

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001530-MR

THURMAN BALL

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 00-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Thurman Ball, Jr., (hereinafter "Ball") has appealed from the Rowan Circuit Court's June 19, 2001, Judgment and Sentence on a plea of guilty, and from the June 29, 2001, order denying his motion to withdraw his guilty plea. Having considered the parties' briefs, the record, and the applicable case law, we affirm.

On July 21, 2000, the grand jury indicted Ball for Assault, Second-Degree. He waived a formal arraignment and entered a plea of not guilty on August 23, 2000. On April 20, 2001, while represented by his third attorney, Ball entered a guilty plea to Assault, Second-Degree, with a recommended

sentence of eight years. The plea agreement included the additional term that "upon satisfactory treatment plan probation would not be opposed at time of sentencing." After first questioning his attorney and then ascertaining that there was nothing interfering with Ball's understanding of the proceedings, the trial court entered into the following colloquy with Ball:

BY THE COURT: Do you understand the nature and the consequences of the charges which have been placed against you in this case?

Mr. Ball: Yes.

BY THE COURT: And, have you consulted with your attorney, Mr. Pillersdorf, about the entry of your plea of guilty?

Mr. Ball: Yes.

BY THE COURT: Have you had all of the time necessary to talk to him that you feel is necessary?

Mr. Ball: Yes.

BY THE COURT: Do you have any complaints at all about the representation he's provided you?

Mr. Ball: No, sir.

BY THE COURT: And, have you read, or gone over with your attorney the motion to enter a guilty plea - this document here?

Mr. Ball: Yes, sir.

BY THE COURT: And, you feel that you understand it?

Mr. Ball: Yes.

BY THE COURT: Is that your signature on the back?

Mr. Ball: Yes.

BY THE COURT: Do you understand that by pleading guilty today you're going to be

waiving certain constitutional rights to which you otherwise have?

Mr. Ball: Yes.

BY THE COURT: Do you understand you have the right to a trial by jury in which you would be represented by counsel and the Commonwealth would have to prove your guilt beyond a reasonable doubt?

Mr. Ball: Yes, sir.

BY THE COURT: Okay, you understand you have the right to have an attorney appointed to represent you if you can't afford one?

Mr. Ball: Yes.

BY THE COURT: You understand you have the right not to testify against yourself?

Mr. Ball: Yes.

BY THE COURT: You also understand you have the right to cross examine and confront any witnesses who might be called to testify?

Mr. Ball: Yes, sir.

BY THE COURT: You understand there'll be no appeal to a higher court from the judgment of this court if you plead guilty?

Mr. Ball: Yes, sir.

BY THE COURT: Now, in this case, specifically it is alleged that on or about June 15th of 2000, here in Rowan County, that you committed the offense of Assault Second Degree when you intentionally caused serious physical injury to one Charlene Norris by striking her and fracturing her wrist, breaking her nose and injuring her eye. Do you understand that this is the charge against you?

Mr. Ball: Yes.

BY THE COURT: Do you understand the facts on which that charge is based, given the discovery that has been provided to you and your attorney?

Mr. Ball: Yes.

BY THE COURT: And, do you desire at this time to change your plea and enter a plea of guilty to that charge at this time?

Mr. Ball: Yes.

BY THE COURT: In return for your guilty plea the Commonwealth has agreed to recommend to the Court a sentence of eight years imprisonment. However, the Commonwealth has also said that upon satisfactory treatment plan – upon presentation of a satisfactory treatment plan, probation would not be opposed at the time of sentencing. Is that your understanding of the plea agreement?

Mr. Ball: Yes.

BY THE COURT: Do you understand that prior to final sentencing I'm going to order a pre-sentence investigation report which will contain information about you, your background, and your record, and I'll want to review that prior to final sentencing?

Mr. Ball: Yes, sir.

. . . .

BY THE COURT: Okay, let me just ask you again, with regard to this charge, are you entering your plea of guilty to the charge of Assault in the Second Degree willingly, freely, and voluntarily?

Mr. Ball: Yes.

BY THE COURT: Then, let's let the record reflect the defendant's plea has been made willingly, freely, and voluntarily. The defendant has made a knowing and intelligent waiver of his rights. . . . [O]nce you get that treatment program, get with Mr. Moore. If they're in agreement with it, then that shouldn't be any problem. If there is a dispute over it, then make sure I get it in advance so that I can review it, and we know where we stand with regard to that. Okay, that'll take care of it.

Earlier in the hearing, counsel for Bath indicated that he would be contacting Pathways for treatment program information. The parties and the trial court then discussed

whether the treatment program would be on an outpatient or an inpatient basis, and the Commonwealth's Attorney stated, "We haven't made any agreements on that, and I - I'm going to need to know what Pathways can do. You know, probably I'm not going to be satisfied with him showing up every Thursday afternoon to talk to Mr. Frost, so . . ." Following the hearing, Bath filed his proposed treatment plan in support of his motion for probation, indicating that he wanted to attend an evening outpatient program at Pathways for substance abuse treatment. The Commonwealth responded, indicating that outpatient counseling would not be satisfactory in this case due to Ball's history of violent responses and significant problems with alcohol. Instead, the Commonwealth suggested some initial residential treatment.

On June 19, 2001, the trial court held the sentencing hearing. At that time, the trial court first noted that the victim was not in agreement with the plea agreement and was opposed to probation. He then noted that "Mr. Ball was proposing that any treatment that he were to undergo, if he were to be granted probation, that it would be on an outpatient basis through Pathways. My understanding is that the Commonwealth is opposed to that program. The Commonwealth was insisting on an in-house treatment program." Based upon his review of the PSI and the victim impact statement, the trial court declined to consider probation because of the seriousness of the crime Ball committed, the revocation of a previous probation for a reckless homicide conviction, previous charges involving domestic violence, disorderly conduct, terroristic threatening, assault 4th, attempted assault 4th, and resisting arrest, as well as

several unsuccessful attempts at treatment for his alcohol problem. The trial court then sentenced Ball to eight years' imprisonment "in accordance with the plea agreement." Under the circumstances, the trial court stated that probation was not warranted even though "the Commonwealth said they were not opposed to a probation with treatment plan." The written judgment and sentence on the plea of guilty was entered accordingly.

On June 29, 2001, Ball moved the trial court to withdraw his guilty plea and his attorney moved to withdraw as counsel. The same day, the trial court granted the motion to withdraw as counsel. However, the trial court denied the motion to withdraw the guilty plea after reviewing the transcript, reasoning that his plea was made willingly, freely and voluntarily, and with full knowledge of his rights. Additionally, probation was never guaranteed, and was not warranted in light of his record. This appeal followed.

In his brief, Ball relies upon RCr 8.10 and asserts that the trial court abused its discretion in refusing to allow him to withdraw his guilty plea when it did not afford him the opportunity to withdraw his plea when it deviated from the Commonwealth's recommendation. At the guilty plea hearing, Ball asserts that the trial court did not specifically inform him that the decision as to whether probation should be granted was solely within its discretion, or that if it chose to reject the plea agreement, he must be given the choice to either persist in his plea or withdraw it and proceed to trial. The trial court's

failure to do so rendered Ball's plea a nullity because it was no longer voluntarily, intelligently, or knowingly entered.

On the other hand, the Commonwealth argues that RCr 8.10 does not apply because Ball did not move to withdraw his plea until ten days after the judgment was entered. Therefore, the trial court should only allow Ball to withdraw his plea if it was unwillingly entered under fear, deceit or coercion. Additionally, the Commonwealth points out that the trial court did not reject the plea agreement, making the second paragraph of RCr 8.10 inapplicable in this case. Ball did not submit a satisfactory treatment plan, meaning that the Commonwealth was under no obligation not to oppose probation at sentencing. Lastly, there was no agreement that Ball would be probated even if he had submitted an acceptable treatment program.

The applicable standard of review in an appeal from the denial of a motion to withdraw a guilty plea is abuse of discretion. In Hurt v. Commonwealth, Ky., 333 S.W.2d 951, 952 (1960), the former Court of Appeals stated that "[t]he withdrawal before judgment of a guilty plea and substitution of a plea of not guilty is a matter within the sound discretion of the trial court. . . ." (emphasis added). See also, Anderson v. Commonwealth, Ky., 507 S.W.2d 187 (1974). Subsequently, the court further defined the standard of review in instances where the motion to withdraw the guilty plea came after the judgment was entered. Citing Kidd v. Commonwealth, 255 Ky. 498, 74 S.W.2d 944 (1934), the court held that "the trial court should not 'exercise its judicial discretion by allowing the withdrawal of the plea after sentencing, unless it appears that the accused's

consent to plead guilty was unwillingly given and made under the circumstances of fear, deceit, or coercion.'" Allee v. Commonwealth, Ky., 454 S.W.2d 336, 341 (1970). See also, Blair v. Commonwealth, Ky., 479 S.W.2d 643 (1972). Therefore, the trial court's decision to deny Ball's motion to withdraw his guilty plea after sentencing will be upheld unless Ball can establish that the trial court abused its discretion in denying the motion because his guilty plea was unwillingly given due to fear, deceit or coercion.

Pursuant to RCr 8.08, a trial court may accept a plea of guilty after it determines that "the plea is made voluntarily with understanding of the nature of the charge." Here, the trial court entered into the necessary colloquy with both Ball and his attorney, and determined that Ball understood the charges against him, that he understood the terms of the plea agreement, and that his plea was given freely, voluntarily, and willingly. The necessary safeguards were followed pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Pursuant to RCr 8.10:

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.

The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report.

Ball relies on the second paragraph of RCr 8.10 to assert that the trial court did not follow the proper procedures in the guilty plea proceedings. However, the Commonwealth correctly points out that Ball moved the trial court to withdraw his guilty plea only after the judgment had been entered. The rule only addresses situations where the motion to withdraw the guilty plea is made prior to the entry of the judgment. Regardless, the trial court did not reject the plea agreement. Indeed, the trial court sentenced Ball to eight years "in accordance with the plea agreement." The granting of probation was not a term of the plea agreement; the Commonwealth merely agreed that it would not oppose probation if an acceptable treatment plan were filed. Ball did not even comply with his end of the bargain as he proposed an outpatient treatment plan when the Commonwealth was clearly opposed to that type of plan. Therefore, the trial court was not required to comply with the second paragraph of RCr 8.10 and afford Ball the opportunity to withdraw his guilty plea.

The trial court and Ball's attorney ensured that his rights were adequately protected at the guilty plea hearing, and the trial court ascertained that his guilty plea was knowingly, freely, willingly, and voluntarily entered. The plea was not entered under fear, deceit or coercion. It is clear that the only reason Ball wanted to withdraw his guilty plea is because the trial court denied his motion for probation. Neither fear, deceit, nor coercion was involved in Ball's decision to plead

guilty. The Commonwealth did not recommend probation in the plea agreement, but merely agreed not to oppose it if Ball met the named condition. Even though Ball did not meet that condition, the Commonwealth still did not formally object to probation at sentencing.

The trial court did not abuse its discretion in denying Ball's motion to withdraw his guilty plea after sentencing.

The judgment and order of the Rowan Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, KY

BRIEF FOR APPELLEE:

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