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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001766-MR

GERALD LAMONT MARTIN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CR-01480

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,¹ SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Gerald Lamont Martin brings this appeal from September 2, 2009, and September 3, 2009, judgments of the Fayette Circuit Court

¹ Senior Judge Michael L. Henry 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.

sentencing him to twelve-months' imprisonment upon a guilty plea to sexual abuse in the second degree. We affirm in part, reverse in part, and remand.

Appellant was indicted by the Fayette County Grand Jury upon the offense of second-degree rape. It was alleged that appellant had "consensual" sex with a thirteen-year-old girl. Eventually, the Commonwealth and appellant entered into a plea agreement. Pursuant to the plea bargain, appellant pleaded guilty to second-degree sexual abuse. In exchange, the Commonwealth recommended a sentence of twelve-months' imprisonment probated for two years. However, prior to sentencing, appellant retained new defense counsel and filed a motion to withdraw his guilty plea. Following an evidentiary hearing, the circuit court denied the motion. Appellant was ultimately sentenced in accordance with the plea agreement. This appeal follows.

Appellant contends that the circuit court erred by denying his motion to withdraw his guilty plea. Appellant maintains that his original defense counsel failed to adequately inform him of a statutory defense pursuant to KRS 510.030.² Under KRS 510.030, appellant points out that mistake as to age of the victim is a defense to second-degree rape. Appellant alleges that the victim, a thirteen-year-old girl, affirmatively told him in the presence of others that she was eighteen years old. Because his defense counsel failed to fully inform him of this possible

² Appellant was initially represented by Attorney Ben Cabuay, who appeared with appellant in court when he entered his guilty plea on May 22, 2009. When appellant appeared in court for sentencing on June 26, 2009, he had retained new counsel, Thomas Griffiths.

defense, appellant argues that the trial court erred by denying his motion to withdraw guilty plea.

Under Kentucky Rules of Criminal Procedure (RCr) 8.10, a circuit court “may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted” any time before entry of final judgment. However, the law is clear that if the guilty plea is involuntarily entered into by defendant, the circuit court must grant the motion to withdraw; conversely, if the guilty plea was voluntarily entered, the circuit court may exercise its discretion when ruling upon the motion to withdraw. *Rigdon v. Com.*, 144 S.W.3d 283 (Ky. App. 2004). The issue of whether the guilty plea was voluntary is factual, and our review proceeds under the clearly erroneous standard.³

In its order denying appellant’s motion to withdraw his guilty plea, the circuit court found that appellant voluntarily entered the guilty plea:

Mr. Cabuay testified that he met with the Defendant 1-2 times while he was in jail and numerous other times in preparing for the 8 Status Hearings before the Court. He testified that the Defendant told him that the victim had called him on his cell phone, that he put her on speaker and that three other people heard her tell him that she was 18 years old. One of these “witnesses” was his sister and another one was the other individual who was in the room having sexual contact with a 13 year old. Mr. Cabuay testified that he told the Defendant that it would be up to the jury whether they believed this defense.

³ In *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004), the Court of Appeals held that a “trial court’s determination on whether the [guilty] plea was voluntarily entered is reviewed under the clearly erroneous standard.”

The original offer from the Commonwealth was to amend the charge to Rape Third Degree with a recommendation of one year. Mr. Cabuay testified that he continued to negotiate with the Commonwealth for several months and explained to them that his client had a possible defense regarding the victim's dishonesty concerning her age. The Commonwealth eventually made a new offer to the Defendant of Sexual Abuse Second Degree, twelve months.

The Defendant testified that the original prosecutor in the pre-trial had told him that it didn't matter if the victim told him she was 18, it only mattered what her actual age was. The Defendant argued that Mr. Cabuay agreed with that. Mr. Cabuay disputed that fact. However, the Defendant also testified that Mr. Cabuay told him that to a jury, it may not matter either. Ultimately, the Defendant stated that Mr. Cabuay told him he had a defense, just not a good defense.

According to *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001), the court shall consider the totality of the circumstances surrounding the guilty plea. Therefore, the Court having reviewed the tape of the actual guilty plea, the testimony presented and arguments of counsel, find that Mr. Cabuay had fully advised the Defendant of all possible legal defenses. The fact that Mr. Cabuay may have commented regarding his opinion of the possible defenses does not render the guilty plea void.

For the above stated reasons, the Court hereby finds that the Defendant entered a voluntary, knowing and intelligent guilty plea after having been fully advised as to his rights, his defenses and his choices as to alternative courses of action.

At the evidentiary hearing, appellant's defense counsel testified that he informed appellant that the victim's alleged dishonesty concerning her age was a defense. In fact, appellant admitted that defense counsel informed him of the defense but told him it was not a good defense. Upon review of the circuit court

order and the evidence as a whole, we believe that substantial evidence exists to support the circuit court's finding that appellant's guilty plea was voluntary. *See Ridgon*, 144 S.W.3d 283. Additionally, we cannot conclude that the circuit court abused its discretion in denying the motion to withdraw appellant's guilty plea.

The primary reason given by appellant to support the motion to withdraw his guilty plea was found by the court to be refuted by the testimony of his defense counsel.

In sum, we hold that the circuit court did not err by denying appellant's motion to withdraw guilty plea.

Appellant also argues that the circuit court erred by requiring him to pay court costs of \$155 as he was indigent. It is well-established that the circuit court may not impose court costs upon an indigent defendant. KRS 31.110; *Edmonson v. Com.*, 725 S.W.2d 595 (Ky. 1987). Herein, it is clear that appellant qualified as a "poor" person and, thus, was indigent. KRS 453.190. Appellant was represented by a public defender during the proceedings below and was granted *in forma pauperis* status on appeal of his conviction. As an indigent person, the circuit court clearly erred by ordering him to pay court costs. *See Edmonson*, 725 S.W.2d 595. The imposition of court costs upon appellant, who is without resources to pay same, affects his substantial rights and results in manifest injustice. We, thus, conclude the circuit court's imposition of court costs constituted palpable error under RCr 10.26.

In sum, we affirm appellant's sentence of imprisonment upon second-degree sexual abuse and reverse the circuit court's imposition of court costs.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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