

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002568-MR

DAVID FLOYD HOUSTON

APPELLANT

V. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, SPECIAL JUDGE
ACTION NO. 94-CR-92

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; GARDNER and GUIDUGLI, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Bullitt Circuit Court. Appellant pled guilty to the offense of second-degree escape and was sentenced to five years' imprisonment. On appeal, appellant contends that the court erred by denying his motion to withdraw his guilty plea. We disagree. Hence, we affirm.

This is the second appeal in this action. In November 1994 appellant was indicted for the offense of second-degree escape and as a first-degree persistent felony offender (PFO 1). A plea agreement was negotiated whereby the Commonwealth agreed to dismiss the PFO 1 charge and to recommend five years'

imprisonment on the escape charge. In July 1995, the circuit court adjudged appellant guilty of second-degree escape and sentenced him to five years' imprisonment. The five-year sentence was ordered to run concurrently with a twenty-year sentence imposed in another Bullitt Circuit Court action stemming from convictions for knowingly receiving stolen property and PFO 1. Both appellant and the commonwealth appealed to this court, raising sentencing issues.

On June 6, 1997, this court rendered an opinion affirming in part, reversing in part, and remanding with directions. Basically, a panel of this court found that the circuit court had erred by failing to consider a sentence of less than one year's imprisonment, by failing to grant appellant's motion for a stay of execution, and by failing to direct that appellant's five-year sentence run consecutively to the twenty-year sentence. The action was remanded to the circuit court.

In September 1997, appellant filed a motion seeking permission to withdraw his guilty plea. He asserted in his motion that he would not have pled guilty had he known that he was subject to consecutive sentencing, that he understood that he was eligible to receive a misdemeanor sentence, and that he did not understand the elements of second-degree escape. After a hearing, the court entered an order denying appellant's motion. Instead, appellant was adjudged guilty of second-degree escape and sentenced to five years' imprisonment which the court ordered

to run consecutively to the twenty-year sentence. This appeal followed.

The Commonwealth claims that appellant's motion to withdraw his guilty plea, filed more than two years after his plea, was not timely. We disagree.

RCr 8.10 states that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty to be substituted." Here, the first judgment was reversed in part and the action was remanded to the trial court for re-sentencing. The action was essentially reinstated to the status it held subsequent to appellant's guilty plea but prior to the original judgment and sentence. Cf. Haight v. Commonwealth, Ky., 938 S.W.2d 243 (1996), cert. denied, ___ U.S. ___, 118 S.Ct. 110, 139 L.Ed.2d 63 (1997). Thus, appellant's motion to withdraw was filed "before judgment." Hence, we will consider the merits of the issue raised on appeal.

Appellant contends that the court erred by denying his motion to withdraw his guilty plea because it was not knowingly, intelligently, and voluntarily entered. We disagree.

Permission to withdraw a guilty plea rests within the sound discretion of the trial court if it does not reject the plea bargain. Haight v. Commonwealth, supra. Moreover, it is well settled that a guilty plea must represent a voluntary and intelligent course of action by a criminal defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Further, the validity of the guilty plea is determined

by the totality of the circumstances, including the defendant's background, experience, and conduct. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978); Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902 (1980). On appeal from the denial of a motion to withdraw a guilty plea, the issue is limited to whether the court abused its discretion. Lynch, supra.

Here, appellant claims that the record is clear that he did not understand the elements of the offense of second-degree escape. KRS 532.020(1) states that a person is guilty of second-degree escape when "being charged with or convicted of a felony, he escapes from custody." Appellant focuses his argument on the following exchange during the guilty plea proceeding:

Q.[trial court]: You're pleading guilty because, one, you are guilty of the offense of Escape in the Second Degree. And also because you believe pleading guilty is what is in your overall best interest?

A.[appellant]: That's correct. As I understand the Escape in the Second Degree, Judge, it is more or less an absolute liability. It is like a custody charged with a felony and escape from custody while charged with a felony. That's the elements. That is my understanding and I am entering the plea based on that.

During the July 1995 sentencing hearing, appellant stated the following:

The point I was going to make, I think, you know, I pled guilty to Escape in the Second Degree because it appeared to me to be an absolute liability crime.

If you read the statute there is no knowingly, intentionally, or anything of that kind in the statute. But although it appears

from reading the statute that it's an absolute liability and I am guilty of it, I also feel that there are mitigating circumstances. . . .

. . .

The factual circumstances is we went before -- last month were that I was in the Bullitt County law library, not handcuffed, not shackled, simply walked out. I, you know, again at that particular point in time the jury in the earlier case had just returned a verdict of guilty on a count of Receiving Stolen Property the night before.

Appellant also points to the following statement he made during the hearing on his motion to withdraw his plea:

THE DEFENDANT: And it's readily apparent, from both the transcripts of the plea and sentencing and the plea agreement that's on the file in the record, that I was not aware of the mental elements of the crimes. And I would be -- I'm not going to sit here and tell you that I'm functionally illiterate. I have had legal training. I have practiced law for years and years. I have passed a multistate bar exam.

Appellant insists that his statements regarding absolute liability demonstrate that he did not understand the elements of the charge to which he pled guilty. True enough, second-degree escape is not a strict liability offense. KRS 501.050. Indeed, in order to violate KRS 520.030 the actor must act intentionally or knowingly. See KRS 501.040; Covington v. Commonwealth, Ky. App., 849 S.W.2d 560 (1993). However, a review of the entire guilty plea proceedings herein demonstrates that appellant understood that he was indeed guilty of second-degree escape because he knowingly or intentionally walked away from the

Bullitt County Courthouse while in custody after his conviction for receiving stolen property.

Indeed, appellant signed a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," in which he stated that he understood the three elements of second-degree escape to be "(1) custody, and (2) escape while (3) charged with felony - ." Moreover, appellant signed the "Commonwealth's Offer on a Plea of Guilty," on which the facts of the case were stated as follows: "On 10-13-94 the defendant, in preparation for the sentencing phase of case # 94-CR-00008, and while in custody of the Bullitt County Jailer, escaped from the courtroom and was later found hiding in a drainage tile in Shep. Ky." Further, the court extensively questioned appellant about his knowledge of the constitutional rights that he would be waiving by pleading guilty prior to accepting the plea. Appellant demonstrated that he was totally familiar with the criminal justice system due to his paralegal training and his extensive criminal record.

In determining whether appellant entered his guilty plea knowingly, voluntarily, and intelligently, the trial court appropriately considered the totality of the guilty plea proceedings. See Kotas, supra. We agree with the trial court that it is clear appellant's guilty plea was entered knowingly, voluntarily, and intelligently. Simply put, appellant admitted that he was guilty of second-degree escape by intentionally walking away from the courthouse while under custody after his conviction for receiving stolen property, and only attempted to

explain his actions to the court in order to mitigate his sentence. In short, based upon our review of the record, we conclude that the court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Neel, Jr.
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, KY