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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000779-MR

ANTHONY D. PENNINGTON, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CR-000951

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Anthony D. Pennington, Jr. appeals from a judgment of the Jefferson Circuit Court following his conditional guilty plea to robbery in the first degree. For the reasons stated herein, we affirm.

On January 1, 2008, Bruce Brown called Louisville Metro Police and stated that he was the victim of an armed robbery in the Iroquois Homes Housing

Project. When police arrived, Brown described the perpetrator as an African-American man, with a slender build, standing approximately 6'2", and wearing dark clothing. After searching for the suspect, police located an African-American male fitting the suspect's description located on the corner of Cayuga Street and Oneida Court. The suspect, later identified as Pennington, was subjected to a pat-down search and a revolver was found. He was arrested and taken to Brown who positively identified the suspect as the perpetrator of the robbery.

On March 18, 2008, Pennington was indicted by a Jefferson County grand jury for robbery in the first degree. He then moved to suppress the show-up identification arguing that it was conducted in a highly suggestive manner. At the suppression hearing, Officer Luke Phan testified that Brown informed police that he had been robbed at approximately 6:30 a.m. According to Officer Phan, he met Brown at the scene at 6:37 a.m., and Brown stated that the suspect was armed with a revolver. Brown informed him that the suspect was accompanied by three other African-American men but that the suspect was significantly taller than the others.

Officer Phan further testified that he observed Pennington fifteen minutes after speaking with Brown. He noticed Pennington because he was taller than the man standing beside him and was wearing a thick, black jacket. Officer Phan further testified that Brown had an opportunity to fully view the perpetrator during the robbery, had described the perpetrator before his apprehension, and had fully viewed the perpetrator at the time of the identification.

After Officer Phan's testimony, defense counsel called Brown as a witness, but the prosecutor stated that he had already released Brown for the day and did not expect him back until the morning for Pennington's trial. He further stated that there was sufficient evidence in the record to rule on the suppression motion. Defense counsel responded that he was unaware of Brown's release and suggested that the hearing be continued to the next day to permit Brown to testify. However, the trial court ruled that Brown's testimony was unnecessary and denied the motion, finding that the show-up identification was not unduly suggestive.

The next day, the prosecutor offered Pennington a plea deal in which it would recommend the minimum sentence for first-degree robbery. Thereafter, Pennington pled guilty, pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to first-degree robbery and reserved his right to appeal the denial of his motion to suppress. During the plea colloquy, while sitting beside Pennington, defense counsel read into the record the Commonwealth's plea offer. He discussed the ten-year sentence, the application of the violent offender statute, and that the plea would be a conditional plea with regard to the suppression issue.

Defense counsel further stated that he explained to his client his constitutional rights, that he explained to his client the facts of his case, and that he had already read the Commonwealth's plea offer to his client. Pennington then stated that he had enough time to consider the offer and desired to plead guilty. Pennington further stated that he understood the waiver of his constitutional rights,

was not under the influence of any intoxicant, had sufficient time to consider the plea and consult with counsel, and was satisfied with counsel's representation.

Responding to the trial court's questioning, Pennington stated that his depression did not affect his decision to plead guilty. Pennington further affirmed that his counsel did read and discuss the plea offer to him. The trial court then read the facts of the case from the plea form, stated the ten-year sentence, and explained the right to appeal the suppression issue. After obtaining Pennington's affirmation that he still desired to plead guilty in light of their colloquy, the trial court accepted Pennington's plea after finding that it was made voluntarily. Defense counsel then renewed his motion to permit Brown's testimony or, alternatively, to admit Brown's testimony by avowal. The trial court denied the motion.

On January 23, 2009, Pennington filed a *pro se* motion to withdraw his guilty plea contending ineffective assistance of counsel. Subsequently, the trial court permitted Pennington's counsel to withdraw and appointed the Office of the Louisville Metro Public Defender to represent Pennington. At the evidentiary hearing, Pennington's appointed counsel argued in favor of the plea withdrawal motion. However, the trial court denied Pennington's motion finding that the plea was entered voluntarily, knowingly, and intelligently. Following this denial, the trial court sentenced Pennington to ten-years' imprisonment in accordance with the recommended sentence contained in the plea agreement. This appeal followed.

Pennington argues that the trial court erred when it denied his motion to withdraw his *Alford* plea. He first contends that his plea was involuntary

because he received ineffective assistance from his counsel. Thus, he contends that his guilty plea was constitutionally defective and should have been set aside. Alternatively, he contends that the trial court abused its discretion by denying his motion to withdraw under the unique circumstances of his case. We disagree.

A trial court may accept a defendant's guilty plea to a criminal charge, but the plea must be voluntarily made and with an understanding of the nature of the charge. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 565 (Ky. 2006). RCr[1] 8.10 provides that a defendant may withdraw his guilty plea with the permission of the court before judgment. *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007). A motion to withdraw a guilty plea is generally addressed to the sound discretion of the trial court and is reviewed to determine only if the court abused its discretion. *Commonwealth v. Lopez*, 267 S.W.3d 685, 689 (Ky.App. 2008). If a defendant's plea was involuntary, a trial court must grant the motion to withdraw the guilty plea. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002).

The trial court conducted a lengthy plea colloquy with Pennington and then held an evidentiary hearing regarding Pennington's motion. Although Pennington contends that he was not provided discovery and did not understand that the suppression issue was reserved, his original defense counsel stated that he informed Pennington of the facts and law of his case. Pennington knew that his criminal case hinged on the testimony of the lone eyewitness. Additionally,

[1] Kentucky Rules of Criminal Procedure (RCr).

Pennington's right to appeal the suppression ruling was repeatedly discussed during the plea colloquy and Pennington stated that he understood.

While Pennington contends that the trial court failed to conduct a factual inquiry of the plea and his attorney-client relationship, we note that the trial court observed defense counsel read the plea offer in open court. Counsel then expressly informed the trial court that he had discussed the facts and law with his client. The trial court then read over the plea offer for a second time with Pennington. The trial court then engaged in a lengthy colloquy where Pennington stated that he was satisfied with counsel's representation. Therefore, we conclude that the trial court did not err by finding the plea was voluntary.

We further conclude that the trial court did not abuse its discretion by denying Pennington's motion to withdraw his plea. We recognize Pennington's claims of illiteracy, depression, and of having a learning disability. However, the trial court ensured on multiple occasions that he understood his plea. The trial court further questioned him regarding his depression and obtained counsel's confirmation that Pennington was competent to accept the guilty plea. While his guilty plea was accepted the morning of his trial, his counsel's statements that he had previously discussed the plea offer with Pennington established that he had sufficient time to consider the offer. Additionally, under oath, Pennington stated that he had sufficient time to confer with counsel regarding his case. Therefore, the trial court's denial of Pennington's motion was an abuse of discretion.

Pennington next contends that the trial court erred by not suppressing Brown's identification of him as a result of an unduly suggestive show-up. He further contends that the trial court erred by precluding him from introducing the alleged victim's testimony and for failing to make any finding concerning the reliability of the Brown's identification. We disagree.

When a defendant challenges an identification procedure, the foremost issue is whether there was a very substantial likelihood of irreparable misidentification. *Parker v. Commonwealth*, 291 S.W.3d 647, 662-63 (Ky. 2009). To determine if a very substantial likelihood of an irreparable misidentification has occurred, Kentucky courts employ a two-step process. *Id*. at 663.

We first determine if the circumstances leading to the identification were "'unduly suggestive.'" *Id*., quoting *Dillingham v. Commonwealth,* 995 S.W.2d 377, 383 (Ky. 1999). "Only if the circumstances were unduly suggestive do we move on to the next step where we determine if the identification was, nevertheless, reliable." *Id*. Thus, we ask whether the witness likely would have been able to identify the defendant even if a proper photographic identification procedure had been utilized. *Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978). In step two, we analysis the following five factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. We review a trial court's ruling regarding the admissibility of a witness's identification under an abuse of discretion standard. *Id*.

Officer Phan testified at the suppression hearing and reiterated what Brown told him and what is contained in Brown's written victim statement. According to this testimony, Brown had a good opportunity to observe Pennington's face. Regarding his degree of attention, Brown heard Pennington yell to his three friends that he was going to rob "this paperboy and take his bike." When Brown turned, Pennington pulled out his gun and displayed it to Brown. He pleaded to Pennington not to shoot him because he had a family and children.

As to the accuracy of the prior description, Brown's description of the suspect and the type of gun used matched Pennington and the gun found in his possession. Next, Brown appeared to have positively identified Pennington with relative ease and also identified Pennington's gun. Finally, only approximately fifteen minutes of time separated the robbery and the show-up identification. Accordingly, based on the totality of the facts, we cannot conclude that the trial court abused its discretion by admitting Brown's show-up identification.

Regarding Pennington's denied request to call Brown as a witness, a defendant has a constitutional right to present witnesses and evidence in his own defense. *Jones v. Commonwealth*, 237 S.W.3d 153, 159 (Ky. 2007). Under the Sixth Amendment to the United States Constitution, a defendant must be able to confront witnesses against him and to compel the testimony of witnesses in his favor. *Crawley v. Commonwealth*, 107 S.W.3d 197, 199 (Ky. 2003). However, a

"defendant's Sixth Amendment right to compulsory process must yield to legitimate demands of the adversarial process..." *Combs v. Commonwealth*, 74 S.W.3d 738, 745 (Ky. 2002).

For example, hearsay testimony is admissible during a suppression hearing even if this testimony would not be admissible at trial. *United States v. Raddatz,* 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). The court explained that the interests involved at a suppression hearing are of a lesser magnitude than those interests involved in a criminal trial. *Id*. Thus, the trial court did not err by denying Pennington's motion to call Brown as a witness. The record demonstrates that the substance of Brown's knowledge regarding the crime and identification were introduced by hearsay testimony from Officer Phan. Additionally, because Officer Phan conducted the show-up identification, he was in a position to provide other relevant testimony to Pennington. Finally, we note that Pennington has cited no authority contrary to our conclusion.

For the foregoing reasons, the judgment of conviction of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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