RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001608-MR

LARRY WAYNE WEATHERS — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 04-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,[1] SPECIAL JUDGE.

WINE, JUDGE: Larry Wayne Weathers, Appellant, was indicted in Washington Circuit Court on a two count indictment of theft by unlawful taking over three hundred dollars ($300) pursuant to Kentucky Revised Statutes (KRS) 514.030 and as a persistent felony offender in the first degree pursuant to KRS 532.080(3). The Appellant signed a guilty plea that was filed with the Washington Circuit Court May 24, 2005. Subsequently on May 27,

[1] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

2005, the Appellant filed a motion to withdraw his plea. This motion was supplemented with additional grounds on June 9, 2005. The trial court denied, without a hearing, the Appellant's attempt to withdraw the guilty plea. The record on appeal does not contain a transcript of the guilty plea colloquy, but does contain the signed plea agreement. A final judgment and sentence was entered in Washington Circuit Court on July 8, 2005. This appeal follows. We now affirm.

Following his arraignment, the Appellant filed several *pro se* motions, including a motion to dismiss and a motion suppress for failure to properly secure a warrant. Included in the motion to dismiss, filed November 9, 2004, were allegations that the citation failed to charge a felony offense and that the arresting officer was not credible. A second motion to dismiss was filed on December 4, 2004, alleging defects in the indictment. These are the same grounds raised by the Appellant in the appeal before this Court.

The Appellant decided to serve as his own counsel and so announced during his arraignment on December 9, 2004. However, on January 6, 2005, the court did appoint the Hon. Shelby Horn of the local public defender's office to represent the Appellant. All pretrial motions were passed to March 10, 2005. The Appellant continued to file detailed motions on his own behalf including challenges to the citation. The Appellant was

provided a copy of all discovery including a copy of the grand jury transcript. A hearing was held on April 7, 2005, and all said motions were denied.

On May 6, 2005, the Appellant filed yet a third motion to dismiss again raising irregularities in the citation and challenging the arresting officer's credibility.

On the day of trial, the Appellant pled guilty to theft by unlawful taking over $300. A PFO I enhancement was dismissed in exchange for the plea.

Immediately thereafter on May 27, 2005, the Appellant moved to withdraw his plea, again citing the same allegations contained in the motions to dismiss as well as this appeal.

RCr 8.10 provides that "[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." However, the word "may" in RCr 8.10 does not give a trial judge unfettered discretion to deny a motion to withdraw a guilty plea without affording the defendant a hearing on the motion. Our 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. Rodriguez v. Commonwealth, 87 S.W. 3d 8 (Ky. 2002). If the plea was involuntary, the motion to withdraw it must be granted. Haight

v. Commonwealth, 760 S.W.2d 84, 88 (Ky. 1988); Allen v. Walter, 534 S.W.2d 453, 455 (Ky. 1976).

Appellant asserted in his RCr 8.10 motion that his plea was involuntary because it was the product of ineffective assistance of counsel. In Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), it was held that "[a] guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.'" Id. at 344, 100 S. Ct. at 1716, citing McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 1448-49, 25 L. Ed. 2d 763 (1970). The line running through these cases is that the voluntariness of a guilty plea "can be determined only by considering all of the relevant circumstances surrounding it." Brady v. United States, 397 U.S. 742, 749, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970). In Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001), the Kentucky Supreme Court referred to this as the "totality of the circumstances surrounding the guilty plea." Generally, an evaluation of the circumstances supporting or refuting claims of ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing.

While the trial court did not conduct an evidentiary hearing under the circumstances of this case, one was not necessary. From the pleadings filed by the Appellant *pro se*, it

is readily apparent he is very articulate. Further, there is a written plea agreement and waiver of rights included in the record.

The Appellant did not designate that the plea colloquy be made part of this record. It has long been held that when the complete record is not before the appellate court, that Court must assume that the omitted record supports the decision of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985), citing Commonwealth, Dept. of Highways v. Richardson, 424 S.W.2d 601 (Ky. 1968). Even in the absence of an oral plea colloquy or transcript, the signed plea sheet alone is sufficient to show a voluntary plea. Commonwealth v. Crawford, 789 S.W.2d 779 (Ky. 1990). There are no cited cases requiring a judge to read from the bench a defendant's rights to a defendant who has already waived those rights. Id. In determining the validity of a guilty plea in a criminal case, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky. App. 1990), citing North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). See also Sparks v. Commonwealth, 721 S.W.2d 726 (Ky. App. 1986).

The available record demonstrates that Appellant made a knowing, intelligent, and voluntary waiver of his rights

guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Section 11 of the Kentucky Constitution. The record on appeal reveals absolutely no error or abuse by the trial court. For all of the above-stated reasons, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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