

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001785-MR

DAMON SMITH

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 97-CR-000125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND KNOX, JUDGES.

KNOX, JUDGE: Damon Smith appeals from a judgment of the Kenton Circuit Court convicting him of the offenses of first-degree possession of a controlled substance and second-degree persistent felony offender. He was sentenced to five (5) years, as enhanced by the persistent felony offender charge. Appellant's convictions result from his pleas of guilty to those charges. He appeals from the ruling of the Kenton Circuit Court denying his motion to withdraw his guilty pleas.

In March 1997, appellant was indicted by a Kenton County grand jury for the offenses of first-degree trafficking in a controlled substance and second-degree persistent felony offender. His attorney, Hon. Gwen Pollard, proceeded to file motions for discovery on his behalf. Appellant was arraigned on March 31, 1997, and entered pleas of guilty. At appellant's status conference on April 7, 1997, Ms. Pollard reported to the court that she had been given a plea offer from the Commonwealth, but had not discussed it with appellant. She requested additional time within which to do so.

At a second status conference, held on April 14, 1997, Ms. Pollard reported to the court that appellant had accepted the Commonwealth's plea offer of an amendment of the trafficking charge to first-degree possession of a controlled substance with a sentence of five (5) years. Further, the Commonwealth recommended an enhanced sentence of five (5) years based upon appellant's plea of guilty to the offense of second-degree persistent felony offender. On that date, appellant entered his pleas of guilty to those charges. Preparatory to accepting his pleas of guilty, the court fully canvassed appellant with respect to his constitutional rights. Appellant acknowledged that he understood his rights, and that his plea was entered voluntarily and intelligently. Appellant further acknowledged to the court that he had, in fact, possessed a "small amount" of cocaine. The trial court then scheduled sentencing for June 2, 1997.

As the sentencing hearing commenced, Ms. Pollard informed the court that appellant was expressing the desire to withdraw his guilty plea and proceed to trial. In order to extend additional time to counsel to discuss the matter with appellant, the court continued the matter until June 9, 1997. Just prior to that date, Ms. Pollard filed a written motion to withdraw appellant's guilty plea. That motion stated that because appellant had not reviewed the discovery submitted by the Commonwealth prior to entering his guilty plea, he had not knowingly and voluntarily entered the plea. In response, the court scheduled an evidentiary hearing on appellant's motion.

On June 19, 1997, appellant appeared before the court, with Ms. Pollard representing him, for an evidentiary hearing upon his motion to withdraw his guilty plea. At that hearing, appellant testified he did not review the discovery the Commonwealth submitted to his counsel until after he entered his guilty plea. He testified he did not believe the Commonwealth had any basis to charge him with trafficking in a controlled substance, and had no evidence to prosecute a trafficking case. Thus, he wished to withdraw his plea of guilty to the charge of possession of a controlled substance. The trial court overruled appellant's motion to withdraw his guilty plea and, on July 7, 1997, appellant was sentenced based upon the Commonwealth's recommendation. At his sentencing hearing, appellant orally moved the court for permission to withdraw his guilty plea on grounds of ineffective assistance of counsel. The trial court

denied appellant's motion, and final judgment in the matter was entered on July 9, 1997.

On appeal, appellant argues: (1) the trial court denied him his right to effective assistance of conflict-free counsel when it allowed him to proceed with his motion to withdraw his guilty plea while represented by an attorney (Ms. Pollard) who had an actual conflict of interest; and, (2) the trial court erred in overruling his motion to withdraw his guilty plea.

While the parties have briefed this case as if the central issue was whether appellant's counsel rendered ineffective assistance in some fashion prior to the entry of his plea, we believe the pivotal question is whether the trial court erred in denying appellant's motion to withdraw his guilty plea. We do not believe the trial court erred.

The record reflects that the trial court carefully canvassed appellant with respect to his plea and the consequences of his plea, in accordance with Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Appellant acknowledged: (1) he understood his rights; (2) he had competent counsel; and, (3) he had, in fact, possessed a "small amount" of cocaine, thus admitting on the record his guilt to the amended offense of possession of a controlled substance which the Commonwealth had recommended. Under these circumstances, appellant's plea was voluntarily and intelligently made.

RCr 8.10 appears to give a trial judge some discretion in whether to permit a defendant to withdraw a guilty plea. That

rule states, in part: "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." (Emphasis added). See also Anderson v. Commonwealth, Ky. 507 S.W.2d 187, 188 (1974) (Whether the defendant may withdraw a guilty plea pursuant to RCr 8.10 is "a matter within the sound discretion of the trial court"). In this case, the trial court fully accepted and implemented the recommendation of the Commonwealth to amend the trafficking charge to a possession charge, and to impose an enhanced sentence of five (5) years. Further, as noted, the record fully reflects the voluntary nature of appellant's plea. We do not believe appellant's contention that he could not have been convicted on a trafficking charge is a sufficient basis to set aside his guilty plea, where the Commonwealth recommended an amendment of that charge to possession. Further, we believe appellant's admission of his guilt to the offense of possession confirms our opinion that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea. See Hurt v. Commonwealth, Ky., 333 S.W.2d 951 (1960).

While appellant claims he received ineffective assistance of counsel in some unspecified fashion prior to the entry of his plea, and was not properly represented by counsel during the evidentiary hearing on his motion to withdraw his guilty plea, we believe RCr 11.42 affords a better process for hearing those claims.

For the foregoing reasons, we affirm the judgment of
the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Shawn C. Goodpaster
Assistant Attorney General
Frankfort, Kentucky