

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001145-MR

JESSE MORRISON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Jesse Morrison (hereinafter "Morrison") has appealed from the Boyd Circuit Court's May 13, 2003, Order denying his motion to withdraw his guilty plea and from the May 23, 2003, Final Judgment and Sentence of Imprisonment, sentencing him to eight ten-year concurrent sentences for First-Degree Rape.¹ Having considered the parties' brief, the record and the applicable case law, we must vacate the trial court's

¹ KRS 510.040.

order and judgment and remand the matter for further proceedings.

On August 22, 2002, the Boyd County Grand Jury indicted Morrison on eight counts of First-Degree Rape for engaging in sexual intercourse with another person by forcible compulsion during the months of April 2001 through November 2001.² On March 24, 2003, the date of trial, Morrison moved the trial court to enter a plea of guilty on the Commonwealth's offer that in exchange for guilty pleas on each count of First Degree Rape, he would receive a ten-year sentence for each conviction, to run concurrently for ten years.³ After conducting a hearing pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the trial court determined that Morrison's guilty plea was knowing and voluntary, and accepted the plea. Accordingly, the trial court found Morrison guilty of the eight counts charged in the indictment and sentenced him to eight ten-year concurrent sentences in accordance with the Commonwealth's offer. The trial court entered an order accepting the guilty plea and scheduled a sentencing hearing for May 6, 2003.

On April 9, 2003, Morrison moved the trial court to set aside the entry of his guilty plea on the grounds that it

² The victim was his twelve-year-old stepdaughter.

³ The penalty range for a conviction of First Degree Rape is ten to twenty years.

was involuntary because when he entered his plea, his attorney erroneously told him that he would be eligible for parole after serving 20% of his sentence, rather than 85%. Morrison attached his affidavit in support of the motion. In essence, Morrison stated that because he did not want to serve 85% of his sentence before being eligible for parole, he would not have entered the guilty plea and no longer wanted to continue with the original plea agreement.

The trial court entertained arguments from counsel on May 9 and May 13, 2003, on the motion to withdraw the guilty plea, after which the trial court denied Morrison's motion, relying on Turner v. Commonwealth, Ky.App., 647 S.W.2d 500 (1982). The trial court found that Morrison's right to be informed about parole eligibility was not the type of right that would interfere with his Boykin protections. The oral ruling was memorialized by an order entered May 13, 2003, as follows:

In support of his motion to withdraw his guilty plea, the defendant argues that the case of Sparks vs. Sowders, 852 F.2d 882 (6th Cir. 1988)(sic), mandates allowing the plea withdrawal. However, the various circuits in the federal courts are not uniform in their treatment of the issues and the Sowders court only goes as far to say that "gross" misadvice concerning parole eligibility can amount to ineffectiveness of counsel. It goes on to state that the petitioner is entitled to an evidentiary hearing but never gets close to saying that such advice as a matter of law amounts to ineffective assistance of counsel. It also

provides no help in determining what amounts to "gross" misadvice as opposed to ordinary misadvice. The case of Turner vs. Commonwealth, 647 SW 2nd. 500 (1982)(sic), is the controlling law in Kentucky on this issue and states unequivocally that parole is not a constitutional right. When the defendant entered the plea this Court satisfied the requirements of Boykin vs. Alabama, 395 U.S. 238 (1969)(sic). Accordingly, whether to allow the defendant to withdraw his plea is within the court's discretion pursuant to RCr 8.10. The defendant told this Court under oath that he committed these reprehensible crimes. The Court believed the defendant and still believes the defendant was truthful when he told this Court that he was guilty. Accordingly, the motion to withdraw guilty plea pursuant to RCr 8.10 is overruled.

IT IS FURTHER ORDERED that this action is set for final sentencing on Friday, May 23, 2003, at 9:30 A.M.

The final judgment sentencing Morrison to eight ten-year concurrent sentences was entered on May 23, 2003. This appeal followed.

On appeal, Morrison argues that the trial court abused its discretion in denying his motion to withdraw his guilty plea prior to the entry of the final judgment. He asserts that his guilty plea was not voluntarily entered because he was misinformed by his trial counsel about the percentage of time he would have to serve before being eligible for parole, and that the trial court misapplied the holding in Turner v. Commonwealth, Ky., 647 S.W.2d 500 (1982). In its brief, the

Commonwealth argues that the trial court properly denied Morrison's motion based upon Turner in that the failure to inform a defendant regarding parole eligibility is not a violation of constitutional due process.

We must first determine what standard of review is applicable to our review of this case. Morrison asserts that it is an abuse of discretion standard, citing to the opinion of Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980). The Commonwealth appears to indicate that the same standard applies, but also cites to another line of cases culminating with Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002), in which cases a clearly erroneous standard was enunciated for those decisions denying a motion to withdraw a guilty plea.

We have reviewed the applicable cases, and hold that our standard of review in this case is a clearly erroneous standard. In Hurt v. Commonwealth, Ky., 333 S.W.2d 951, 953 (1960), the former Court of Appeals held 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." In the later case of Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974), the same court cited to the Hurt decision and stated, "[w]e have held that the permission to withdraw a guilty plea and substitute a plea of not guilty is a matter within the sound discretion of the trial court." Six

years later and in the context of an appeal from the denial of an RCr 11.42 motion contesting the voluntariness of his plea, this Court held that it, "is not to act de novo in determining the question of voluntariness. Rather it is to review the record before it to ascertain whether the court below acted erroneously in denying that appellant's pleas were made involuntarily." Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902, 905 (1980).

Over twenty years later, our Supreme Court cited to the standard expressed in Lynch and held, "this Court reviews a trial court's ruling on a defendant's motion to withdraw his guilty plea only for abuse of discretion by 'ascertain[ing] whether the court below acted erroneously in denying that appellant's pleas were made involuntarily.'" Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 487 (2001). However, Justice Cooper, in a concurring opinion in Bronk, stated:

In other words, RCr 8.10 vests the trial court with discretion to *permit* a guilty plea to be withdrawn; however whether to *deny* a motion to withdraw a guilty plea is not discretionary but requires a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered. . . . If the motion is denied, the decision is reviewed under the "clearly erroneous" standard, *i.e.*, whether the trial judge's denial of the motion was supported by "substantial evidence."

Bronk v. Commonwealth, 58 S.W.3d at 489 (Cooper, J., concurring). Justice Cooper went on to point out that Lynch did not apply an abuse of discretion, as the majority opinion stated, but rather held that the lower court's findings were not in error and that it did not act erroneously in relying upon those findings. Finally, in Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002), an opinion authored by Justice Cooper, the Supreme Court stated, "[o]ur case law is clear that the discretion to deny a motion to withdraw a guilty plea exists only after a determination has been made that the plea was *voluntary*. If the plea was *involuntary*, the motion to withdraw must be granted." Id. at 10.

RCr 8.08 provides that, "[a] defendant may plead not guilty, guilty or guilty but mentally ill. The court may refuse to accept a plea of guilty or guilty but mentally ill, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." Pursuant to RCr 8.10, "[a]t 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."

The first matter we shall address is the trial court's reliance upon the Supreme Court's decision in Turner as controlling. The issue in that appeal, which was taken from the denial of Turner's RCr 11.42 motion, was whether Turner's plea

was involuntary because he was not informed about parole eligibility. In affirming the lower court's decision, the Supreme Court stated:

The record indicates that the appellant was fully and thoroughly informed of the rights specified in Boykin. Boykin does not mandate that a defendant must be informed of a "right" to parole. This is especially true since, unlike the rights specified in Boykin, parole is not a constitutional right. U.S. v. Timmreck, 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.

Turner v. Commonwealth, 647 S.W.2d at 500-01. We agree with Morrison that Turner is inapplicable here because the present case does not deal with a failure to inform him of parole eligibility. Instead, Morrison's attorney informed him of parole eligibility, but the information he provided was incorrect.⁴

⁴ We also disagree with the trial court's interpretation of the opinion in Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988). The trial court states that the opinion provides no guidance as to what amounts to "gross" misadvice. However, the Sparks opinion cites to the case of Strader v. Garrison, 611

We shall next address the propriety of the trial court's order denying Morrison's motion to withdraw his guilty plea. The applicable case law as cited above makes it clear that if such a motion is denied, the trial court must first decide whether the original guilty plea was voluntary. This is a factual finding that must be supported by substantial evidence. Here, the trial court improperly based its decision to deny Morrison's motion on the Turner decision as well as upon its belief that Morrison was truthful when he admitted to having committed the crimes. While Morrison might have been truthful as to having committed the crimes, such a belief on the trial court's part cannot form the basis to deny a motion to withdraw a guilty plea prior to the entry of the final judgment. The trial court should first have made a factual finding as to whether Morrison's guilty plea was voluntary, and then ruled on the motion accordingly. However, as the trial court did not engage in any fact-finding as to the voluntariness of Morrison's plea, we are unable to review this matter to determine whether the trial court was clearly erroneous in denying Morrison's motion.

Upon remand, the trial court must either grant Morrison's motion to withdraw his guilty plea, exercising its

F.2d 61, 65 (4th Cir. 1979), which defines gross misadvice as misadvice "so gross as to amount to a denial of the constitutional right to the effective assistance of counsel."

discretion, or make appropriate factual findings and determine whether Morrison's plea was voluntary prior to denying it. If the trial court determines that the plea was involuntary, Morrison's motion must be granted.⁵ Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002).

For the foregoing reasons, the Order denying Morrison's motion to withdraw his guilty plea as well as the Final Judgment are vacated and this matter is remanded for further proceedings consistent with this opinion.

MINTON, JUDGE, CONCURS.

McANULTY, JUDGE CONCURS IN RESULT ONLY.

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⁵ We note that if Morrison is successful below in having the trial court allow him to withdraw his guilty plea, he runs the risk of being convicted on eight counts of First Degree Rape, and that the penalty range for each count is ten to twenty years. Furthermore, the sentences may be ordered to run consecutively, for a maximum sentence of seventy years based upon the law in effect when the crimes were committed.