

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001903-MR

LUCIO LUNA CLEMENTE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN, III, JUDGE  
ACTION NO. 03-CR-00523

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.<sup>1</sup>

COMBS, CHIEF JUDGE: On April 20, 2004, the appellant, Lucio Luna Clemente, entered a plea of guilty to the crime of assault in the first degree. He appeals from the final judgment and twelve-year sentence of imprisonment imposed by the Daviess Circuit Court on August 27, 2004. He also appeals from the

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court's order of August 19, 2004, which denied his motion to withdraw his guilty plea.

Clemente, who is of Hispanic descent and speaks very little English, claims that his interpreter failed to explain adequately the rights he was waiving and that his trial counsel provided ineffective assistance. As a combined result of both problems, he argues that his plea was not voluntary, knowing, or intelligent. After our review of the record, we are not persuaded by Clemente's arguments. Thus, we affirm.

Clemente was arrested on October 11, 2003, after attacking Francisco Espinoza, an acquaintance, outside a bar in Owensboro. He stabbed Espinoza numerous times with a knife, causing nearly fatal injuries to the victim. He was indicted on a charge of assault in the first degree on November 4, 2003.

At his arraignment, Clemente received appointed counsel, Attorney Cher Eaves; he also received the service of an interpreter, Greta Payne, designated as a competent court interpreter by the Administrative Office of the Courts (the AOC). Between his arraignment and the entry of his plea of guilty, attorney Eaves, who speaks Spanish, met with Clemente on seven or eight separate occasions. During at least three of her visits with Clemente, Eaves was accompanied by Payne. On another occasion, Payne brought along a second interpreter -- one skilled in translating medical terminology -- to assist her

and Eaves in communicating to Clemente the contents of the medical records pertaining to the injuries that Espinoza sustained in the assault.

During the Boykin<sup>2</sup> colloquy, the trial court, assisted by the interpreter, took considerable time and care to determine whether Clemente understood the rights that he was waiving and the terms of the plea agreement that he had negotiated with the Commonwealth. After Clemente acknowledged that the contents of the written agreement had been read to him, he executed the document before the court.

The court asked several questions of Clemente relating to the representation afforded by Eaves and the interpreting services provided by Payne. Without hesitation, Clemente expressed satisfaction with both his lawyer and his interpreter.

When asked to describe the assault, Clemente acknowledged that he had stabbed Espinoza. He claimed that he was drunk at the time and that he had obtained the knife from the victim himself. At that juncture, the trial court directly inquired whether Clemente understood that he was giving up any claim of self-defense. Clemente indicated that he understood.

A few days before his scheduled sentencing hearing, Clemente filed a motion pursuant to RCr<sup>3</sup> 8.10 to withdraw his guilty plea, contending that he did not understand the

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<sup>2</sup> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>3</sup> Kentucky Rules of Criminal Procedure.

implications of his plea. He alleged that Payne left him with a "limited understanding of the contents of the discovery in the case" and that she failed to "interpret correctly" during the Boykin colloquy. He cited Payne's lack of certification as proof of her "inadequacy to interpret." Clemente also charged that a twelve-year sentence was unfair and that there was insufficient evidence to establish his guilt beyond a reasonable doubt.

Since it was becoming apparent that Clemente was also dissatisfied with his trial counsel, the court continued his case to allow Clemente time to obtain new counsel. A new interpreter was also obtained, and an evidentiary hearing was conducted on Clemente's motion to withdraw his guilty plea on August 5, 2004. At the hearing, the trial court allowed Clemente to amend his motion to include a claim of ineffective assistance of trial counsel.

Clemente testified that Eaves and Payne did not read the entire discovery materials to him. He also claimed that prior to his plea of guilty to the assault charge, Eaves had not advised him of the possibility of defenses of self-defense or extreme emotional disturbance. He testified that if he had known about the availability of those defenses, he would have insisted on going to trial. According to Clemente, Eaves told him that the victim and the four or five persons who witnessed

the assault were prepared to testify that he instigated the fight with the victim. In light of the state of the evidence against him, Eaves advised Clemente to accept the Commonwealth's offer of twelve years in prison.

Clemente claimed that he had a hard time understanding Eaves and blamed her for not asking more questions of him. He also told the court that he did not know what questions to ask of her. However, he acknowledged that his dissatisfaction with Eaves did not arise until he came into contact with other Hispanic inmates who told him that "it wasn't good" that he had entered a guilty plea.

As to Payne, his translator, Clemente alleged that she instructed him how to answer the court's questions during the Boykin colloquy. As a result of her directions, he testified that he told the court that he understood many things when in fact he did not.

Clemente called Eaves as a witness. She testified that she had no trouble understanding Clemente and that she had no reason to believe that he failed to understand any matter she discussed with him. She related to the court that she spoke Spanish fluently and that she had taken Payne to their meetings on several occasions as a "safety net" and as a facilitator due to Payne's ability to speak and translate faster than she could herself. Eaves did not preserve notes of her meetings with

Clemente; nor did she remember all the matters she discussed with him. However, she remembered advising Clemente that recourse to a claim of self-defense was not viable in light of the anticipated testimony of the victim and that of the eye-witnesses to the stabbing. She also testified that she advised Clemente that he should not rely on his belief that Espinoza would not appear in court.

Eaves testified that Payne spoke excellent Spanish, citing her nine-year tenure as a court interpreter. She believed that Clemente had understood the discussions that he had with her alone as well as those in which Payne acted as an interpreter. She wholly denied that Clemente had been coached by Payne during his Boykin colloquy with the court. She testified that prior to entering his plea of guilty, Clemente had never raised any complaint concerning her Spanish-speaking skills or the competency of the interpreter.

Payne testified that Eaves spoke a broken Spanish and needed assistance in communicating technical terms. However, she stated that Eaves's Spanish language skills were good enough to enable her in her capacity as a lawyer to communicate with her clients most of the time without the aid of an interpreter. Payne did not remember the substance of most of the discussions between Eaves and Clemente in which she had acted as an interpreter. However, she did remember Clemente's suggestion

that the victim might not appear at trial, refuted by Eaves's response that the victim and several witnesses would appear and would accuse him of starting the fight. She also remembered discussions concerning the possible penalties, the offers made by the Commonwealth, and the terms of the plea agreement.

Following the presentation of evidence, Clemente's new interpreter viewed the videotaped recording of the Boykin colloquy and testified that she failed to see any instance in which Payne erred either in her interpretation of the questions posed by the court to Clemente or in her interpretation of Clemente's responses. The new interpreter also saw no indication that Payne prompted or suggested to Clemente the responses that he should give to the court's questions.

In its order denying the motion to withdraw the guilty plea, the court found as follows:

The record of the original Court colloquy and the evidence presented in the subsequent hearing completely refutes [*sic*] [Clemente's] claims that he did not understand the Commonwealth's offer and the negotiated plea entered into in the case and that he did not enter his plea of guilty knowingly, intelligently and voluntarily. The Court specifically asked [Clemente] whether he waived his right to assert self defense. He intelligently waived that defense on the record. While no mention was made of extreme emotional disturbance, under the circumstances any disturbance would be related to self protection. [Clemente] has made no proffer in support of any other cause of extreme emotional disturbance. The

Court further notes evidence that [Clemente] is motivated by a desire to take advantage of the perspective [sic] unavailability of certain witnesses.

As he did before the trial court, Clemente argues that his plea was not entered voluntarily, knowingly, or intelligently. He contends that the dialects spoken by Eaves and Payne were unfamiliar to him, thus failing to communicate to him the legal concepts necessary to render his plea valid. He also asserts that his lawyer failed to discuss any defenses with him and that he was not provided with a "written translation of [his] waiver and of the plea agreement." (Appellant's brief at p. 11.) He charges that his attorney erred in failing to bring an interpreter to **all** of her meetings with him and she did not properly appreciate the potential for a defense of extreme emotional disturbance. Finally, he argues that his trial counsel was ineffective in failing to investigate the circumstances surrounding his assault of Espinoza.

Rigdon v. Commonwealth, 144 S.W.3d 283, 287-289 (Ky.App. 2004), governs the procedure to be used by the trial court in ruling upon a motion to withdraw a guilty plea under RCr 8.10 as well as our appellate review of that decision:

When a criminal defendant pleads guilty, Rule 8.10 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. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. Once a 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. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. 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." The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. 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. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. [Citations omitted; emphasis original.]

Clemente contends that he did not enter a plea knowingly and intelligently because the dialects of Spanish spoken by Eaves (Cuban) and Payne (Argentinean) were significantly different from his native Mexican *patois*. Nonetheless, the evidence at the hearing to withdraw the plea revealed that Clemente had no difficulty whatsoever in

understanding either his lawyer or his interpreter. That evidence includes the testimony of both Eaves and Payne -- as well as that of the probation officer who interviewed Clemente (with the help of Payne) in preparing the pre-sentence investigation report. Clemente did not raise any complaint with Payne's skills as an interpreter at any time prior to his guilty plea; nor did he identify any specific portion of the Boykin colloquy where the dialect utilized impeded his understanding of the proceedings. Most significantly, the testimony of his second and subsequent interpreter completely undermined his testimony that he was coached by Payne as well as his claim that Payne misinterpreted portions of the plea proceeding.

With respect to the claim of ineffective assistance of counsel, Clemente argues that Eaves failed to interview him adequately enough to determine the actual events surrounding his attack of Espinoza. He contends that:

[a]s Clemente's record stands, there is a looming question as to whether Ms. Eves [sic] investigated his defenses and mitigating factors at all. There is no indication that Ms. Eves [sic] knew that the knife had been drawn on Clemente, not the other way around. There is no indication in her testimony that she took notice of any inebriation of witnesses at the bar. There is no indication that, despite her faith in her ability to translate, that she even inquired as to Mr. Clemente's home, native dialect, length of time in the United States and other factors affecting his ability to understand her. . . Clemente's record is

silent as to whether Ms. Eves [sic] ever inquired as to whether he was legally registered as an alien. (Appellant's brief at pp. 21-22.)

Clemente also claims that Eaves failed to discuss with him the mitigating factor of extreme emotional distress and that she failed to communicate to him that a jury might acquit him if it were informed that the eye-witnesses were friends with Espinoza or related to him.

Clemente bore the burden of satisfying the two-pronged Strickland standard as to the investigation undertaken by Eaves and/or the matters she discussed with him during the seven or eight encounters that they had prior to his guilty plea. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Contrary to Clemente's contentions, the record does not establish that he did not receive advice as to his potential defense of self-defense. On the contrary, there is both direct and circumstantial evidence that Eaves fully informed him as to the option of self-defense.

Clemente presented no evidence at the hearing that Eaves might have uncovered exculpatory evidence if she had engaged in a more extensive investigation of his case. Clemente has not alleged the existence of any witness who might have testified that Espinoza threatened him with the knife used in

the assault. Thus, he has failed to establish that additional investigation would have discovered evidence to support a theory of self-defense. Additionally, he has not shown any prejudice or any indication that he would have not pled guilty regardless in order to receive the benefit of his plea agreement.

Finally, Clemente testified that at the time of the stabbing, he was **unaware** that his wife and Espinoza were involved in a relationship. In light of his admitted ignorance of this fact, his trial counsel cannot be blamed for failing to advise him of a potential defense of extreme emotional disturbance based on the extra-marital relationship. The trial court found that Clemente failed to meet his burden of showing that Eaves rendered constitutionally defective representation -- much less that he would have insisted on going to trial but for her alleged errors. See, Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). We conclude that it did not err in so finding.

Having reviewed the Boykin colloquy, we are convinced that the trial judge fully comprehended Clemente's reliance on and relationship with his interpreter. The judge took care to speak slowly and to afford the interpreter all the time needed to communicate every concept to Clemente and to insure that he understood the gravity and the consequences of his plea. The court gave Clemente several opportunities to ask questions and

to express any concerns about his attorney, the interpreter, his plea, and its implications. Nothing indicated -- either in his answers or in his demeanor -- that Clemente was confused or that he lacked an understanding of the rights that he was waiving.

The voluntariness of Clemente's guilty plea can be ascertained only from the totality of the circumstances surrounding it. Rigdon, supra; Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). The records of both the Boykin colloquy and of the evidentiary hearing persuade us that Clemente entered his plea voluntarily. In light of the evidence against him, we conclude that Clemente obtained a very favorable plea bargain with the Commonwealth: twelve years in prison as distinguished from a possible sentence of twenty years. Accordingly, we have found no abuse of discretion on the part of the trial court in denying his motion to withdraw his guilty plea.

We affirm the judgment of the Daviess Circuit Court.

ALL CONCUR.

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