

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000295-MR

JOSE GONZALES

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 09-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Jose Gonzalez, appeals as a matter of right from a plea of guilty to one count of assault in the second degree, one count of wanton endangerment in the first degree, and one count of alcohol intoxication, for which he was sentenced to six years of imprisonment. On appeal, Gonzalez argues

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<sup>1</sup> 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.

that he was represented by conflicted counsel during the hearing on his motion to withdraw his guilty plea in violation of the Sixth and Fourteen Amendments to the United States Constitution, and Section 11 of the Kentucky Constitution. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand to the trial court for additional proceedings not inconsistent with this opinion.

On October 20, 2009, Gonzalez pled guilty to one count of second-degree assault, one count of first-degree wanton endangerment, and one count of alcohol intoxication. During the course of the plea colloquy, the court asked Gonzalez if he was entering the plea because he was in fact guilty. Gonzalez, who does not speak English, responded in the affirmative through a translator. The trial court then asked Gonzalez, “You were hesitant on that, are you positive about that?” Gonzalez, again through a translator, responded in the affirmative.

Subsequently, Gonzalez moved to withdraw his guilty plea. His counsel advised the court that Gonzalez said he did not commit the offenses with which he was charged, as he had asserted through the translator at arraignment, and that he misunderstood the plea agreement. However, a few minutes later, Gonzalez’s counsel told the trial court that he believed Gonzalez had in fact understood the agreement. Thereafter, counsel filed a motion for an evidentiary hearing on the motion to withdraw the guilty plea, which was held on January 26,

2010. During the course of that hearing, Gonzalez's counsel, who was the same counsel through whom he entered the initial guilty plea, directly examined Gonzalez for less than two minutes. At the hearing, Gonzalez testified, through a translator, that he understood the judge during the plea colloquy, but that he did not understand the proposal defense counsel had made to him regarding the plea.

During cross-examination at the evidentiary hearing, the prosecution inquired into Gonzalez's confusion. Gonzalez testified that, from what he had understood, his counsel had advised him that if he pled guilty, he would be released from incarceration on probation. Gonzalez further testified that he was innocent, and had been dishonest with the trial court when he entered a guilty plea. Gonzalez explained that his confusion regarding the plea began when defense counsel read him the plea agreement through a translator. Gonzalez also testified that he understood that the trial court said that he would not be probated during the course of his plea colloquy, but that his attorney had already advised him that he would be probated.

Following cross-examination, the trial court asked Gonzalez's counsel if he would testify or make a statement in his capacity as an officer of the court. Then, without being placed under oath, counsel stated that he did not promise Gonzalez that he would receive probation, that he made it clear that probation was the court's decision, and that he had advised Gonzalez that he could proceed to trial if he did not like the deal. The trial court then asked the translator if she ever

told Gonzalez that he would receive probation. The translator stated that she did not.

Following the evidentiary hearing, the trial court denied Gonzalez's motion, expressly relying upon the statements provided by his counsel. Gonzalez was convicted of the aforementioned charges and sentenced to six years of imprisonment. Gonzalez now appeals to this Court as a matter of right.

In its response to the arguments made by Gonzalez, the Commonwealth agrees that error occurred in this case when Gonzalez's counsel testified against him during the course of the evidentiary hearing. Consequently, the Commonwealth also agrees that Gonzalez is entitled to some relief. However, the Commonwealth argues that, rather than vacating his guilty plea as Gonzalez requests, this Court should remand this case for appointment of new counsel and a new evidentiary hearing on Gonzalez's motion to withdraw his guilty plea. In support of that request, the Commonwealth states that in questioning Gonzalez's counsel, the court was trying to be thorough and protect his rights, rather than trample upon them. Further, the Commonwealth asserts that Gonzalez's counsel breached no ethical duties by testifying at the trial court's direction. It asserts that Gonzalez does not argue on appeal that the court erred in accepting his plea, and instead only argues that he was prejudiced by an actual conflict of counsel during the course of the hearing on his motion to withdraw. Thus, the Commonwealth argues that the proper remedy is to remand this matter for appointment of new counsel and a new evidentiary hearing.

Having reviewed the arguments of the parties and the applicable law, we are in agreement with both Gonzalez and the Commonwealth that Gonzalez received ineffective assistance counsel, and that error occurred when his own counsel testified against him during the course of the evidentiary hearing. Accordingly, we agree that he is entitled to the appointment of new counsel for a new evidentiary hearing. In so finding, on the basis of our past holdings discussed *infra*, we believe the appropriate course of action in the matter *sub judice* is to vacate the final judgment and sentence against Gonzalez, pending a determination on the course of the evidentiary hearing. If, following the evidentiary hearing, the trial court finds that the plea was knowingly, voluntarily, and intelligently entered, it may reinstate the judgment and sentence.

We believe this course of action to be consistent with our previous holdings in *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002),<sup>2</sup> and other similar cases. In *Rodriguez*, as in the matter *sub judice*, the defendant pled guilty to the charge against him, and later moved to withdraw his plea based on ineffective assistance of counsel. A hearing was scheduled, but Rodriguez was not allowed to testify because he would not sign a waiver of attorney/client privilege.

On appeal, the Supreme Court held that his refusal to sign a blanket waiver of

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<sup>2</sup>See also the unpublished case of *Penman v. Commonwealth*, 2006 WL 3386582 (Ky. 2006)(2005-SC-000533-MR, 2005-SC-000534-MR), wherein the defendant moved to withdraw his guilty plea in the trial court, and the trial court denied the motion and entered final judgment without holding an evidentiary hearing. Our Kentucky Supreme Court held that the trial court was required to hold an evidentiary hearing on the motion to withdraw and, accordingly, vacated the circuit court's judgment and remanded the case for an evidentiary hearing. Therein, the Court ordered that if, after the hearing, the circuit court determined that the plea was involuntary, defendant should be permitted to withdraw the plea and, if voluntary, the trial court could use its discretion in deciding whether the motion to withdraw would be granted or denied.

privilege did not preclude him from testifying, and held that a new evidentiary hearing was required.

In so finding, the Court reversed the circuit court judgment, and remanded the case with instructions to hold an evidentiary hearing on the motion to withdraw the guilty plea. The Court further ordered that if the circuit court determined on remand that the plea was involuntary, then the plea should be withdrawn. Likewise, the Court ordered that if the trial court determined on remand that the plea was voluntary, then the judgment and sentence should be reinstated. Accordingly, we believe such a course of action to be the appropriate manner of proceeding in the matter *sub judice*.

Wherefore, for the foregoing reasons, we hereby vacate the final judgment and sentence, and the order overruling Gonzalez's motion to withdraw his guilty plea, and remand this matter to the Adair Circuit Court for appointment of new counsel to represent Gonzalez in another evidentiary hearing on his motion to withdraw his guilty plea.

ALL CONCUR

BRIEFS FOR APPELLANT:

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