

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001767-MR

DAMON MCCORMICK

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: KNOFF, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Damon McCormick appeals from a judgment entered by the Union Circuit Court. He asserts that the court abused its discretion by denying his motion to withdraw his guilty plea, and that the court erred by failing to hold a competency hearing given the court's knowledge of his history of mental illness. We affirm in part, reverse in part, and remand.

McCormick was indicted in March 2000 on charges of organizing or participating in organizing a criminal syndicate, knowingly and unlawfully manufacturing methamphetamine, and

being a persistent felony offender (PFO) in the first-degree. The trial court ordered the Kentucky Correctional Psychiatric Center (KCPC) to perform psychiatric evaluations of McCormick in both July 2000 and October 2001. The evaluators determined that McCormick's actions were neither a result of mental illness or defect, nor due to a "lack of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to requirements of law[.]" They further determined that McCormick was aware of the roles of the prosecutor, the defense attorney, and the judge in the courtroom. Finally, McCormick correctly explained the concepts of innocence and guilt, as well as the nature and consequences of a plea bargain.

On May 21, 2003, the court accepted McCormick's guilty plea to the amended charge of criminal conspiracy to manufacture methamphetamine and the original charge of engaging in organized crime. The PFO charge was dismissed. Regarding the circumstances of the guilty plea, the record contains the following documents: (1) Commonwealth's Offer on a Plea of Guilty, purportedly signed by the Commonwealth Attorney, McCormick, and his counsel; (2) Motion to Enter Guilty Plea, purportedly signed by McCormick and his counsel; and (3) Order (Guilty Plea), again purportedly containing the signatures of McCormick and his counsel, as well as the signature of the trial judge. Both the motion and the order contain appropriate

language concerning the rights McCormick waived by the entry of a guilty plea, McCormick's state of mind, the charges and the range of penalty, and the knowing, intelligent and voluntary nature of the guilty plea. The video record of the May 21 hearing, however, discloses only that the Commonwealth made an oral motion to amend the charge, presumably in exchange for the guilty plea, that the trial court granted the motion, and that the only question the trial court asked McCormick was how he wished to plea to the amended charges, to which McCormick responded "guilty."

On July 22, 2003, at his sentencing hearing, McCormick made an oral motion to withdraw his guilty plea. The trial court overruled the motion, and entered a judgment and sentence in accordance with the Commonwealth's recommendation of "ten (10) years for Engaging in Organized Crime to run concurrently with prior sentences and five (5) years for Criminal Conspiracy to Manufacture Methamphetamine to run consecutively with the ten (10) year sentence." McCormick appeals from this judgment.

McCormick claims that the trial court abused its discretion by denying his motion to withdraw his guilty plea without first conducting a hearing. We agree.

RCr 8.10 provides in part that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." While this

language is permissive, the Kentucky Supreme Court held in *Rodriguez v. Commonwealth*¹ that a trial court may exercise discretion as to the withdrawal of a guilty plea only after first determining that the plea was voluntary. If it is determined that the plea was not voluntary, "the motion to withdraw must be granted."²

This court, after *Rodriguez*, addressed the procedure a trial court must follow in deciding whether to grant a defendant's motion to withdraw a guilty plea under RCr 8.10. In *Rigdon v. Commonwealth*,³ this court stated:

When a criminal defendant pleads guilty, Rule 8.10 [sic]⁴ of the Kentucky Rules of Criminal Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty.^[5] Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it.^[6] The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea.^[7] Once a

¹ 87 S.W.3d 8 (Ky. 2002).

² *Id.* at 10.

³ 144 S.W.3d 283, 287-89 (Ky.App. 2004).

⁴ Presumably this citation should have been to RCr 8.08 since that rule states that a court "shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." RCr 8.10 pertains to the withdrawal of a guilty plea.

⁵ *Bronk v. Commonwealth*, Ky., 58 S.W.3d 482, 486 (2001) [Footnotes 5 - 19 have been renumbered from those used in the quoted text to comport with the footnotes used in this opinion. The footnoted citations have been modified to comply with CR 76.12(4)(g), effective January 1, 2005].

⁶ *Id.*

⁷ *Id.*

criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted.^[8] However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion.^[9] Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires "a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered."^[10] The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard.^[11] A decision which is supported by substantial evidence is not clearly erroneous.^[12] If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard.^[13] A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles.^[14]

⁸ *Rodriguez v. Commonwealth*, Ky., 87 S.W.3d 8, 10 (2002).

⁹ *Id.*

¹⁰ *Bronk*, 58 S.W.3d at 489 (Cooper, J., concurring).

¹¹ *Id.*

¹² *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003).

¹³ *Bronk*, 58 S.W.3d at 487.

¹⁴ *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). *Cf. Kennedy v. Commonwealth*, 962 S.W.2d 880, 882 (Ky.App. 1997) (holding that "fair play and honesty" as well as RCr 8.10, require a trial court to permit a defendant to withdraw his guilty plea, despite the fact that it was made knowingly, voluntarily, and intelligently as part of a plea agreement, where the trial court subsequently declined to follow the Commonwealth's sentencing recommendation).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington*^[15] inquiry into the performance of counsel."^[16] To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(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.^[17]

Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel.^[18] The Kentucky Supreme Court has stated that "[g]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that

¹⁵ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

¹⁶ *Bronk*, 58 S.W.3d at 486 (footnotes omitted).

¹⁷ *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

¹⁸ *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

led to the entry of the plea, *i.e.*, an evidentiary hearing."^[19]

The decisions in both *Rigdon* and *Rodriguez* make clear that while the trial court is in the best position to judge the voluntariness of a guilty plea and retains discretion whether or not to set aside a voluntary guilty plea, that discretion must be grounded in knowledge of what transpired between client and attorney, which knowledge generally must be ascertained by means of an evidentiary hearing.

In this case, McCormick moved to withdraw his guilty plea under RCr 8.10, and his counsel made generally known to the trial court that four grounds involving ineffective assistance of counsel would be presented at a hearing. The record indicates that the trial court summarily overruled the motion. While the final judgment does contain a finding that the guilty plea was voluntarily entered, the summary rejection of McCormick's RCr 8.10 motion cannot be reconciled with the holdings in *Rodriguez* and *Rigdon*, and as such constituted an abuse of discretion. We also note that the plea colloquy at the May 21, 2003 hearing stands in stark contrast to that which this court approved in *Centers v. Commonwealth*.²⁰

¹⁹ *Rodriguez*, 87 S.W.3d at 11.

²⁰ 799 S.W.2d 51, 54-55 (Ky.App. 1990).

McCormick's second argument, that the trial court erred in failing to conduct a hearing with respect to his competency, lacks merit. As stated by the court in *Mills v. Commonwealth*,²¹ the issue is "whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." Thus, *Mills* held that the failure to conduct a hearing amounted to harmless error because the defendant failed to establish a basis upon which the trial court could doubt his competence to stand trial.²²

In the instant case, the trial court ordered two separate competency evaluations. The reason for the first evaluation does not appear in the record as no written or oral motion was made for such evaluation, but the court entered two orders for that evaluation on July 19, 2000 and July 25, 2000. The first evaluation report is dated August 14, 2000. The order for the second evaluation, entered October 9, 2001, apparently upon the motion of defense counsel, resulted in an evaluation report dated November 8, 2001. In each evaluation, McCormick was found competent to stand trial with the ability to participate in his own defense. Additionally, the record

²¹ 996 S.W.2d 473, 486 (Ky. 1999) (quoting *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)).

²² *Id.*; see also *West v. Commonwealth*, 161 S.W.3d 331, 335 (Ky.App. 2004).

indicates that McCormick was a stranger to neither the legal process nor the trial judge. Under the facts of this case, the trial court did not err by failing to conduct a competency hearing under KRS 504.100(3).

The judgment of the Union Circuit Court is affirmed in part and reversed in part, and this matter is remanded to that court for further proceedings consistent with this opinion.

ALL CONCUR.

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