

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000973-MR

RODNEY WALKER

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 98-CR-00259

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART
** ** * * * * *

BEFORE: BUCKINGHAM, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a guilty plea convicting appellant of rape in the first degree and sodomy in the first degree. Appellant argues that he was improperly sentenced to an additional three-year conditional discharge under KRS 532.043 because said statute was an ex post facto law as applied to him. The Commonwealth concedes this issue and we agree that KRS 532.043 was improperly applied to appellant pursuant to the holding in Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000). As for appellant's remaining argument that his guilty plea was not entered knowingly or voluntarily because he did not understand an element of the offenses and because he

was highly emotional at the time of the plea, we believe this argument is without merit. Accordingly, we affirm the convictions, but reverse that portion of the sentence applying KRS 532.043.

In August of 1998, appellant, Rodney Walker, was indicted on one count of rape in the first degree and one count of sodomy in the first degree. Both offenses stemmed from an incident which occurred on July 5, 1998. Walker initially entered a plea of not guilty. Thereafter, Walker accepted a plea agreement wherein he agreed to plead guilty to both offenses in exchange for the Commonwealth's recommendation that he be sentenced to two 15-year sentences to be served concurrently. The plea agreement also provided that an additional three-year term of conditional discharge would be imposed on Walker upon his release from prison pursuant to KRS 532.043.

On January 18, 2000, Walker appeared with his appointed counsel and entered an emotional guilty plea to one count of first-degree rape and one count of first-degree sodomy. When Walker later appeared for sentencing on March 1, 2000, Walker informed the court that he could not plead guilty to the offenses. For reasons other than Walker's contention, the sentencing hearing was rescheduled for April 3, 2000. On that date, Walker moved the court to allow him to withdraw his guilty plea because he was highly emotional during the plea and did not understand that forcible compulsion was an element of the offenses due to his ineffective counsel. After taking the motion under submission and reviewing the videotape of the guilty plea,

the court denied Walker's motion and thereafter sentenced him to two 15-year terms of imprisonment to be served concurrently. No mention was made in the judgment of the three-year conditional discharge term. This appeal by Walker followed.

Walker first argues that the imposition of the three-year conditional discharge term pursuant to KRS 532.043 was an unconstitutional ex post facto law as applied to him. Although the final judgment and sentence on the plea of guilty did not mention the additional three-year conditional discharge, we shall assume that it was nonetheless imposed on Walker since it was listed in his plea agreement with the Commonwealth. Further, we shall review this argument as palpable error under RCr 10.26 even though it was not raised below. KRS 532.043 provides that the defendant must complete any sex offender treatment program required by the Department of Corrections, and if the defendant fails to so complete the program, the conditional discharge may be revoked and the defendant required to serve any of the remaining three-year sentence. KRS 532.043 was effective on July 15, 1998, and Walker committed the offenses in this case on July 5, 1998. In Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000), the defendant committed the sex offenses prior to the effective date of KRS 532.043, and the court imposed the additional three years' conditional discharge per that statute. The Court held that the application of KRS 532.043 as to that defendant constituted an ex post facto law because it enhanced the legal consequences of offenses committed before the effective date of the law. It follows that in the present case, the

application of KRS 532.043 was likewise improper. Accordingly, we reverse that portion of the sentence which imposed the three years' conditional discharge.

Walker next argues that his guilty plea was not entered knowingly, voluntarily or intelligently because he was not informed by his attorney that an element of both offenses was forcible compulsion and because he was highly emotional during the plea. During the course of the plea, Walker at times cried and his voice cracked. However, his statements and responses could clearly be heard. The following colloquy occurred between the court, Walker, and Walker's counsel during the plea:

Court: Mr. Walker, do you understand the facts which you are charged in the indictment?

Walker: Yes sir.

Court: Did you in fact on July 5, 1998, here in Daviess County, Kentucky engage in sexual intercourse with Heather Carter-Reynolds by forcible compulsion?

Walker: Yes sir.

Court: How do you plead to count one in the indictment, rape in the first degree?

Walker: Guilty.

Court: Did you in fact on July 5, 1998, here in Daviess County, Kentucky engage in deviate sexual intercourse with Heather Carter-Reynolds by forcible compulsion?

Walker: Yes.

Court: Alright, how do you plead to count two of the indictment, sodomy in the first degree?

Walker: Guilty.

Court: What did you do to commit those offenses?

Walker: Could you explain your question sir, please?

Court: Tell me what you did, exactly what you did.

Walker: Well, to my understanding, the lady wanted to have sex with me. She made advances at me, so I obliged. I tried to have sex with her as I thought she was wanting to have sex with me. That's what I did.

Court: Well, are you now acknowledging for the record that she did not consent to you having sex with her and that you had sex with her forcibly?

Walker: I don't understand.

Defense counsel: Are you admitting today that, uh, saying today you forced her to have sex and oral sex with her?

Walker: Yes sir. I am admitting today that I forced her to have oral sex with me.

Court: Is that oral sex also?

Walker: Yes sir.

Court: So, she did not consent to any of it?

Walker: No sir.

A guilty plea is valid if it represents a voluntary and intelligent choice by a competent and counseled defendant to waive the several trial-related constitutional rights, and the record affirmatively establishes this knowing waiver. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). Whether a plea is voluntary is determined from the surrounding circumstances as well as from the transcript of the plea

proceeding. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978).

A guilty plea may be involuntary either because the accused does not understand the nature of his waived rights or because he has such an incomplete understanding of the charge that the plea is not a reliable admission of guilt. Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). The trial court is in the best position to determine if there was any reluctance, involuntariness, or incompetence to plead guilty. Kotas, 565 S.W.2d at 447.

In the instant case, Walker signed the Commonwealth's offer on a plea of guilty, which specifically lists "forcible compulsion" as an element of the crime. Further, the motion to enter guilty plea, which Walker also signed, states that he was voluntarily, freely, knowingly, and intelligently pleading guilty, that he was represented by competent counsel, and that he understood the nature of the charges against him and any possible defenses thereto. At the guilty plea proceeding, Walker confirmed that he had all the time necessary to confer with his attorney and that he was fully satisfied with her services. The court explained all the rights Walker was waiving by pleading guilty, and Walker acknowledged that he was freely waiving those rights. The court read the charges against Walker, which specifically included the element of forcible compulsion, and Walker unequivocally admitted he was guilty of both charges. Although Walker at first did not admit that he forced the victim to have sex when asked by the court what he did to commit the offenses, he subsequently confirmed that he forcibly committed

the acts without the consent of the victim when the question was clarified by his counsel.

As to Walker's claim that he was emotionally overwrought during the guilty plea, after viewing the videotape of the guilty plea proceeding, we do not believe that Walker was so emotional that his judgment was impaired or that he was not aware of what was he was doing. In fact, during the plea, Walker conceded that he had no mental disease or defect and that his judgment was not impaired in any way. Although he was emotional, he appeared to be competent, and his responses and statements were coherent and intelligent. Simply because a defendant is emotional does not render him incompetent or his plea involuntary. On the contrary, a defendant facing imprisonment on charges such as these has good reason to be emotional, and his emotion can be a sign that he is competent and well aware of the proceedings and the attendant consequences. Accordingly, we reject Walker's assertion that his guilty plea was not entered voluntarily.

For the reasons stated above, the judgment of the Daviess Circuit Court is affirmed in part and reversed only as to that portion of the sentence which imposed the three-year conditional discharge under KRS 532.043.

ALL CONCUR.

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