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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001163-MR

JASON D. LLOYD — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 07-CR-00473

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Jason D. Lloyd appeals from the Boone Circuit Court's denial of his motion to withdraw his guilty plea to one count of Burglary in the

[1] Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

First Degree (Complicity), two counts of Assault in the Second Degree and one count of Retaliating Against a Participant in the Legal Process.

Lloyd argues that the trial court committed reversible error by denying his motion to withdraw his guilty plea because Lloyd's plea was involuntary and he was not competent to enter a plea due to his heavy drug usage and underlying mental health issues. The Commonwealth disagrees and asserts that Lloyd's plea was voluntary and that he was competent as evidenced by the record, which includes a two-day hearing on Lloyd's competency to stand trial on the day he pled guilty. After a thorough review of the parties' arguments, the record and applicable law, we affirm.

Lloyd was indicted by the Boone County Grand Jury on one count of Burglary in the First Degree (Complicity), two counts of Assault in the Second Degree and one count of Intimidating a Participant in the Legal Process on August 10, 2007, to which Lloyd pled not guilty.[2] On July 7, 2008, Lloyd's jury trial commenced. After the jury panel had been selected, Lloyd informed the trial court that he wished to change his plea to guilty based upon the Commonwealth's sentencing recommendation.[3] Lloyd pled guilty and the trial court ordered him to appear for sentencing on August 6, 2008. Thereafter, Lloyd failed to appear for sentencing and failed to contact the probation and parole office to prepare a

[2] The one count of Intimidating a Participant in the Legal Process was later amended to one count of Retaliating Against a Participant in the Legal Process.

[3] The Commonwealth offered the minimum sentences for each charge and further recommended that the sentences be run concurrently for a total of ten years.

Presentence Investigation Report. The trial court issued a warrant for Lloyd's arrest.[4]

Subsequently, on October 22, 2008, Lloyd moved to withdraw his guilty plea, asserting that he was not competent to enter a guilty plea, rendering the plea involuntary. Lloyd's argument was based on his heavy drug usage and underlying mental health issues which he alleged were exacerbated by his heavy drug usage.[5] Lloyd attached an evaluation from Dr. David Roebker to his motion to support his argument that he was not competent to enter the guilty plea. The trial court then ordered an evaluation from the Kentucky Correctional Psychiatric Center ("KCPC") and set the matter for an evidentiary hearing.

On January 8, 2009, the trial court conducted an evidentiary hearing on Lloyd's competency to enter a guilty plea. Dr. Timothy Allen, a psychiatrist with KCPC, testified on behalf of the Commonwealth. Dr. David Roebker testified on behalf of Lloyd. On March 24, 2009, a second evidentiary hearing was held in which Lloyd testified. On March 31, 2009, the trial court entered its order denying Lloyd's motion to withdraw his guilty plea.

The trial court's order of March 31, 2009, was meticulous in its review of the evidence concerning Lloyd's competency, which we have set out in part below:

[4] The Boone County Grand Jury added an additional count of Bail Jumping, First-Degree, but that matter is not before us on appeal.

[5] The "heavy drug usage" referred to by Lloyd consisted of illegal drugs.

> This matter was before the Court on July 7, 2009, for a jury trial. The Commonwealth of Kentucky was represented by Assistant Commonwealth Attorney Kurt Kruthoffer and Defendant was present and represented by two (2) private attorneys, Hon. Edward Drennen and Hon. Thomas Raisbeck. The trial commenced and during the course of the trial the parties negotiated a plea agreement. The trial was being presided over by Senior Status Judge Kevin Horne, who also presided over the guilty plea hearing.[6] Counsel approached the Judge and advised the Judge that the Defendant wanted to enter a guilty plea. Judge Horne stopped the trial, granted the jury a recess and granted Defendant's counsel additional time to meet privately with the Defendant. When Defendant and his counsel returned to the Courtroom, Judge Horne called the Defendant to the Judge's bench and examined the Defendant from that vantage point, a short distance of approximately two (2) feet or so. He placed the Defendant under oath and proceeded to examine the Defendant regarding his intention to withdraw his plea of not guilty and to enter a plea of guilty pursuant to the plea agreement. He went over the plea agreement with the Defendant. The Defendant told Judge Horne that he was not under the influence of alcohol or drugs. The Defendant assured Judge Horne that he was satisfied with the service of his attorneys . . . Judge Horne told the Defendant that he had a jury here and could proceed with the trial. The Defendant admitted to the crimes. Judge Horne asked the Defendant if he had any questions at all he wanted to ask. The Defendant said no. While Judge Horne was going over the crimes with the Defendant, the Defendant at one time corrected the judge. The Judge took a break so the Defendant and his two attorneys could go over all the paperwork. When the Defendant was starting to go over the paperwork with his attorneys the Defendant can be heard saying that he understood it and had done the paperwork before . . . . Judge Horne went over the paperwork with the Defendant to assure that he understood it and it was voluntary and intelligently made. The Defendant met with his lawyers again to sign the

[6] Judge Horne presided over Appellant's jury trial and guilty plea, while Judge Frohlich presided over Appellant's motion to withdraw guilty plea.

plea agreement which had not yet been signed. Judge Horne brought the Defendant before him a third time. Judge Horne again questioned the Defendant. The Defendant declared the guilty plea was his free and voluntary act . . . .

At the competency hearing on January 8, 2009 . . . Dr. Allen testified that if the Defendant was using cocaine at the time of the guilty plea, combined with his anxiety disorder, would make the Defendant's nervousness worse. He also testified that using cocaine can exacerbate mental decision making. Dr. Roebker testified the Defendant has a bipolar disorder, drug dependency disorder and a personality disorder. He testified the Defendant's personality disorder involved fear of abandonment, self-damaging behavior and tumultuous relationships. The affect of cocaine could amplify impulsive behaviors and amplify manic problems and could cause him to become paranoid and aggressive.

The [hearing] was continued . . . [until] March 24, 2009. The only witness to testify was the Defendant . . . Lloyd testified that on July 7, 2009, the date of his trial and the date he entered the guilty plea, that he was under the influence of illegal drugs . . . . He testified that for twenty (20) days prior to that date, except for the previous Friday, he had used drugs everyday . . . . His choice of drugs was crack cocaine, at about a quarter of an ounce per day, snorted or smoked, at about a cost of $200 per day. He also would partake of alcohol or "regular" cocaine. He testified that on the day of trial he smoked crack cocaine in a hotel room. He went to his father's place of business and rode to the trial with his father. He testified that on the way to the trial he smoked [crack] cocaine again. The Defendant testified that while the trial was going on he felt things were not going well. Defendant testified that he became paranoid and because of the paranoia and the influence of drugs . . . [his plea] was not voluntary, knowingly and intelligently made.

The Defendant is indeed a troubled man . . . both Dr. David Roebker and Dr. Timothy Allen testified the

> Defendant was competent when they examined him. Both testified that they could make a determination as to whether the Defendant was competent to enter a guilty plea on July 7, 2009, *only if they had examined him on that date.*
>
> The [trial c]ourt has the benefit of watching the Defendant's guilty plea on video tape. The guilty plea was taken by Judge Kevin Horne [who] has a tremendous amount of experience in handling criminal cases . . . . On the day in question, Judge Kevin Horne's examination of the Defendant was probing and complete. The Defendant was only two (2) feet from the Judge during their interaction, and Judge Horne had the best view of anyone of the Defendant's demeanor and performance. *The interaction occurred on three different occasions.* The Court also takes notice of the fact the Defendant had two (2) private attorneys with excellent reputations....This Court can only draw the conclusion that as officers of this Court had they any inkling that the Defendant was under the influence of illegal drugs that they would not have advocated their client to enter a guilty plea. *The Court does not believe that the Defendant was so under the influence of illegal drugs on July 7, 2008, that he would have the ability to fool Judge Horne and three (3) attorneys involved in this case as to his competency to enter a guilty plea.*
>
> In sum, there is no factual or legal basis to set aside the guilty plea . . . .

Trial court's order of March 31, 2009 (emphasis added). In addition to the facts recited by the trial court's order, each party refers this Court to the record in support of their respective arguments. First, Lloyd refers this Court to Dr. Roebker's report which was attached to his motion to withdraw the guilty plea. Therein, Dr. Roebker surmised that Lloyd was incapable of entering a plea due to his impairment from smoking crack cocaine shortly before the trial. Lloyd also refers this Court to his testimony at the second day of the evidentiary hearing,

wherein he testified that he believed his attorneys were working for the Commonwealth; that he did not share his fears with the trial court because he thought the judge would think he was an idiot; and that he signed the plea offer because he felt pushed and forced to accept it.

Second, the Commonwealth refers this Court to the signed motion to enter guilty plea contained within the record, wherein, the motion states, "My judgment is not now impaired by drugs, alcohol, or medication." The trial court likewise asked Lloyd, "Today you are not under the influence of any kind of substance or mental condition that might affect your judgment?" To which Lloyd responded, "No, sir."[7]

The Commonwealth next refers this Court to testimony by Dr. Allen, wherein Dr. Allen testified that he did not find evidence of a mood disorder, such as bipolar disorder, from his evaluation of Lloyd. Further, Dr. Allen testified that Lloyd's frequent cocaine usage likely built up some tolerance which would reduce the impairment the drugs would otherwise have caused; that Lloyd was able to function in court and discuss the issues without appearing intoxicated; that the outward appearance of an individual and the level of intoxication go hand in hand, which would suggest a low degree of impairment, if any at all.[8]

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[7] *See* Video Record 7/7/08 at 11:03.

[8] The Commonwealth argues that the crack cocaine's effects would be waning even if Lloyd smoked crack cocaine immediately prior to entering the courtroom, since Dr. Allen explained that crack cocaine has a fast onset of about 15 to 20 minutes with the intoxication lasting an hour to two and virtually out of the system after four to six hours. Given that Lloyd was in court at 8:55 AM the morning of trial and did not plead guilty until 11:01 AM, the Commonwealth argues that the crack cocaine effects would be waning when Lloyd entered his guilty plea.

With this evidence from the record in mind, we now turn to the parties' arguments. Lloyd presents one argument on appeal, namely, that the trial court committed reversible error by denying his motion to withdraw his guilty plea because Lloyd's plea was involuntary, and that Lloyd was not competent to enter a plea due to his heavy drug usage and underlying mental health issues. The Commonwealth disagrees and argues that the trial court properly denied Lloyd's motion to withdraw his guilty plea, because he was competent to plead guilty; that his plea was voluntary, knowingly and intelligently made; and that the trial court did not abuse its discretion in so denying the motion. We now turn to our applicable jurisprudence.

Kentucky Rules of Criminal Procedure (RCr) 8.10 provides that, "At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." In *Williams v. Commonwealth,* 229 S.W.3d 49 (Ky. 2007), the Kentucky Supreme Court addressed RCr 8.10:

> To be valid, a plea must be knowing, intelligent and voluntary, *Haight v. Commonwealth*, 760 S.W.2d 84, 88 (Ky.1988), and a trial court shall not accept a plea without first determining that it is made voluntarily with understanding of the nature of the charge. RCr 8.08. RCr 8.10 provides that a guilty plea may be withdrawn with permission of the court before judgment. A motion to withdraw a plea of guilty under RCr 8.10 is generally addressed to the sound discretion of the court; however, where it is alleged that the plea was entered involuntarily the defendant is entitled to a hearing on the motion. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky.2006). If the plea was involuntary, the motion to

> withdraw it must be granted; if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App.2004). A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles. *Edmonds*, 189 S.W.3d at 570. The inquiry into the circumstances of the plea as it concerns voluntariness is inherently fact-sensitive. *Id*. at 566. Accordingly, the trial court's determination as to whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. *Id.*

Williams, at 50-51. Thus, we must review the trial court's determination that Lloyd's plea was entered voluntarily under the clearly erroneous standard; if the plea was entered voluntarily then we must determine whether the trial court abused its discretion in denying the motion to withdraw the guilty plea.

Regarding Lloyd's alleged incompetency to plead guilty, we note that a trial court's determination of competency to plead guilty is considered a finding of fact and is reviewed under the clearly erroneous standard. *Thompson v. Commonwealth*, 147 S.W.3d 22, 33 (Ky. 2004) (internal citations omitted). A decision supported by substantial evidence is not clearly erroneous. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004). Moreover:

> To be competent to plead guilty, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him. Competency determinations are made based on a preponderance of the evidence standard.

Thompson at 32-33 (internal citations omitted).

As an appellate court, we must bear in mind that "the trial court is in the best position to determine if there was . . . reluctance, misunderstanding, involuntariness, or incompetence to plead guilty at the time of the guilty plea and in a superior position to judge [witnesses'] credibility and the weight to be given their testimony at an evidentiary hearing." *Bronk v. Commonwealth,* 58 S.W.3d 482, 487 (Ky. 2001) (internal citations omitted).

We agree with the Commonwealth that the trial court's determinations that Lloyd's guilty plea was entered voluntarily and that Lloyd was competent to plead guilty are not clearly erroneous in light of the record. The trial court had ample opportunity to observe Lloyd's behavior and understanding of his plea agreement when Lloyd was called to the bench three separate times. The trial court's thorough questioning of Lloyd prior to accepting his plea further evidences his competency, and that the plea was entered voluntarily.

In addition, Lloyd repeatedly denied during the proceeding that he was under the influence of drugs or unable to plead guilty due to drug usage. The record further supports the trial court's determinations of Lloyd's competence and that his plea was entered voluntarily by the testimony of Dr. Allen, who explained the particular circumstances surrounding Lloyd's use of illegal drugs and that Lloyd's current impairment from the drugs would be low because of his prior habitual drug use. As noted by the trial court, it would seem unlikely that if Lloyd was under the influence of drugs on July 7, 2008, he was able to escape detection

by the trial court and three attorneys involved in his proceeding. The trial court's findings are supported by substantial evidence and, thus, are not clearly erroneous.

Given that Lloyd's plea was entered knowingly, intelligently and voluntarily we must now determine whether the trial court abused its discretion in denying the motion to withdraw the guilty plea. As noted in *Williams, infra*, "[a] motion to withdraw a plea of guilty under RCr 8.10 is generally addressed to the sound discretion of the court." *Id.* at 51. In the case *sub judice,* the trial court's denial of Lloyd's motion was not arbitrary, unreasonable, unfair or unsupported by legal principles. *See id.* Thus, the trial court did not abuse its discretion in denying Lloyd's voluntary guilty plea.

For the aforementioned reasons, we affirm the Boone Circuit Court's denial of Lloyd's motion to withdraw his guilty plea.

ALL CONCUR.

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