

RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001253-MR

GERALD JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CR-000075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: McANULTY¹ AND SCHRODER, JUDGES; ROSENBLUM,² SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Gerald Johnson (Johnson) brings this matter of right appeal from a judgment of the Jefferson Circuit Court, entered May 18, 2005, on a guilty plea, adjudging him guilty of first-degree trafficking in a controlled substance

¹ Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

(cocaine),³ operating a motor vehicle on a suspended license,⁴ failure to stop at a stop sign,⁵ and failure to give a traffic signal,⁶ and sentencing him to respective terms of imprisonment of five years and ninety days, and fines of \$20.00 and \$20.00, to be served concurrently for a total of five years. Before us, Johnson argues that the trial court abused its discretion in violation of his due process rights when it denied his request to withdraw his guilty plea, pursuant to Kentucky Rule of Criminal Procedure (RCr) 8.10, without holding an evidentiary hearing into whether the plea was knowing, intelligent, and voluntary.⁷ We agree, and vacate and remand.

During the January, 2002, term of the Jefferson County Grand Jury, Indictment 02-CR-000075 was returned against Johnson and co-defendant David A. Cantrell, charging both with first-degree trafficking in a controlled substance (cocaine). Johnson was additionally charged with operating a motor vehicle on a suspended license, failure to stop at a stop sign, and failure to give a proper traffic signal. According to the arrest slip, the arresting officers stopped Johnson's vehicle after observing Johnson failing to both stop for a stop sign and use a turn

³ Kentucky Revised Statutes 218A.1412.

⁴ Kentucky Revised Statutes 186.620(2), class B misdemeanor.

⁵ Kentucky Revised Statutes 189.330(4), violation.

⁶ Kentucky Revised Statutes 189.380(1),(3), violation.

⁷ U.S. CONST. amends. VI, VIII, XIV; Ky. CONST. §§ 2, 7, 11, 17.

signal. Upon the stop, Johnson informed the officers that his license was suspended. The vehicle was searched and a piece of crack cocaine was discovered under the front passenger seat where Cantrell was sitting. Johnson had \$2,352.00 in his front pocket, \$2,080.00 of which was in twenty dollar bills. While seated in the police car, Cantrell volunteered that the cocaine belonged to him.

On July 16, 2003, Johnson accepted the Commonwealth's offer on the guilty plea, which included dismissal of a first-degree persistent felony offender⁸ (PFO I) charge,⁹ no stand on probation, and forfeiture of all items seized. Johnson signed the standard guilty plea form and the trial court accepted the plea, finding it to be voluntary.¹⁰ That same day, co-defendant Cantrell was sentenced to five years' imprisonment pursuant to his guilty plea to first-degree trafficking in a controlled substance (cocaine).¹¹ Johnson's sentencing was set for September 3, 2003.

⁸ Kentucky Revised Statutes 532.080.

⁹ Although not on appeal and not contained in the record before us, the trial court's order on the plea of guilty also references Indictment 03-CR-000074, which, based on the record before us, is the first-degree persistent felony offender charge that was dismissed as a condition of the plea.

¹⁰ Although the plea colloquy was designated for inclusion in the record before us, the clerk noted that the tape of this proceeding could not be found.

¹¹ A panel of this court dismissed Cantrell's appeal of this judgment on January 7, 2004, upon his motion. Cantrell v. Commonwealth, 2003-CA-001726-MR.

On September 3, 2003, Johnson failed to appear for sentencing and a bench warrant was issued. Sixteen months later, on January 11, 2005, he was arrested on the warrant, arraigned, and a court date of February 16, 2005 was set. On that date, Johnson appeared before Judge Kathleen Voor Montano, as Judge Tom McDonald, who had accepted the plea originally, had retired. Not only were Judge Montano and the defense attorney new to the case, but the original prosecutor was not in court that day. Johnson initially moved to withdraw his guilty plea contending that he originally understood from his attorney that he was pleading guilty to five years' *probated*, and not five years' *imprisonment*. Upon the trial court's review of the record, the court noted that Johnson had signed the standard guilty plea forms, and despite Johnson's assertion that he was assured probation, those forms indicated that the Commonwealth took no stand on probation. The court gave Johnson the option of a review of the guilty plea colloquy to determine if a hearing was necessary on the motion to withdraw or pass the case for sentencing in accordance with the plea documents in the record. Johnson withdrew his motion to withdraw the plea, asking instead for the case to be passed for sentencing.

Johnson appeared before the court for sentencing on May 10, 2005. On this date, Judge Geoffrey P. Morris was sitting in for Judge Montano, who was in trial. Johnson advised

Judge Morris that he had argued before Judge Montano to withdraw his guilty plea on the basis that he believed that he had pleaded guilty to a probated sentence, but that Judge Montano overruled the motion. Based on that information, Judge Morris declined to revisit the issue. Johnson then indicated that the denial of the motion to withdraw the guilty plea would be an issue for appeal. Johnson's motion for probation was denied, and he was sentenced pursuant to his plea to five years' imprisonment.¹²

The Commonwealth argues that this issue is not preserved for appeal, as Judge Morris declined to review the motion due to counsel's erroneous information that Judge Montano had issued a ruling denying the motion. We disagree.

In the instant case, Johnson's new defense attorney originally made the motion to withdraw the guilty plea before a judge new to the case; additionally, the original prosecutor was not in court on that date. Because all were unfamiliar with the record, a recess was taken for the attorneys to review same. After the recess Johnson himself withdrew the motion, instead asking to be sentenced to a probated sentence. Based on the signed guilty plea forms in the record indicating the Commonwealth took no stand on probation, the trial court gave

¹² Later, on May 23, 2005, an order of forfeiture was entered as to the \$2,352.00 seized.

Johnson the option to continue looking into the validity of the plea or to continue the matter for sentencing, and Johnson chose the latter. At sentencing, Johnson again moved to withdraw his guilty plea, citing misinformation from his attorney as to the probated sentence. The error before us occurred when Judge Morris, albeit in reliance on the defense attorney's erroneous statement that Judge Montano had already denied the motion, declined to issue a ruling.

Pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10, the trial court can permit the withdrawal of a guilty plea at any time before judgment. The discretion of the trial court to deny a motion to withdraw a guilty plea exists only after a determination has been made that the plea was voluntary, because if the plea was involuntary, the plea must be allowed to be withdrawn. Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). By declining to rule herein, the trial court effectively denied Johnson's motion without the necessary inquiry into the voluntariness of the plea. Johnson's allegation that he believed he pleaded guilty to a probated sentence and not to a term of imprisonment is an argument as to the voluntariness of his plea. Pursuant to Rodriguez, an inquiry into this claim is accomplished by an evidentiary hearing into the circumstances surrounding the entry of the plea. Id. at 11. The trial court's declination to rule on Johnson's motion is an abuse of

discretion, requiring remand for an evidentiary hearing into the voluntariness of Johnson's plea.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is vacated, and the case is remanded for an evidentiary hearing as to the voluntariness of the plea in light of Johnson's RCr 8.10 motion to withdraw his guilty plea.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Kentucky Attorney General

Kevin R. Branscum
Assistant Attorney General
Frankfort, Kentucky