral matter can constitute deficient performance under *Strickland [v. Washington]*, 466 U.S. 668, 687, 104 S.Ct. 2052, 1064, 80 L.Ed.2d 674 (1984)]” and whether “the ruling in *Padilla v. Commonwealth*[, 253 S.W.3d 482 (Ky. 2008)] should not be extended to apply to all collateral consequences,” we decline to address these issues, as to do so would merely be dicta.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Margaret A. Ivie
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky