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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000629-MR
AND
NO. 2010-CA-001187-MR

RANDY LEE ZOBENICA

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 09-CR-00149 AND 09-CR-00150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING APPEAL NO. 2010-CA-000629-MR
AND DISMISSING APPEAL NO. 2010-CA-001187-MR

** ** * * * * *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Randy Zobenica appeals from two separate judgments of the Hardin Circuit Court entered on March 26, 2010 (2010-CA-000629-MR) and June 17, 2010 (2010-CA-001187-MR), respectively. Zobenica asserts that the trial court abused its discretion when it denied his motion to withdraw his pleas of

guilty. He alleges his guilty pleas were involuntary because they were the product of ineffective assistance of counsel and because his mental and physical condition at the time of his pleas of guilty prevented him from making knowing and voluntary pleas. We find that Zobenica's appeal from the judgment of conviction in Case No. 09-CR-00149 was not timely and must be dismissed. Therefore, we dismiss Appeal No. 2010-CA-001187-MR. Further, as we find no error or abuse of discretion in the trial court's decision to deny Zobenica's motion to withdraw his guilty plea and to enter a final judgment of conviction and sentence in Case No. 09-CR-00150, we affirm the trial court in Appeal No. 2010-CA-000629-MR.

On April 28, 2009, a Hardin County grand jury returned two indictments against Zobenica. Indictment No. 09-CR-00149 charged Zobenica with one count of first-degree sexual abuse. Indictment No. 09-CR-00150 charged Zobenica with five counts of first-degree sexual abuse. Zobenica was arraigned on June 9, 2009, at which time he entered not guilty pleas in both actions. Although the actions were never formally consolidated before the trial court, they were heard together.

On January 19, 2010, Zobenica withdrew his former pleas of not guilty and entered guilty pleas under both indictments. Zobenica pleaded guilty to one count of first-degree of sexual abuse under Indictment No. 09-CR-00149; and to the amended charges of five counts of second-degree unlawful transaction with a minor under Indictment No. 09-CR-00150. The Commonwealth recommended

five years on each count in each indictment, for a total of ten years. The Commonwealth further agreed to recommend probation.

The trial court engaged in a lengthy plea colloquy with Zobenica and his counsel, during which Zobenica stated he appreciated the legal situation and the repercussions of entering a guilty plea. He further stated he was satisfied with the representation of his attorney and that he had no questions. He confirmed that he was pleading guilty of his own free will and that he was not under the influence of anything that would affect his ability to think clearly. Pursuant to questioning by both his own counsel and the trial court, Zobenica admitted that he touched the genital areas of the victims. The trial court found that the pleas were valid and that Zobenica's attorney had provided competent representation.

On February 10, 2010, prior to the final sentencing, Zobenica filed a motion to withdraw his guilty pleas and requested that the court set the matter for a jury trial. The trial court held evidentiary hearings on the motions on March 9 and March 16, 2010. At that time, Zobenica appeared in court with new counsel. He argued that he was not guilty of the offenses to which he had pleaded guilty and that his pleas were not knowingly and voluntarily made. He contended that, at the time of his guilty pleas, he was not in his right state of mind; that his wife was sick; that he was experiencing his own health problems; and that he was taking multiple medications at the time of the pleas which affected his decision-making capability. In addition, Zobenica claimed that he felt compelled to enter a guilty plea because his counsel was unprepared to proceed with trial. Zobenica claims that, because

the trial court had not yet ruled on an outstanding motion to consolidate the indictments, he did not know which indictment would be tried first. He further claims to have felt pressured to accept the Commonwealth's offer or it would be withdrawn.

Several of Zobenica's witnesses at the evidentiary hearings testified regarding Zobenica's poor health in the days leading up to the guilty pleas. Additionally, Zobenica alleged that, due to ineffective assistance of his counsel, his pleas of guilty were not knowing or voluntary. Zobenica claimed that his prior counsel did not explain to him that he would be required to complete a sex offender treatment program as a result of his guilty plea. However, Zobenica's prior counsel testified that he advised Zobenica of both the sex offender presentence investigation evaluation and the sex offender treatment program. Prior counsel further testified that, while he did observe Zobenica to be upset and reluctant to enter guilty pleas, such behaviors are normal under these circumstances. Prior counsel testified that he believed Zobenica's pleas to be knowing, voluntary, and truthful.

On March 22, 2010, the trial court denied Zobenica's motion to withdraw his guilty pleas. The trial court entered final judgments of conviction in both indictments on March 26, 2010. However, the trial court later set aside and re-entered the judgment in 09-CR-00149 to correct a clerical error. The court entered an amended Judgment in that case on June 17, 2010. Zobenica now

appeals from the trial court's judgments of conviction in both cases. These actions were consolidated by the Court of Appeals on July 26, 2010.

At the outset, the Commonwealth argues that this Court lacks jurisdiction to consider the merits of Appeal No. 2010-CA-001187-MR (Indictment No. 09-CR-00149). We agree. Zobenica filed a timely notice of appeal from the judgment in 09-CR-00150 on April 1, 2010, but not from the judgment in 09-CR-00149. On June 15, 2010, the parties tendered an Agreed Order to set aside the March 26, 2010 Judgment under 09-CR-00149 due to a clerical error. The original judgment contained provisions relating to probation supervision fees to which the parties had not agreed. The trial court signed an order setting aside the judgment in 09-CR-00149 and entered an amended judgment of conviction in that case.

Kentucky Rule of Civil Procedure ("CR") 73.02(1)(b) provides that a notice of appeal "shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." Compliance with the time requirements of CR 73.02 is mandatory and jurisdictional. CR 73.02(2). CR 73.02 also specifies that timely motions made pursuant to CR 50.02, 52.02, and 59 toll the running of time to take an appeal. CR 73.02(1)(e).

However, a motion to correct a clerical error under CR 60.01 is not encompassed within these rules and does not toll the thirty day time for filing a notice of appeal. Thus, the time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment and not from the

entry of an amended judgment. *United Tobacco Warehouse, Inc. v. Southern States Frankfort Co-op., Inc.*, 737 S.W.2d 708, 709-710 (Ky. App. 1987).

Consequently, Zobenica's notice of appeal from the judgment in 09-CR-00149 was not timely, and his appeal in Case No. 2010-CA-001187-MR must be dismissed.

Zobenica primarily argues that his guilty plea was not knowing and voluntary. He contends that he was in a poor mental and physical state and was unaware of the decision he was making. He also argues that his guilty plea was the result of ineffective assistance from his prior counsel. As a result of these circumstances, Zobenica maintains that the trial court abused its discretion by denying his motion to withdraw those pleas.

When a criminal defendant pleads guilty, Kentucky Rule of Criminal Procedure ("RCr") 8.10 requires the trial court accepting the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty. If the trial court determines that a guilty plea was not knowing or voluntary, it must permit the defendant to withdraw the plea. *Rodriquez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). A plea may be involuntary where a defendant entered a plea under duress or coercion. *Id.* Furthermore, a guilty plea may be withdrawn if counsel failed to provide reasonably competent advice. *Id.*

The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). Consequently, the trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous

standard. *Id.* If the court determines that the guilty plea was entered voluntarily, then the trial court's decision to grant or deny a motion to withdraw the plea is reviewed under the abuse of discretion standard. *Id.* We find no clear error or abuse of discretion in this case.

The trial court found no evidence supporting Zobenica's allegation that his guilty pleas were the product of duress or coercion. The trial court conducted an extensive plea colloquy with Zobenica. That colloquy fully complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Although Zobenica has provided evidence that he was in poor health and was taking several medications at the time he entered his guilty plea, the trial court found no evidence that these factors affected his ability to enter knowing and voluntary pleas of guilty. In ruling on the motion to withdraw the plea, the trial court noted that Zobenica appeared to fully understand the charges against him and the consequences of entering a guilty plea. Furthermore, the presentence investigation report found Zobenica to possess above normal intelligence.

Similarly, Zobenica asserts that he was under stress at the time he entered the pleas and felt pressure to accept the Commonwealth's offer. However, the trial court observed that Zobenica never indicated any hesitance, reluctance, misunderstanding, or involuntariness while entering his pleas of guilty. Zobenica freely acknowledged his guilt to the factual bases for the charges. He was specifically asked if he had any questions for the court or his counsel prior to

entering pleas of guilty. He indicated that he had no questions or reservations about entered pleas of guilty.

Zobenica also maintains that he pleaded guilty because his prior counsel failed to adequately investigate his defenses or prepare the case for trial. Where a defendant claims that a guilty plea was involuntary due to ineffective assistance of counsel, the trial court must consider counsel's representation under the analysis set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Under *Strickland*, Zobenica has the burden of showing that his original counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. In cases involving a guilty plea, the movant must demonstrate that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but rather would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed.2d 203 (1985). *See also Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

During his plea colloquy, Zobenica acknowledged to the court that he had fully informed his attorney of all the facts of the case and that he understood all the charges against him and all possible defenses to the charges. He further stated that he was satisfied with his counsel's advice, representation, and investigation of the case. Such pronouncements under oath in open court raise a

strong presumption that counsel's assistance was constitutionally sufficient.

Strickland at 689.

Furthermore, at the evidentiary hearing on the motion to withdraw the plea, Zobenica's former counsel testified that he discussed all the evidence with Zobenica, kept him informed about ongoing plea negotiations, and discussed the plea offer and counter-offer with him. Counsel also informed Zobenica that, upon acceptance of a plea agreement, he would be required to admit to the court and on the record the factual basis for the plea. Counsel further testified that, prior to the entry of the pleas of guilty, Zobenica had not expressed any reservation to pleading guilty because the case was not ready for trial.

Based on this evidence, the trial court concluded that Zobenica failed to substantiate his allegation that his original counsel was deficient in advising him to plead guilty. Since there was substantial evidence to support this conclusion, the trial court's finding that Zobenica's pleas were voluntary will not be disturbed. We further find that the trial court did not abuse its discretion by denying Zobenica's motion to withdraw his voluntary guilty pleas. The trial court has broad discretion to grant or deny a motion to withdraw a guilty plea under such circumstances. *Williams v. Commonwealth*, 229 S.W.3d 49, 53 (Ky. 2007). We cannot find that the trial court's decision to deny Zobenica's motion was arbitrary, unreasonable, unfair or unsupported by legal principles. *Id.* at 51.

Accordingly, the judgment of conviction by the Hardin Circuit Court in Case No. 09-CR-00150 (Appeal No. 2010-CA-000629-MR) is affirmed.

Zobenica's appeal from his judgment of conviction in Case No. 09-CR-00149

(Appeal No. 2010-CA-001187-MR) is dismissed as untimely.

ALL CONCUR.

ENTERED: September 23, 2011

/s/ Thomas B. Wine
Judge, Court of Appeals

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