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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002020-MR

TIMOTHY ROUSE — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 06-CR-00013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Timothy Rouse, appeals from the Fulton Circuit Court's order denying his motion to withdraw a prior plea of guilty. Appellant claims that he was not informed of the probation restrictions applicable

[1] Senior Judge Joseph E. Lambert 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.

to his sentence, rendering his plea involuntary. Discerning no clear error in the trial court's denial of the requested relief, we affirm.

Appellant was charged with complicity to the offenses of first-degree burglary, robbery, and assault. He was also charged with theft by unlawful taking and with two counts of unlawful transaction with a minor in the second degree. Initially, Appellant entered a plea of not guilty. Counsel was appointed after a determination that Appellant was indigent. However, as a result of Appellant's continued insistence upon representing himself, the trial court designated counsel as "stand-by" counsel pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This technique, often termed "hybrid representation," secures the right to representation afforded by Section 11 of the Kentucky Constitution. *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005); *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004).

After the first day of trial, Appellant and the Commonwealth reached a plea agreement. Before accepting Appellant's guilty plea, the trial court properly observed the procedures established in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and determined that Appellant's guilty plea was voluntary and intelligent. Under the terms of the agreement, Appellant pled guilty to complicity to first-degree robbery and first-degree assault in exchange for a sentence recommendation of ten years on each count. The Commonwealth

amended the burglary charge to second degree and Appellant pled guilty to the lesser degree in exchange for a recommended sentence of seven and one-half years. The recommendation was to be that the sentences were to run consecutively for a total of 27 years and six months. Pursuant to the plea agreement, the three remaining charges were dismissed.

However, after acceptance of the plea, but before sentencing and final judgment, Appellant sought withdrawal of the plea pursuant to RCr 8.10.[2] RCr 8.10 provides that the court may permit a guilty plea to be withdrawn at any time before judgment. Whether to permit withdrawal of a plea is a decision subject to the sound discretion of the trial court. Notwithstanding, a hearing is required upon an allegation that the original plea was entered involuntarily. *Edmonds v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006); *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002). In the case at bar, Appellant claimed that his plea was not freely and voluntarily entered because he was unaware that the violent offender parole and probation restrictions would apply to his sentence.

Violent offender status arises from the commission of certain offenses. It is explicitly applicable where commission of the offense is established by a guilty plea or by conviction. KRS 439.3401(1).[3] Two of the three offenses to which Appellant pled guilty are violent offenses under KRS 439.3401. Namely, a Class B felony is a violent offense where it involves death or serious physical

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Revised Statutes.

injury to a victim. KRS 439.3401(1)(c). First-degree assault is a Class B felony pursuant to KRS 508.010(2) and the trial court noted that the victim here suffered serious physical injury. First-degree robbery is also among the offenses deemed to be violent offenses by KRS 439.3401(1)(l).[4] Classification as a violent offender carries with it substantial restrictions on probation and parole eligibility. Based on Appellant's offenses, violent offender classification renders him ineligible for probation or parole until 85% of the imposed sentence has been served. KRS 439.3401(3).

Following Appellant's assertion that his plea was involuntary due to his misapprehension concerning the probation restrictions, the trial court held a hearing, but ultimately denied Appellant's request to withdraw the plea. Both Appellant and his stand-by counsel testified at the hearing. Stand-by counsel testified that he informed Appellant numerous times prior to the plea that Appellant would be required to serve 85% of his sentence.

Appellant acknowledged that he was aware that his offenses were classified as violent offenses and that, upon conviction, he would be required to serve 85% of his sentence. However, he claimed to have believed that the restrictions would be inapplicable if he pled guilty. Appellant gave no explanation for this peculiar assumption. While *Boykin* and its progeny require an understanding of the proceeding, "the requirement that a plea be intelligently and

[4] First-degree robbery did not automatically render the offender a violent one until 2002. As Appellant's offenses occurred in 2006, the violent offender statute applies. KRS 439.3402(8).

voluntarily made does not impose upon the trial judge a duty to discover and dispel any unexpressed misapprehensions that may be harbored by a defendant. This is especially true as to mistaken assumptions for which there is no reasonable basis." *Edmonds*, 189 S.W.3d at 567, n.5 (*quoting Armstrong v. Egeler*, 563 F.2d 796, 800 (6th Cir. 1977)).

Whether a plea is found to be voluntarily entered, considering the totality of the circumstances is a fact-sensitive inquiry, rendering our standard of review one of clear error. *Edmonds*, 189 S.W.3d 558. The record in the instant case reveals substantial evidence supporting the trial court's decision, including the trial court's references to the *Boykin* hearing, wherein Appellant admitted that he had been informed of the full range of penalties as well as the post-plea hearing, wherein stand-by counsel averred that he had repeatedly explained to Appellant that 85% of his sentence would have to be served prior to parole or probation eligibility.

Finally, even if one assumes that Appellant truly did not realize that the restrictions would be applicable if he pled guilty, that fact alone would not be sufficient to render his plea involuntary. Appellant correctly notes that a guilty plea is involuntary where the defendant lacked full awareness of its direct consequences. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). However, the Kentucky Supreme Court has explicitly rejected the contention that parole eligibility constitutes a direct consequence that would render a plea involuntary. *Edmonds*, 189 S.W.3d 558.

In view of the substantial evidence supporting the trial court's determination that Appellant's guilty plea was freely and voluntarily entered, the trial court's decision is affirmed.

ALL CONCUR.

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