

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000993-MR

SHY LAMONT HEATH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 06-CR-003366

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE, STUMBO, AND VANMETER, JUDGES.

MOORE, JUDGE: Shy Lamont Heath appeals the Jefferson Circuit Court's decision denying his motion to withdraw his guilty plea. After a careful review of the record, we affirm because the circuit court did not abuse its discretion in denying Heath's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Heath entered a guilty plea to the charges of: First-degree Trafficking in a Controlled Substance, subsequent offense, and Illegal Possession of Drug Paraphernalia. Several weeks later, and prior to his sentencing, Heath filed a *pro se* motion to withdraw his guilty plea in the circuit court. In that motion, Heath alleged that he had received the ineffective assistance of trial counsel because: Counsel had threatened to withdraw as counsel if Heath did not accept the Commonwealth's plea offer; counsel had failed to investigate all exculpatory evidence; and counsel had failed to investigate other ways of finding out if detectives used a confidential informant to make a controlled buy.

The circuit court held a hearing on Heath's motion to withdraw his guilty plea, during which Heath was represented by new defense counsel. Heath testified he believed that the detective in his case was the person who had telephoned the tip line to complain of the alleged drug activity, thus providing the detective with the probable cause he needed to obtain a search warrant. Hence, Heath alleged that his counsel had rendered ineffective assistance in failing to turn the tapes of the tip line calls over to him as he had requested because he would not have entered a guilty plea if he had known that the detective had placed the tip line calls. Heath proffered no evidence, other than his own testimony, to show that the voice on the telephone calls was the detective's.

The circuit court did not rule on the motion to withdraw Heath's guilty plea at that time but took it under consideration. During a subsequent

hearing, the circuit court noted that each of the telephone calls to the tip line that were at issue occurred after the offense date and subsequent to the indictment in this case. Thus, the court concluded that, even if it were to assume that the tip line telephone calls were in fact made by the detective, the calls were nonetheless made more than six months after the indictment in this case. Accordingly, the court found that it likely would not have admitted those tapes of the tip line calls into evidence, except possibly if the defense had sought to introduce them as impeachment evidence. The circuit court concluded that defense counsel's failure to provide the tapes to Heath did not result in a substantial breach of counsel's duty in representing Heath. The court further noted that Heath, in negotiating his plea deal, received the benefit that he wanted to receive: a recommendation of probation. The court concluded that defense counsel thoroughly represented Heath. Therefore, the circuit court stated on the record during the hearing that, under the totality of the circumstances, defense counsel had appropriately advised Heath and had provided effective assistance and that Heath had voluntarily entered his guilty plea in accord with defense counsel's appropriate advice.

The court did not enter a written order specifically denying Heath's motion to withdraw his guilty plea but, in the court's written judgment, it stated that it had found Heath's guilty plea to be voluntarily entered. The court sentenced Heath to thirteen years of imprisonment for the first-degree Trafficking in a Controlled Substance (Cocaine) conviction and twelve months of imprisonment for the Illegal Possession of Drug Paraphernalia conviction. The sentences were

ordered to be served concurrently for a total of thirteen years. The circuit court then ordered Heath's entire thirteen-year sentence to be probated. Heath now appeals.

In his appellate brief, Heath contends: (a) he received the ineffective assistance of counsel due to counsel's failure to investigate all exculpatory evidence, particularly other ways of finding out if the detective used a confidential informant to make a controlled buy and due to counsel's refusal to turn over tapes of 911 calls to Heath; (b) the prosecutor violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding tip line/911 calls; (c) the Louisville Metro Police Department used a discredited identification procedure to arrest Heath; and (d) the trial court abused its discretion by not admitting the tip line/911 calls as impeachment evidence.

II. STANDARD OF REVIEW

Heath appeals the denial of his motion to withdraw his guilty plea.

Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered. The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. If, however, the trial court determines that the guilty plea was entered voluntarily,

then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal quotation marks and footnotes omitted).

III. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Heath first alleges that his guilty plea was involuntary because he received the ineffective assistance of counsel. He contends that counsel was ineffective because counsel failed to investigate all exculpatory evidence, particularly other ways of finding out if the detective used a confidential informant to make a controlled buy. He also asserts that counsel was ineffective due to counsel's refusal to turn over tapes of 911 calls to Heath.

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such an instance, the trial court is to consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington*[], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel. To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel,

there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel. The Kentucky Supreme Court has stated that generally, an evaluation of the circumstances supporting or refuting claims of coercion and 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.

Rigdon, 144 S.W.3d at 288-89 (internal quotation marks and footnotes omitted).

Heath's ineffective assistance of counsel argument is based upon his personal belief, after listening to the tip line/911 calls, that the detective who investigated his case was the person who called the tip line/911, *i.e.*, creating the probable cause upon which the affidavit for the search warrant was based. Heath asserts that his counsel failed to investigate the tapes of the telephone calls, which Heath contends would have shown that the detective placed the telephone calls. He further argues that if counsel had turned the tapes over to Heath as requested, Heath would have discovered that the detective was the person who placed the telephone calls. Heath contends that if he had this information, he would not have entered a guilty plea. However, Heath provided no evidence, expert or otherwise, to show that the voice on the tip line/911 telephone calls was the detective's voice. Rather, it was based on Heath's own belief and speculation. Because Heath provided no evidence to support this allegation, the circuit court did not err in finding that Heath failed to show that his counsel rendered ineffective assistance

on this ground. Additionally, the circuit court found that the telephone calls at issue were placed more than six months after the indictment in this case.

Consequently, the relevancy of the telephone calls is questionable.

Heath also contends that counsel rendered ineffective assistance by failing to investigate whether the detective actually used a confidential informant to make a controlled buy of drugs from Heath or his co-defendants. The detective attested in his affidavit in support of the search warrant that a confidential informant was used to make a controlled buy. Heath has offered no proof to the contrary; rather, he merely alleges that counsel should have investigated whether a confidential informant was, in fact, used to make a controlled buy. Because Heath's allegation is pure conjecture, the circuit court did not err in finding that Heath failed to show that his counsel rendered ineffective assistance. This is particularly so considering that Heath is unable to demonstrate prejudice. Before he entered his guilty plea, Heath faced a potential sentence of ten to twenty years of imprisonment for the trafficking charge and up to twelve months of imprisonment for the possession of drug paraphernalia charge; however, he ultimately received probation due to the plea agreement defense counsel negotiated for him. Consequently, Heath's ineffective assistance of counsel claims lack merit, and the circuit court did not err in denying Heath's motion to withdraw his guilty plea based upon these claims.

B. *BRADY* VIOLATION

Heath next asserts that the prosecutor violated *Brady*, 373 U.S. 83, 83 S.Ct. 1194, by withholding tip line/911 calls. However, Heath also contends that his counsel failed to turn over the tapes of the tip line/911 telephone calls to Heath, which implies that counsel had the tapes in his possession. Therefore, based upon Heath's allegations and his arguments during the hearing on his motion to withdraw his guilty plea, it appears that the prosecutor did turn over the tapes of the telephone calls to Heath's counsel.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. Because the prosecutor did provide the evidence at issue to defense counsel, the prosecutor did not violate *Brady*. Accordingly, this claim did not provide a basis upon which to grant Heath's motion to withdraw his guilty plea. The circuit court did not err in denying that motion based upon this claim.

C. DISCREDITED IDENTIFICATION PROCEDURE

Heath next alleges that the Louisville Metro Police Department used a discredited identification procedure to arrest him. Specifically, he asserts that the police showed only one photograph to a witness for identification of Heath as a suspect, rather than using the more reliable procedure of presenting the witness with photographs of several different people and asking the witness to pick the suspect from the photographs. However, Heath did not raise this argument in the

circuit court. Consequently, we will not consider it on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”).

D. IMPEACHMENT EVIDENCE

Finally, Heath contends that the trial court abused its discretion by not admitting the tip line/911 calls as impeachment evidence. This allegation appears to be based upon the circuit court’s statement during the hearing wherein it denied his motion to withdraw his guilty plea, concluding that it likely would not have admitted the tapes of the tip line calls into evidence, except possibly if the defense had sought to introduce them as impeachment evidence, presumably during trial. However, counsel did not seek to introduce the tapes as impeachment evidence because Heath entered a guilty plea before proceeding to trial. Therefore, we fail to see a basis for this claim.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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