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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001549-MR

TIMOTHY D. ROUSE, JR. APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 07-CR-00100

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Timothy D. Rouse, Jr., appeals *pro* se from an order of the Fulton Circuit Court denying his RCr 11.42 and RCr 8.10 motions. Finding no error, we affirm.

[1] Senior Judge Joseph Lambert 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.

In August 2007, a Fulton County Grand Jury indicted Appellant on one count of second-degree forgery and one count of second-degree possession of a forged instrument. The indictment charged that Appellant "falsely completed or altered court orders by forging the name of the special circuit judge in attempt to hinder prosecution in another case and/or effect escape from custody." Appellant subsequently entered into a plea agreement with the Commonwealth whereby he agreed to plead guilty to the second-degree forgery charge and the Commonwealth agreed to dismiss the possession of a forged instrument charge.

On August 30, 2007, Appellant appeared in open court with his attorney for a hearing to determine whether his plea was knowing, voluntary and intelligent. During the colloquy with the trial court, Appellant stated that he had been told that the sentence in this case would run concurrently with a sentence he received in another separate case. The trial court informed Appellant that the decision whether to run sentences concurrently or consecutively was solely within the discretion of the trial court and could not be part of any plea agreement. The trial court specifically asked Appellant whether he needed additional time to consider the matter. Appellant responded in the negative and clearly indicated that he understood the sentencing procedure. Despite being informed that he could choose not to plead guilty, Appellant again confirmed that he wished to proceed and enter his plea. Based upon Appellant's statements during the colloquy, the trial court determined that his plea was knowing, intelligent and voluntary.

A sentencing hearing was held the following day wherein defense counsel again asked the trial court to run the current sentence concurrent with Appellant's twenty-seven year sentence in Indictment No. 06-CR-00013. Although the Commonwealth did not take a position on how the sentences should run, the prosecutor noted that applicable sentencing provisions could prohibit the sentences from running concurrently. The trial court thereafter commented that concurrent sentences would depreciate the seriousness of the crimes and ordered the current two and a half year sentence to run consecutive to the twenty-seven year sentence. When asked if he had any questions, Appellant responded, "No." The final judgment and sentence was entered on August 31, 2007.

Appellant immediately thereafter began filing numerous and repetitive collateral motions, including but not limited to four RCr 11.42 motions, four CR 60.02 motions, and at least two RCr 8.10 motions to withdraw his guilty plea.[2] Most of the motions included a request for the appointment of counsel and an evidentiary hearing. The trial court denied each on the merits. Finally, on March 2, 2009, the court entered an order stating, in part:

> IT IS HEREBY the findings of this Court that Defendant has created a lengthy record, the majority of which ultimately is much ado about absolutely nothing, and has continually filed repetitive pleadings, despite the Court's ruling on those various issues. Defendant has several other felony cases from multiple jurisdictions, all stemming in one way or another from Defendant's original Fulton Circuit Court case, 06-CR-00013, involving the assault and robbery of David Homra, now

[2] In a February 2009 order, the trial court noted that Appellant filed the same repetitive motions at four month intervals.

> deceased. Defendant has a history of procuring his release (while he was in custody with the Kentucky Correctional Psychiatric Center at LaGrange, Kentucky), and attempting subsequent release by subterfuge, by falsifying records, and by forgery of a prosecutor's and judge's signature. Defendant's actions have been calculated and executed with the hope that he can pull the wool over the eyes of someone involved in the criminal justice process to which he is a constant party.
>
> The Court further finds that it has reviewed in its entirety the record in the captioned matter and can find no substantive matter which would require any further action by this Court. . . .
>
> . . .
>
> IT IS, THEREFORE, THE ORDER OF THIS COURT that, to the extent there are any motions pending which have not yet been ruled upon, any and all such motions should be, and are hereby, denied.

In this Court, Appellant argues that the trial court erred by failing to hold evidentiary hearings on his RCr 11.42 and 8.10 motions. Due to the numerous pleadings and repeated notices of appeal, it is not entirely clear from the record which order of the trial court Appellant actually appeals from.

Nevertheless, the underlying basis of these motions is the same. Namely, Appellant claims that his guilty plea was rendered involuntary when the prosecutor "reneged" on his oral agreement "that the Commonwealth would make no sentence recommendation toward the sentence in Indictment No. 07-CR-00100, forgery second degree whether it be to favor or opposse [sic] concurrent sentences."

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Furthermore, an evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds* in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

RCr 8.10 provides in pertinent 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, our Supreme Court has held that a trial court may exercise discretion as to the withdrawal of a guilty plea only after first determining that the plea was voluntary. *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002). If the court finds that the plea was not voluntary, "the motion to withdraw must be granted." *Id.* at 10. In *Rigdon v.*

Commonwealth, 144 S.W.3d 283, 287-89 (Ky. App. 2004), a panel of this Court discussed the procedure a trial court must follow:

> When a criminal defendant pleads guilty, Rule 8.10[3] 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. [*Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)]. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. [*Id.*] The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. [*Id.*] 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. [*Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002)]. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. [*Id.*] 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." [*Bronk*, 58 S.W.3d at 489 (Cooper, J., concurring)]. The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. [*Id.*] A decision which is supported by substantial evidence is not clearly erroneous. [*Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky. App. 2003)]. 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. [*Bronk*, 58 S.W.3d at 487.] A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. [*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky.

[3] 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.

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).]

Upon review of the record, we are convinced that the trial court correctly denied an evidentiary hearing as it was clear that Appellant's guilty plea was voluntary and he was not entitled to either withdrawal of his plea or any other post-conviction relief. During the lengthy plea colloquy, Appellant acknowledged that he understood his constitutional rights and the charges against him. The trial court specifically questioned Appellant and counsel as to the voluntariness of the plea. The trial court gave Appellant ample opportunity to withdraw his plea or to express dissatisfaction with counsel during the plea colloquy. Appellant unequivocally stated that, despite the court's admonition that only it could determine how the sentences would run, he nevertheless wished to enter a guilty plea.

Furthermore, Appellant's claim that the Commonwealth "reneged" on its agreement is plainly refuted from the record. The plea agreement contains no mention of concurrent/consecutive sentencing. And there is certainly no evidence that the prosecutor made any "behind the scenes" promise regarding such. *Cf. Woods v. Commonwealth*, 469 S.W.2d 765 (Ky. 1971). Finally, the prosecutor clearly did not ask the trial court during the hearing to run the sentences

concurrently, but rather commented that applicable sentencing provisions may have prohibited a concurrent sentence.

We are convinced that the trial court adequately determined the voluntariness of Appellant's plea. Accordingly, the trial court did not abuse its discretion by denying an evidentiary hearing as both Appellant's RCr 11.42 and RCr 8.10 motions were wholly lacking in merit.

The order of the Fulton Circuit Court denying Appellant's RCr 11.42 and RCr 8.10 motions is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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