

RENDERED: OCTOBER 1, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000562-MR

TAMMY SUE RIGGS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A. C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 05-CR-000121 AND 05-CR-000121-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Tammy Sue Riggs appeals the judgment of the Jefferson Circuit Court removing her from pretrial diversion and denying her motion to withdraw her guilty plea. For the reasons stated herein, we affirm.

On November 4, 2004, Louisville Metro Police went to the residence of Timmy Parkerson to discuss an investigation. Parkerson was present at the

residence with Riggs, his then-girlfriend. After talking, Parkerson consented to the search of his residence and detached garage. While searching the garage, police discovered several items used to manufacture methamphetamine. When informed that he was under arrest, Parkerson fled but was apprehended a short time later. Police then returned to the residence and placed Riggs under arrest.

Riggs was indicted for complicity to manufacture methamphetamine and complicity to traffic methamphetamine. On July 6, 2006, Riggs pled guilty to facilitation to manufacture methamphetamine. The trial court sentenced her to one-year's imprisonment and the sentence was pretrial diverted for a period of three years. Almost a year later, the Commonwealth filed a motion to revoke Riggs's probation because of her indictment on June 19, 2007.

At the hearing, Riggs argued that her due process rights were violated because the Commonwealth improperly titled its motion. She contended that the Commonwealth must move for her removal from pretrial diversion prior to moving for the revocation of her probation. While stating that the motion was improperly titled, the trial court stated that everyone knew that the Commonwealth intended to seek Riggs's removal from pretrial diversion. Thus, the trial court ruled that the hearing to remove Riggs from pretrial diversion could proceed.

At the hearing, Jessie Napier, Riggs's probation and parole officer, testified that Riggs violated the conditions of her pretrial diversion by using and possessing methamphetamine, and by failing to report to her probation officer. She further testified that Riggs had a new charge against her for possession of

methamphetamine. Additionally, Louisville Metro Police Officer Ronald Russ testified that he found several items used to manufacture methamphetamine when he responded to a house fire at Riggs's residence on May 16, 2007.

Following the hearing, the trial court found that Riggs violated the conditions of her pretrial diversion and removed her from the program. The trial court observed that Riggs received adequate notice and that her due process rights were not violated because of the Commonwealth's titling of the motion. After her removal from pretrial diversion, Riggs moved to withdraw her guilty plea, contending that there was no factual basis for her facilitation conviction. She contended that the record was devoid of evidence to establish facilitation and, thus, could not support the entering of a knowing and intelligent guilty plea.

The trial court then conducted a hearing on Riggs's motion to withdraw her guilty plea. Riggs testified that she and Parkerson were not involved in manufacturing methamphetamine and that she never discussed the nature of these charges with her counsel before pleading guilty. She testified that she signed the plea forms before they were completed at her counsel's direction. Riggs's defense counsel then testified that he has never permitted his clients to execute a blank form and that he and his clients discuss the facts and law in each case.

After two hearings, the trial court denied Riggs's motion, finding that her guilty plea was made knowingly, intelligently, and voluntarily. On March 13, 2009, a probation revocation hearing was conducted wherein Riggs stipulated to

violating her probation conditions. The trial court then revoked her probation and ordered the commencement of her one-year sentence. This appeal followed.

Riggs contends that the trial court erred by denying her motion to withdraw her guilty plea because she did not understand the nature of her charge. She further argues that there were no facts asserted or found that would support a finding that she committed criminal facilitation and that guilty pleas must be supported by a factual basis to survive constitutional scrutiny. Therefore, she contends that the trial court was required to permit the withdrawal of her plea.

Trial courts may accept a defendant's guilty plea to a criminal charge, but the plea must be voluntarily made and with an understanding of the nature of the charge. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 565 (Ky. 2006). RCr<sup>1</sup> 8.10 provides that a defendant may withdraw his guilty plea with the permission of the court before judgment. *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007). A motion to withdraw a guilty plea is generally addressed to the sound discretion of the trial court and is reviewed to determine only if the court abused its discretion. *Commonwealth v. Lopez*, 267 S.W.3d 685, 689 (Ky.App. 2008).

On July 6, 2006, the trial court conducted a lengthy plea colloquy with Riggs pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), wherein Riggs acknowledged the consequences of pleading guilty. She acknowledged that she was waiving her right to a trial; her right against compelled self-incriminating testimony; and other constitutional rights. She further informed

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<sup>1</sup> Kentucky Rules of Criminal Procedure (RCr).

the trial court that she had discussed the plea agreement with her counsel and all the terms on the plea forms. The trial court then recited the facilitation charge and the recommended sentence and explained the pretrial diversion program. Riggs responded that she understood the proceedings and desired to plead guilty.

The trial court then asked Riggs what facts led to her prosecution for facilitating the manufacturing of methamphetamine. Riggs then acknowledged that police found items in her residence used to manufacture methamphetamine. The prosecutor then stated that substances at the residence tested positive for methamphetamine. The trial court then found that Riggs's plea was voluntary and accepted her plea.

After reviewing the record, we conclude that the trial court did not abuse its discretion by denying Riggs's motion to withdraw her guilty plea. The record reflects that her plea was entered intelligently, knowingly, and voluntarily. The trial court informed her of her charge, her constitutional rights, and obtained her acknowledgment that she understood the plea agreement and desired to accept. She further testified that she was provided adequate time to speak with her counsel and that she and her counsel had reviewed her plea agreement. Although Riggs now contends that she did not understand the nature of her charges, her previous solemn declarations in open court to the contrary carry a strong presumption of veracity. *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990). Thus, we cannot conclude that the trial court's decision was an abuse of discretion.

Additionally, Riggs's contention that her guilty plea was involuntary because it lacked a proper factual basis is unpersuasive. Our Supreme Court has stated that "the requirement for a factual basis is satisfied in cases that do not involve unduly complicated crimes if a summary of the charges is read to the defendant and the defendant admits to having committed the offense." *Chapman v. Commonwealth*, 265 S.W.3d 156, 183 (Ky. 2007). Riggs admitted guilt after the trial court informed her of the charge. She further testified that her charge was based on police finding items related to methamphetamine production in her residence. Thus, we conclude that the trial court's acceptance of her guilty plea was proper.

Riggs next argues that the trial court abused its discretion by removing her from pretrial diversion in violation of her due process rights. She contends that the Commonwealth was required to file a motion to void her pretrial diversion but mistakenly filed a motion to revoke her probation. Thus, she asserts that her right to adequate notice was abridged. We disagree.

A defendant's right to due process requires that she be provided with a fair opportunity to defend against the Commonwealth's allegations. *Dickerson v. Commonwealth*, 174 S.W.3d 451, 471 (Ky. 2005). Fundamental requirements of due process provide that a defendant have notice and an opportunity to be heard. *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006). However, if a defendant has actual notice of the matter in dispute and comes to the hearing prepared to present

a defense, she cannot contend that his due process rights were violated. *Polk v. Commonwealth*, 622 S.W.2d 223, 225 (Ky.App. 1981).

On September 6, 2007, Riggs filed a motion to stay the revocation hearing until her new criminal charge was resolved. In her motion, she argued that the logical solution is to “delay the Commonwealth’s motion to remove the Defendant from the diversion program until resolution of the allegations of new criminal conduct now pending and scheduled for trial October 24, 2007.” Accordingly, we conclude that the trial court properly found that Riggs was aware that the Commonwealth intended to void her pretrial diversion. Further, we observe that Riggs has not argued that she was not prepared to argue against the merits of her removal from the pretrial diversion program. Thus, Riggs cannot contend that her due process rights were violated. *Id.*

Riggs next contends that the trial court committed reversible error by admitting laboratory test results without a proper chain of custody. Riggs contends that the trial court, at her pretrial diversion removal hearing, improperly admitted laboratory results of a urine sample that she provided to a probation officer. The Commonwealth concedes to an incomplete chain of custody of the urine sample. However, it contends that Riggs’s out-of-court admissions validated what the test results intended to show, which was that Riggs had tested positive for drugs.

RCr 9.24 provides that no error in the admission of evidence is ground for reversing a judgment unless a party’s substantial rights were affected. *Jones v. Commonwealth*, 237 S.W.3d 153, 159 (Ky. 2007). Substantial rights are affected

only when erroneously admitted evidence has a reasonable possibility of affecting the outcome of the proceeding. *Anderson v. Commonwealth*, 231 S.W.3d 117, 122 (Ky. 2007). However, an error will be deemed harmless when the fact in dispute is proven by other competent evidence without regard to the inadmissible evidence. *Howard v. Commonwealth*, 787 S.W.2d 264, 265 (Ky.App. 1989).

In this case, Officer Napier testified that Riggs admitted that she had used methamphetamine while on pretrial diversion. While both parties concede that the evidentiary documentation for the drug test was lacking, the record reflects that there was other competent evidence to establish that Riggs used methamphetamine. Based upon the totality of the evidence supporting her removal from pretrial diversion, we conclude that the erroneous admission of the drug test did not affect Riggs's substantial rights.

Riggs next contends that she was denied due process when the trial court assumed the prosecutor's role and conducted its own witness interrogations during her motion to withdraw her guilty plea. Citing *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005), Riggs argues that the trial court exceeded the scope of its authority and transformed from impartial arbiter to prosecutor. We disagree.

KRE 614(b) provides that the trial court may interrogate witnesses, whether called by itself or by a party. *Terry*, 153 S.W.3d at 802. Specifically, the court held that a trial court may question a witness if his testimony is unbelievable and counsel fails to adequately probe an issue. *Id.* at 803. However, a "trial judge cannot ask questions that place him 'in the role of a prosecutor rather than an



arbiter.” *Id.* (quoting *LeGrande v. Commonwealth*, 494 S.W.2d 726, 731 (Ky. 1973)). When sitting without a jury, a trial court’s examination of witnesses is left to its sound discretion. *Couch v. Commonwealth*, 256 S.W.3d 7, 9 (Ky. 2008).

From a review of the record, we conclude that the trial court did not abuse its discretion in its examination of the witnesses in this case. While the trial court did conduct a substantive examination of Riggs, the trial court found Riggs’s purported lack of knowledge regarding her facilitation charge and testimony that her counsel made her sign blank plea forms worthy of skepticism. Further, the trial court’s examination of the other witnesses was not prosecutorial in nature.

Although Riggs contends that the trial court made up its mind against her prior to the conclusion of the December 18, 2008, hearing, the record shows that the trial court requested the testimony of Riggs’s former defense counsel and prosecuting attorney regarding the events surrounding her guilty plea. As a result of the additional witnesses, the trial court ordered a second hearing to be held before it rendered its decision. The trial court specifically stated that it desired to decide the case on a complete record. Thus, we reject Riggs’s argument that the trial court decided against her after the first hearing. The trial court remained impartial and equally weighed all of the evidence prior to issuing a decision.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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