

RENDERED: OCTOBER 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000358-MR

KYRUS LEE CAWL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NOS. 05-CR-000655 AND 05-CR-000849

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, STUMBO, AND VANMETER, JUDGES.

CAPERTON, JUDGE: This matter is before us on remand from the Kentucky Supreme Court following its opinion rendered on February 20, 2014, in which the Supreme Court reversed the order of this Court denying the Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for relief filed by Appellant, Kyrus Lee Cawl. Therein, the Supreme Court reversed the finding of this Court, that Cawl

had waived his right to appellate review because he failed to request specific findings of fact following the trial court's denial of his RCr 11.42 claim, and has directed this Court to review Cawl's appeal on its merits. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

In 2005, Cawl was charged with eleven counts of first-degree robbery. He subsequently accepted a plea agreement and entered a plea to all charges pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Pursuant to the plea agreement, Cawl was sentenced to twenty-one years' imprisonment. Subsequently, in 2008, Cawl filed a pro se motion to vacate his sentence pursuant to RCr 11.42. Along with other grounds for relief, Cawl's motion alleged that his trial counsel had informed him that prior to his acceptance of the plea agreement, he would be eligible for parole after serving twenty percent of his sentence, when in fact, because Cawl's convictions were for first-degree robbery, Cawl was statutorily required, as a violent offender, to serve at least eighty-five percent of his sentence before becoming parole eligible. Cawl asserted, in his RCr 11.42 motion, that such misinformation constituted ineffective assistance of counsel, warranting relief from the judgment of conviction.

On April 14, 2009, without conducting an evidentiary hearing on Cawl's claims, the trial court entered an order concluding that, "Cawl is not entitled to relief pursuant to RCr 11.42." That order made no findings of fact relative to Cawl's allegation of misadvice on parole eligibility, nor did it offer a specific reason for rejecting that aspect of Cawl's claim for RCr 11.42 relief.

Following the filing of a renewed RCr 11.42 motion by appointed counsel raising supplemental issues, the trial court issued an updated order on February 11, 2010, again denying Cawl's RCr 11.42 motion. In that order, the court stated that Cawl, "argues that he did not understand the parole requirements with respect to his plea, and therefore, it was not knowing and voluntary; [...] and that he was denied effective assistance of counsel because of his counsel's failure to advise him of the consequences of his plea[.]" The court went on to note that, "no evidentiary hearing is necessary when the issues may be determined from the record, and that no hearing is required, where, as here, the record demonstrates the voluntariness of the Defendant's plea." Having so found, the trial court again denied Cawl's RCr 11.42 motion in its entirety.

Cawl then appealed to this Court, abandoning all other claims which he had previously asserted for relief under RCr 11.42, and arguing only that the trial court erred in failing to grant an evidentiary hearing on the specific allegation of ineffective assistance of trial counsel pertaining to his parole eligibility. As noted, this Court initially declined to address that issue on the merits, finding that Cawl failed to preserve his right to appellate review because he never requested that the trial court make additional findings pursuant to RCr 11.42(6). The Supreme Court reversed and remanded this matter for consideration of Cawl's appeal on its merits.

Accordingly, we now turn to Cawl's sole argument on appeal, namely, that he was entitled to an evidentiary hearing on his allegation that counsel

misadvised him as to parole eligibility. Prior to addressing the arguments of the parties, we note that in order to maintain an ineffective assistance of counsel claim a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 686–87, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459–60 (Ky. App. 2001). An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Thus, our analysis must begin with the question of whether the trial court should have conducted an evidentiary hearing to determine whether Cawl's plea was made knowingly and voluntarily. "This is because the effect of a valid plea of guilty is to waive all defenses other than that the indictment charges no

offense.” *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009); *see also Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970). “[T]he voluntariness of a guilty plea ‘can be determined only by considering all of the relevant circumstances surrounding it.’ ” *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002), quoting *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

Our review of the record indicates that on November 21, 2005, the Commonwealth made Cawl an offer on a plea of guilty. In exchange for guilty pleas on all eleven counts, the Commonwealth recommended a twenty-year sentence on each count, to run concurrently for a total of twenty years. On that same date, Cawl appeared in open court and entered an *Alford* plea in accordance with the Commonwealth’s offer. Cawl waived his right to a pre-sentence investigation, and the trial court sentenced Cawl in accordance with the Commonwealth’s offer. The trial court memorialized the proceedings in the judgment of conviction and sentence entered on November 22, 2005.

On appeal, Cawl asserts that his counsel advised him that he would be parole eligible after serving only twenty percent of his sentence when, in fact, he would not be eligible until eight-five percent of his sentence had been served, and that this misinformation constituted ineffective assistance of counsel. The Commonwealth disagrees and asserts that Cawl made a knowing, intelligent, and voluntary guilty plea which effectively waived any claim of ineffective assistance

of counsel, that he failed to demonstrate prejudice, and that he failed to establish deficient performance.

Upon reviewing the arguments of the parties with respect to this issue, we note that as our United States Supreme Court has never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary. *Hill v. Lockhart*, 474 U.S. at 56, 106 S.Ct. at 369. Further, we are not persuaded by Cawl's assertion that misadvice concerning his parole eligibility, if it did occur, automatically entitles him to have his judgment set aside. Indeed, to obtain relief on a claim that an attorney provided ineffective assistance by failing to properly advise a defendant on the consequences of a guilty plea, the defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); *see also Williams v. Commonwealth*, 336 S.W.3d 42, 48 (Ky. 2011). Upon review of the record and the applicable law, we find that Cawl fails to meet that burden of proof.

In light of the overwhelming nature of the evidence against Cawl,¹ and in light of the fact that his parole eligibility would have been no different had he decided to go to trial instead of to accept the plea agreement, we cannot find that a decision to reject the plea bargain would have been rational under the

¹ This evidence included, but was not limited to, photo-identifications of Cawl by four different victims, the recovery of Cawl's fingerprints, and Cawl's confession to at least one of the robberies at issue.

circumstances. We find no evidence to support a determination that Cawl's plea was not made intelligently and voluntarily, nor do we find that an explanation of every possible outcome upon pleading guilty was necessary in order to make a knowing, voluntary, and intelligent waiver of his rights, as we believe Cawl did in this instance. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the February 11, 2010, opinion and order of the trial court denying Cawl's motion for RCr 11.42 relief.

ALL CONCUR.

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