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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001236-MR

ADRIAN LEE CALDWELL — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE JAMES RON DANIELS, JUDGE
ACTION NO. 98-CR-00168

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE: The appellant, Adrian Lee Caldwell, appeals from the ruling of the McCracken Circuit Court denying his motion to withdraw a guilty plea. He urges that it was an abuse of discretion for the court to deny his motion. We agree; therefore, we vacate and remand.

On August 14, 1998, the McCracken County Grand Jury indicted Caldwell on one count of trafficking in a controlled substance (cocaine), first offense.

Caldwell appeared in court on January 22, 1999, for a suppression hearing dressed in orange prison clothing. He was apparently in custody for another violation. His motion to suppress was denied.

On February 12, 1999, Caldwell appeared for a pretrial conference. This conference was postponed due to a delay in the transfer of a file by another division concerning a second indictment. Caldwell's counsel alluded to the transfer and mentioned that this second indictment was not yet on the court's docket. He also noted that the Commonwealth had offered to settle both indictments for consecutive terms. The court suggested that these two indictments be called at the end of the day's docket.

Approximately two and one-half hours following this initial delay, Caldwell, by counsel, came before the court and announced his intention to enter a guilty plea on case "168, which was properly before the court, today." He agreed that case "261" was to be set for pretrial on March 19; the court so ordered. At this point, the Commonwealth announced that it would offer a recommendation of five years on the charge of trafficking in cocaine.

This sentencing recommendation apparently took Caldwell's counsel by surprise as he noted that the recommendation was not for a reduced charge. Counsel rejected the offer of the Commonwealth and announced that Caldwell was set for trial. The court then asked Caldwell to "make up his mind." Following a brief consultation at the podium, Caldwell told his

counsel that he would enter a guilty plea pursuant to the recommendation of the Commonwealth. The court proceeded to interrogate Caldwell, advising him that "if we say something you don't understand or don't agree with about your case, will you ask me to explain it for you?" Caldwell indicated that he would.

The Commonwealth then recited the facts underlying the indictment, mentioning that the crime charged had occurred on July 4, 1998. The court then asked Caldwell if he fully understood and realized that he was waiving his right to remain silent, to a trial by jury, and to an appeal. The court told Caldwell that his plea was accepted and that he was to see the presentencing officer for an appointment.

On April 1, 1999, Caldwell appeared at his sentencing hearing. The court noted that he had not appeared for his presentence interview. The court inquired about this failure to appear and was informed by counsel that Caldwell now wanted to withdraw his guilty plea. In response to the court's questioning, counsel explained that Caldwell was "confused" when he entered his plea due to the discussion and setting for trial of a second case contemporaneously with his plea agreement. Although his counsel had attempted to explain and sort out the different aspects of the cases at the time of the plea, Caldwell failed to appreciate or to understand what was transpiring. Counsel also noted that Caldwell had entered the plea against his advice. On the morning of the April 1, 1999, hearing and also several days earlier, Caldwell told his lawyer that he wished to withdraw his plea.

The court then questioned Caldwell directly as to what he did not understand. Caldwell responded that he had been confused about the court dates and that things "didn't come out how the plea was supposed to have been." The court refused to allow him to withdraw his plea and sentenced him to five years to be served in the penitentiary.

Caldwell argues on appeal that the trial court erred in refusing to allow him to withdraw his guilty plea because he did not enter it knowingly or intelligently due to his confusion over the second pending charge.

In order to be valid, a guilty plea must represent a voluntary and intelligent choice among the alternative courses open to the defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was knowingly and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). Finally, the validity of a guilty plea is determined not by reference to some magical incantation recited at the time it is taken but from the totality of the circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

When considering the acceptance of a guilty plea, it is "plain error on the face of the record, for the trial judge to accept [a defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary." Boykin at 242. To avoid plain error, the trial judge cannot accept a guilty plea tainted

by ignorance or incomprehension -- both of which appear to be involved in this case.

On the day that Caldwell entered his guilty plea, the Commonwealth, the trial judge, and his counsel were having some difficulty keeping his two cases straight. Although they had occurred on two different dates, both charges involved drug trafficking. Additionally, Caldwell and his counsel were both confused about the details of the offer that was made. His counsel made it apparent — both by his statements and by the striking of language on the plea sheet — that he had expected a reduced charge to be offered. Caldwell may well have been ignorant of the specific charge as to which he was entering a guilty plea. Alternatively, he may not have been able to distinguish whether the charge to which he entered his guilty plea was the first or second drug trafficking charge. With this apparent confusion in the record, we are not satisfied that this guilty plea was knowingly and voluntarily made in compliance with the constitutional safeguards announced in Boykin.

We are also directed to RCr. 8.10, the rule governing withdrawal of a guilty plea:

> 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.
>
> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea

> the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. (Emphasis added.)

The rule is essentially discretionary with the court as to withdrawal of a guilty plea before entry of judgment. However, the 1989 amendment to the rule mandates that an appellant be informed if a court elects to deviate from the plea agreement and that he be allowed to withdraw his guilty plea. Case law has reinforced that mandatory interpretation of RCr 8.10. Haight v. Commonwealth, Ky., 938 S.W.2d 243 (1996). More recently, we stated in Kennedy v. Commonwealth, Ky. App., 962 S.W.2d 880, 882 (1997):

> The language of RCr 8.10 is clearly mandatory and requires a court to permit a defendant to withdraw a guilty plea if the court rejects the plea agreement . . . . It is not the function of this court upon review to second-guess the wisdom of permitting the plea bargaining process. . . . It is an exchange that the rule regulates, however, with one clear proviso: that in the event that the negotiated deal is rejected by the court, the defendant is guaranteed the right to withdraw his plea and to proceed to trial and be afforded due process of law.

The confusion in this case extends to whether or not the court or the Commonwealth had deviated from the initial plea agreement. The language on the plea sheet contained strikes and alterations. An abundance of caution would indicate that under the questionable circumstances of this case, both Haight and Kennedy support a withdrawal of the guilty plea by Caldwell.

This outcome results in no prejudice to society and does not amount to any sort of automatic acquittal of a criminal defendant. As the court held, "Society cannot be harmed by

withdrawal of the plea by a defendant as he is not set free but instead must proceed to run the gauntlet of a trial with the attendant risk of the maximum punishment prescribed by statute." Kennedy, supra.

For the foregoing reasons, we vacate the judgment of the McCracken Circuit Court and remand the case with directions that the appellant be permitted to withdraw his guilty plea and proceed on to trial on the original charge.

ALL CONCUR.

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