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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000263-MR

CLYDE RAY THACKER

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 02-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, and MINTON, Judges.

MINTON, Judge: Clyde Ray Thacker appeals as a matter of right¹ from the Pike Circuit Court's denial of his motion to withdraw his guilty plea. Thacker asserts that the denial of this motion was an abuse of discretion for the following reasons: 1) he was prejudiced by joint legal representation with a co-defendant, Johndra Baldrige; 2) his guilty plea was not entered freely,

¹ Ky. Const. § 110.

voluntarily, and knowingly because it was the product of ineffective assistance of counsel since his counsel had neither adequately prepared for trial nor adequately consulted with Thacker; 3) there was no factual basis to support the guilty plea; and 4) he had a meritorious defense. For the reasons stated below, we affirm the circuit court's decision.

On March 4, 2002, a Pike County grand jury indicted Thacker and Johndra Baldrige² on one count each of assault in the first degree³ for shooting Curtis Michael Hall⁴ in Pike County on or about October 30, 2001.⁵ Thacker sought the legal services of attorney Robert Wright although Wright was also representing Baldrige in this indictment. Thacker filed a waiver of multiple representation on June 10, 2002,⁶ in which he

² According to Thacker's testimony at the November 5, 2002, hearing, Thacker and Baldrige married several weeks before that hearing. Also at the hearing, Baldrige stated that her name was Johndra Baldrige Thacker. Because this name change occurred while this case was ongoing, she is referred to variously in the record by either surname, Baldrige or Thacker. Because the exact date of her marriage and name change is unknown, and to avoid confusion with Clyde Ray Thacker, we will refer to her in this opinion by her name at the time of indictment, Baldrige.

³ Kentucky Revised Statutes (KRS) 508.010.

⁴ Curtis Michael Hall is also referred to as Curtis Mike Hall in Thacker's brief.

⁵ Baldrige was also indicted for one count of possession of a firearm by a convicted felon, KRS 527.040.

⁶ The waiver of multiple representation indicates that it was signed by Thacker in open court on June 7, 2002. Thacker has not challenged this waiver.

acknowledged that the circuit court had informed him of the possibility of a conflict of interest because of this shared legal representation and stated that, despite this possibility, he wanted Wright to continue representing him.

On the morning of September 16, 2002, the day his case was set for trial, Thacker appeared with counsel and filed a motion to enter guilty plea.⁷ The plea was based upon the Commonwealth's offer to amend the charge against Thacker of assault in the first degree, a Class B felony, to criminal facilitation to commit assault in the first degree,⁸ a Class D felony. The Commonwealth's offer also included its recommending a sentence of three years imprisonment, with 90 days to be served in home incarceration and the remainder of the sentence to be probated for five years. After reading aloud the charges of the amended indictment, the circuit court examined Thacker under oath.⁹ Thacker stated that he had read the Commonwealth's offer and the motion to enter guilty plea and had signed the latter. He said that he had discussed the plea agreement with his attorney and did not need to discuss it with him any further because he understood it, as well as the charge against him and

⁷ Administrative Office of the Courts Form AOC-491.

⁸ KRS 502.020, 508.010.

⁹ The proceedings on September 16, 2002, were video recorded on Tape No. 1122-A-01.

any available defenses. He indicated that he had no complaints about his attorney's representation of him. Calling Thacker's attention to the constitutional rights which he would be waiving, which are enumerated in ¶ 4 of the motion to enter guilty plea, Form AOC-491, the circuit court then reviewed some of these rights orally: the right to a trial by jury, at which he would be entitled to counsel and at which the Commonwealth would have to prove his guilt beyond a reasonable doubt; the right to confront witnesses called against him; the right to remain silent; and the right to appeal to a higher court. Thacker stated he wanted to waive these constitutional rights enumerated by the circuit court and any others mentioned in ¶ 4 of the form motion to enter guilty plea. Regarding the amended indictment, Thacker stated that he understood the facts of it and admitted to the conduct alleged in it with the knowledge that he was pleading guilty to a Class D felony. Thacker stated that no one had promised him anything other than the agreement contained in the Commonwealth's written offer or forced, threatened, or otherwise pressured him to plead guilty. The circuit court explained to him that it could reject the plea agreement and the choices that Thacker would then have. In open court on September 16, 2002, Thacker's counsel signed the certificate of counsel in the Form AOC-491 motion to enter guilty plea. Notwithstanding this certification, the circuit

court also questioned Thacker's counsel in open court. Attorney Wright stated that he had explained Thacker's constitutional rights to him and that he believed that Thacker understood the consequences of entering a guilty plea. He also stated that Thacker's entering a guilty plea based on the Commonwealth's offer was consistent with his legal advice to Thacker.

In its judgment entered September 18, 2002, the circuit court made the following written findings concerning this colloquy:

... the Court examined the Defendant and his counsel ..., and after such examination, the Court finds the Defendant understood the nature of the charges pending against him; that the Defendant knowingly and voluntarily waives his right to trial by jury, privilege against self incrimination, and right of confrontation; and his right to appeal to the Court of Appeals by entering a plea of guilty to the herein charges, and that the Defendant, in fact, committed the acts charged, and there is a factual basis for the Defendant's plea.

Final sentencing was scheduled for October 18, 2002. Before that date, Thacker obtained new legal representation. On October 8, 2002, Thacker's present attorney, W. Sidney Trivette, filed an entry of appearance and filed Thacker's motion to withdraw his guilty plea on the grounds of ineffective assistance of counsel and because Thacker is not, in fact, guilty. The court scheduled an evidentiary hearing concerning

Thacker's motion to withdraw his guilty plea on November 5, 2002.

The only evidence presented at this hearing was the testimony of Thacker and Baldrige.¹⁰ The majority of the hearing dealt with their accounts of the shooting of Hall. According to Thacker and Baldrige, without provocation, Hall threatened harm to Thacker, first with a large, taped stick and then with an open hawk-billed knife. Baldrige then looked for a weapon to protect Thacker, who was unarmed, and discovered a .22 rifle. She pointed the rifle at Hall and told him to drop his knife. When he refused, she shot and wounded him. Hall then ran away. Baldrige and Thacker both testified that Thacker never told Baldrige to get the gun or to shoot Hall and, in fact, Thacker seemed surprised when she shot Hall.

Thacker also testified on the circumstances under which he agreed to the plea agreement and why he thought the circuit court should grant his motion to withdraw his guilty plea.¹¹ Thacker asserted that the court should permit him to

¹⁰ The November 5, 2002, evidentiary hearing was video recorded on Tape No. 1130-A-01.

¹¹ Initially Thacker's counsel only offered the previously-described testimony by Thacker and Baldrige on the events leading up to the shooting of Hall. The Commonwealth then pointed out in its closing that Thacker had presented no evidence on the central issue, the voluntariness of his guilty plea. The circuit court then granted the request of Thacker's counsel to reopen the hearing. Upon reopening, Thacker presented testimony concerning the circumstances surrounding his guilty plea.

withdraw his guilty plea because he did not really understand the plea agreement. Thacker explained that prior to his decision to enter a guilty plea he had been nervous and had not slept because he was worried and "didn't want to go to trial." He concluded, "... then I just got to thinking about it and I had second thoughts about it," apparently referring to his decision to enter a guilty plea. When asked why he did not raise his concerns or questions during the colloquy and instead agreed that he was knowingly and voluntarily pleading guilty, Thacker said, "I's [sic] just nervous and tired and been worried to death about it." He later added, "I was just afraid of going to trial." Thacker asserted that there was no factual basis supporting his guilty plea and reiterated his desire to withdraw his guilty plea.

On November 22, 2002, the circuit court entered an order denying Thacker's motion to withdraw his guilty plea. Based on the evidence presented at the November 5, 2002, hearing, the discovery provided to Thacker by the Commonwealth, and the record, the circuit court found that Thacker failed to establish either that he suffered from ineffective assistance of counsel or that there was no factual basis to support his guilty plea, the two grounds for withdrawal raised in Thacker's motion. The court noted that it had previously made the following findings when Thacker entered his guilty plea: Thacker

understood the nature of the amended charge; he knowingly and voluntarily waived his right to trial by jury, right of appeal, privilege against self incrimination, and right to confrontation; and he acknowledged that there was a factual basis for his plea because he committed the acts as charged in the amended complaint. The circuit court summed up its decision as follows: "This is a case where the Defendant simply wants to change his plea. A change in desire is not sufficient for a change in plea." Final sentencing was conducted on January 24, 2003.¹² In the final judgment and order of probation, filed January 29, 2003, the circuit court sentenced Thacker in accordance with the plea agreement.

When a criminal defendant pleads guilty, Rule 8.10 of the Kentucky Rules of Criminal Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is knowingly, freely, and voluntarily pleading guilty.¹³ Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it.¹⁴ The trial court is in the best position to determine the totality of the circumstances

¹² The final sentencing was video recorded on Tape No. 1140-A-01.

¹³ Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001).

¹⁴ Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8, 10 (2002).

surrounding a guilty plea.¹⁵ Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was not voluntary, the motion to withdraw it must be granted.¹⁶ However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion.¹⁷ When a trial court denies a criminal defendant's motion to withdraw his guilty plea, this Court will not reverse the denial unless the trial court has abused its discretion.¹⁸ A trial court has abused its discretion when its actions were arbitrary and capricious under the circumstances.¹⁹ A court acts arbitrarily and capriciously when its actions are not supported by substantial evidence.²⁰

To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

- (1) that counsel made errors so serious that counsel's performance fell outside

¹⁵ Bronk, 58 S.W.3d at 487.

¹⁶ Rodriguez, 87 S.W.3d at 10.

¹⁷ *Id.*

¹⁸ Bronk, 58 S.W.3d at 487.

¹⁹ Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

²⁰ National Collegiate Athletic Ass'n v. Lasege, Ky., 53 S.W.3d 77, 85 (2001).

the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would instead have insisted on going to trial.²¹

We first address Thacker's claim that he was prejudiced by his counsel's joint representation of both Thacker and his codefendant Baldrige. Thacker did not raise the issue of joint representation in his motion to withdraw his guilty plea before the circuit court. His failure to raise the issue of joint representation before the trial court bars any appellate review of this issue as it is not properly preserved.²² Even if this issue were preserved, Thacker failed to show that he was prejudiced by this joint representation. There is no presumption of prejudice because of joint or multiple representation.²³ A defendant must show an actual conflict of interest.²⁴ Thacker makes no such showing.²⁵

²¹ Bronk, 58 S.W.3d at 486-87.

²² Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

²³ Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 75 (2001), *overruling* Peyton v. Commonwealth, Ky., 931 S.W.2d 451 (1996) and Trulock v. Commonwealth, Ky.App., 620 S.W.2d 329 (1981).

²⁴ *Id.*

²⁵ To the contrary, the record tends to refute any actual conflict of interest between Baldrige and Thacker. They both testified at the

Thacker asserts that the circuit court's denial of his motion to withdraw his guilty plea was an abuse of discretion because his guilty plea was not made freely, voluntarily, and knowingly. Specifically, he asserts that it was the product of ineffective assistance of counsel because his counsel had neither adequately prepared for trial nor adequately consulted with him. In its order denying Thacker's motion to withdraw his guilty plea, the circuit court found that "[t]he Defendant did not present any evidence" that his legal representation by his previous attorney was ineffective or inadequate. We find no error in the circuit court's assessment of the evidence on this issue. While Thacker stated in the November 5, 2002, hearing that he did not fully understand his guilty plea, he never identifies what aspect of it he allegedly did not understand. Moreover, he makes no reference to any actions or any omissions on the part of his attorney, much less how he was allegedly prejudiced by these actions or omissions. The record itself tends to refute any claims of ineffective assistance of counsel. Attorney Wright, the defense counsel in question, filed

evidentiary hearing that Baldrige shot Hall in defense of Thacker and that Thacker did not hand Baldrige the rifle, did not instruct her to shoot Hall, and did not even know she was going to shoot Hall until after the fact. Thus, this is not a case in which the parties have antagonistic defenses. Also, the fact that any conflict of interests prejudiced Thacker is refuted by the fact that he received a very favorable plea offer from the Commonwealth while, at least as of September 16, 2002, Baldrige remained charged with assault in the first degree. See Footnote 27, *infra*.

appropriate motions in preparation for trial, including a motion for a bill of particulars and a motion for production of discovery. The plea agreement itself also demonstrates defense counsel's effectiveness. Kentucky courts have often recognized that the fact that a defendant receives a lighter sentence than the maximum sentence which could have been imposed at trial is evidence tending to show that defense counsel's representation was effective.²⁶ As part of its plea agreement, the Commonwealth agreed to amend the charge against Thacker from assault in the first degree, a Class B felony punishable by up to twenty years' imprisonment, to complicity to commit assault in the first degree, a Class D felony punishable by up to five years' imprisonment. Although Thacker nominally agreed to a recommendation of three years' imprisonment, the offer further specified a recommendation that he only serve 90 days on home incarceration and five years on probation, pursuant to an alternative sentencing plan. Thacker's sentence obtained through the plea agreement was far lighter than the possible twenty years' imprisonment that he initially faced. This plea

²⁶ See, e.g., Phon v. Commonwealth, Ky.App., 51 S.W.3d 456 (2001) (plea agreement resulted in life imprisonment rather than death sentence), and Caples v. Commonwealth, Ky., 481 S.W.2d 675, 676-77 (1972) (plea agreement resulted in 15 year sentence rather than range of possible penalties including death, life without parole, life, or up to 53 years' imprisonment).

agreement was highly advantageous for Thacker, suggesting that his counsel was neither ineffective nor inadequate.²⁷

Thacker asserts as a third basis of error in the circuit court's denial of his motion to withdraw his guilty plea that he is, in fact, not guilty of the crime to which he entered a guilty plea. Therefore, he asserts that there was no factual basis to support a guilty judgment. On this point, the circuit court stated, "[i]f this case had proceeded to trial, adequate evidence existed from the discovery and the potential testimony of Curtis Michael Hall to convict the Defendant of the original charge of First-Degree Assault." We find no error in the circuit court's finding of a sufficient basis to support a guilty judgment for the original charge of assault in the first degree. We note that the uniform offense report of Detective Eddie Crum paraphrases Hall's version of events, which differs vastly from the story told by Baldrige and Thacker. According to Hall, Thacker and Baldrige came to his home, and Thacker threatened to burn the house down with Hall's family inside if he did not come out to fight. Hall then went to meet with Thacker, arming himself with a taped stick. Upon his arrival, Thacker pointed a rifle at Hall and threatened to shoot him.

²⁷ The advantageousness of Thacker's plea agreement is highlighted by the fact that, based on the Commonwealth's statements on the record on September 16, 2002, only the charge in the indictment against Thacker was amended. Baldrige remained charged with assault in the first degree.

Then, Thacker handed the rifle to Baldridge and told her to shoot Hall. Hall stated that he then dropped the stick and tried to run away, but Baldridge shot and wounded him in the leg. As for the amended charge of complicity to commit assault in the first degree, the circuit court stated as follows:

... when he appeared before the Court to plead guilty on September 16, 2002, the Court specifically found that the Defendant understood the nature of the amended charge; voluntarily and knowingly waived his right to trial by jury, right of appeal, privilege against self-incrimination, and right to confrontation; and acknowledged that there was a factual basis for his plea because he committed the acts charged, as amended.

Although Thacker asserts that there is no evidence to support his guilty plea, as the circuit court noted, he admitted that he committed the acts as charged in the amended indictment in his colloquy. Because, as previously determined, he made this admission freely, voluntarily, and knowingly, this admission provides a sufficient factual basis for a guilty plea. Once it is determined that a guilty plea was rendered freely, voluntarily, and knowingly, the plea is an admission of everything charged in the indictment.²⁸ We also note that the evidence in the record, especially Hall's anticipated testimony, provides sufficient factual support for a guilty judgment to the amended charge of facilitation to commit assault in the first

²⁸ Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 225 (1986).

degree. For these reasons, we cannot say that the circuit court abused its discretion in finding a sufficient factual basis to support Thacker's guilty plea.

Finally, Thacker asserts that the circuit court abused its discretion in denying his motion to withdraw his guilty plea because he had a meritorious defense. Presumably, Thacker relies upon the version of events as described by him and Baldrige in which Baldrige, acting in defense of an unarmed Thacker, shot Hall. In this version of events, Thacker did not know that Baldrige was going to get the rifle, did not hand it to her, did not direct her to shoot Hall, and did not know that she was going to shoot him until she had already done so. However, as noted above, this version of events is contradicted by Hall's statement to police. Because of this discrepancy in the evidence, we cannot say that it was an abuse of discretion for the circuit court to deny Thacker's motion to withdraw his plea because of his allegedly meritorious defense, especially given the trial court's superior position to judge the weight and credibility of this evidence. Also, if Thacker means to suggest that the existence of what he believes to be a meritorious defense implies that his defense counsel was ineffective or deficient for recommending that he enter a guilty plea, this claim is without merit. Advising a client to plead guilty is not, in and of itself, evidence of any degree of

ineffective assistance of counsel.²⁹ In these circumstances, because of the anticipated damaging testimony by the victim, Hall, and because of the very favorable terms of the Commonwealth's plea offer, we cannot say that it was deficient performance on the part of Thacker's counsel to advise him to plead guilty, notwithstanding Thacker's belief in the viability of his claim of innocence.

Because we find no error in the circuit court's determination that Thacker's guilty plea was made freely, voluntarily, and knowingly, and because we find no abuse of discretion in the court's denial of Thacker's motion to withdraw his guilty plea, we affirm the judgment of the Pike Circuit Court.

ALL CONCUR.

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²⁹ Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236-37 (1983).