

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000622-MR

GEORGE A. LYTTLE

APPELLANT

V. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 97-CR-59

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and EMBERTON, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Knox Circuit Court. Appellant pled guilty to the offenses of first- and fourth-degree assault. On appeal, appellant contends that the court erred by denying his motion for permission to withdraw his guilty plea. We disagree. Hence, we affirm.

In August 1997 appellant was indicted for the offenses of first-degree assault, criminal attempt to commit murder, fourth-degree assault, two counts of first-degree wanton endangerment and as a persistent felony offender in the second degree. The charges stem from an incident on July 15, 1997, during which appellant assaulted his former wife by repeatedly

striking her with a tobacco knife. During the same episode appellant also pushed his daughter. Pursuant to a plea agreement with the Commonwealth, appellant filed a motion seeking permission to enter a plea of guilty but mentally ill to the charges of first-degree assault and fourth-degree assault. The Commonwealth in turn agreed to recommend that appellant receive concurrent sentences of fourteen years on the first-degree assault charge, twelve months on the fourth-degree charge and that the remaining four counts of the indictment be dismissed.

On January 30, 1998, the trial court conducted a hearing pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). During the hearing, the court first informed appellant of the penalty ranges for convictions of first-degree assault and fourth-degree assault. It then summarized the plea agreement and informed appellant that if it elected to reject the Commonwealth's recommendations, he could withdraw his guilty plea. Appellant stated that he understood the charges and admitted committing the acts underlying the charges. The court further explained to appellant the constitutional rights that he was waiving by pleading guilty.

Appellant equivocated when the court inquired whether the guilty plea was the result of any threats, promises, or coercion. At that point the court commented upon appellant's "apparent hesitation," and again explained to appellant that he had a right to a trial and a right not to testify against

himself. Additionally, the court stated that it was "not a problem" to reject the plea and to hold a trial.

Appellant then stated that he had been advised by his attorneys that he could not win at trial. The trial court explained to appellant that his attorneys had a duty to represent him, which duty included an assessment of the outcome of a trial. The discussion between the trial court, appellant, and his attorneys continued, with the court reiterating to appellant that he had the right to have a jury decide his case. The court also inquired as to whether it was his choice to plead guilty. After a thorough discussion, appellant confirmed for the court that he wanted to plead guilty. Thereupon, the court accepted appellant's guilty plea.

At his sentencing hearing on February 11, 1998, appellant orally requested the court to permit him to withdraw his guilty plea because the underlying facts only gave rise to a second-degree assault charge. After the court replayed the videotape of the earlier Boykin hearing, appellant informed the court that he "lied" when he stated that he chose to plead guilty. The trial court, however, denied appellant's request to withdraw his guilty plea and subsequently the Commonwealth made a motion to sentence appellant as a violent offender. After appellant's former wife, the victim of the first-degree assault, testified with regard to her injuries, the court sentenced him as a violent offender. This appeal followed.

Appellant contends that the trial court abused its discretion by denying his request to withdraw his guilty plea because it was not voluntarily entered. We disagree.

In cases where the court does not reject the plea agreement, the decision as to whether to permit a guilty plea to be withdrawn rests within the sound discretion of the trial court. RCr 8.10; Haight v. Commonwealth, Ky., 938 S.W.2d 243 (1996), cert. denied, ___ U.S. ___, 118 S.Ct. 110, 139 L.Ed.2d 63 (1997). The validity of a guilty plea is determined from a consideration of the totality of circumstances. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978). Clearly, the trial court is in the best position to determine whether the guilty plea is entered intelligently and voluntarily. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990).

Moreover, while the trial court must inform a defendant of the maximum aggregate sentences he or she faces, the court has no duty to inform a defendant as to his or her parole eligibility or other sentencing consequences. Indeed, in Turner v. Commonwealth, Ky. App., 647 S.W.2d 500, 500-501 (1982), we held as follows:

Boykin does not mandate that a defendant must be informed of a "right" to parole. This is especially true since, unlike the right specified in Boykin, parole is not a constitutional right. U.S. v. Timmereck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). Boykin does require a knowing, voluntary and intelligent waiver of all important constitutional rights. However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement

that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.

See also Jewell v. Commonwealth, Ky., 725 S.W.2d 593 (1987).

Further, it is well settled that a guilty plea need only represent a voluntary and intelligent choice among the alternatives available to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Here, the record clearly shows that appellant's guilty plea was a voluntary and intelligent choice among the alternatives available to him. Indeed, in his signed motion for permission to enter a guilty plea, appellant acknowledged, inter alia, that he understood the charges against him, that he was waiving his constitutional rights, and that no one had forced or threatened him to plead guilty. Moreover, the trial court conducted a lengthy hearing prior to accepting appellant's guilty plea. At the point that appellant stated that he was advised that he could not win at trial, the court again further explained to him that he had the right to a fair trial and that a jury could decide his case. After appellant was provided with ample opportunity to not enter a guilty plea at the hearing, the court found that the guilty plea was voluntary and intelligent.

Further, although appellant claims on appeal that his documented

mental illnesses substantiate his claim that his guilty plea was not voluntary, no question was raised before the trial court regarding appellant's competency to enter his guilty plea. In any event, the record creates no issue of fact as to appellant's competency at the time he entered his guilty plea. On the contrary, in our view the record clearly demonstrates that appellant understood the charges and the consequences of pleading guilty. Hence, we conclude that the court did not abuse its discretion by denying appellant's request to withdraw his guilty plea.

Next, appellant contends that the sentence imposed varied from his plea agreement. We disagree.

The definition of a "violent offender" in KRS 439.3401(1) includes a person who has pled guilty to a Class B felony involving serious physical injury to the victim. Prior to its amendment effective July 15, 1998, KRS 439.3401(3) stated that a violent offender must serve at least fifty percent of the sentence before he or she is eligible for parole. However, KRS 439.3401 affects only a defendant's parole eligibility, not the sentence imposed by the court.

Here, there is no allegation that discussion of appellant's parole eligibility was part of the plea agreement with the Commonwealth. Moreover, the record establishes that appellant's parole eligibility was not taken into account during plea negotiations. Moreover, the application of the provisions

of KRS 439.3401 does not alter the Commonwealth's recommended sentence of fourteen years' imprisonment in any event.

Finally, appellant contends that the sentence imposed varied from the plea agreement because the indictment and the plea agreement failed to reflect that the victim suffered serious physical injury. We disagree.

True enough, the indictment did not explicitly state that the victim of the first-degree assault suffered serious physical injury. Nevertheless, any issue in this vein was waived by appellant's entry of a guilty plea. See Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970). Moreover, the indictment alleged that appellant committed the offense of first-degree assault by striking the victim with a tobacco knife. Further, appellant pled guilty to the offense of first-degree assault which is defined by KRS 508.010(1) as follows:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person. (Emphasis added.)

By definition, a first-degree assault causes serious physical injury to the victim. Thus, appellant obviously knew that the offense to which he was pleading guilty involved serious physical injury. Thus, there is no basis for concluding that the sentence imposed varied from the plea agreement.

The court's judgment is affirmed.

ALL CONCUR.

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