

RENDERED: OCTOBER 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000122-MR

CHARLES C. GAMBILL

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: The issue presented is whether the Johnson Circuit Court erroneously denied Appellant Charles Gambill's motion to withdraw his plea of guilty without first conducting an evidentiary hearing. We find the circuit court so erred. Accordingly, we reverse and remand for additional proceedings consistent with this opinion.

On March 16, 2011, the Johnson County Grand Jury indicted Gambill on one count of theft by unlawful taking under \$10,000.00, a class D felony, and being a first-degree persistent felony offender (PFO). The theft charge stemmed from an allegation that Gambill unlawfully took over \$1,300.00 worth of merchandise from a local Wal-Mart store.

On July 1, 2011, Gambill entered a guilty plea to the theft offense. In exchange, the Commonwealth agreed to dismiss the PFO charge and recommend a sentence of three years' imprisonment, probated for three years with 90 days' home incarceration and 30 days' community service. The circuit court accepted Gambill's plea of guilty. However, at final sentencing, the circuit court took issue with Gambill's extensive criminal history. In light of this, the circuit court declined the Commonwealth's sentencing recommendation, but afforded Gambill the opportunity to withdraw his guilty plea; Gambill did so.

On December 2, 2011, the Commonwealth presented Gambill with a second plea offer. For Gambill's plea of guilty to the theft by unlawful taking under \$10,000.00 charge, the Commonwealth offered to dismiss the PFO charge and recommend a sentence of three years' imprisonment, to serve. Gambill accepted the Commonwealth's offer.

The circuit court conducted a lengthy *Boykin v. Alabama*¹ colloquy with both Gambill and his attorney. Ultimately, the circuit court accepted Gambill's

¹ 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

guilty plea, finding it to be made knowingly, voluntarily, and intelligently. Final sentencing was scheduled for December 16, 2011.

At final sentencing, Gambill orally moved to withdraw his plea of guilty claiming he entered his plea involuntarily because of coercion. The circuit court allowed Gambill to cite specific facts to support his motion. Gambill explained he felt coerced into signing the second plea agreement without adequate time to reflect on that agreement; he was not provided relevant discovery, despite several requests, by his attorney until the morning the second plea agreement was offered; and he lacked a meaningful opportunity to review the requested discovery and the second plea agreement.²

The circuit court summarily denied Gambill's motion to withdraw his guilty plea. By order entered December 16, 2011, the circuit court adjudged Gambill guilty, and sentenced him to three years' imprisonment consistent with the Commonwealth's recommendation.³ From this order, Gambill appeals.

² Gambill's arguments and justifications in support of his motion to withdraw were conveyed to the circuit court by Gambill's attorney on Gambill's behalf; Gambill did not testify or otherwise speak on his own behalf during the hearing.

³ On December 28, 2011, Gambill also filed, *pro se* and post-judgment, a written motion styled "Motion to Set Aside Guilty Plea." In the body of that motion, Gambill indicated he was bringing the motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42; Gambill neither mentions nor cites RCr 8.10, the statute authorizing a defendant to withdraw his or her guilty plea. As of the date of the certification of the record, the circuit court had not yet ruled on Gambill's pending motion. Regarding any arguments brought pursuant to RCr 8.10, if any, we emphasize the circuit court lacks subject matter jurisdiction to address those arguments because the court may only permit a plea of guilty to be withdrawn "before judgment." RCr 8.10. We again reiterate the judgment on this matter was entered on December 16, 2011, but Gambill did not file the motion at issue until December 28, 2011. To the extent Gambill raised claims of ineffective assistance of counsel, the circuit court, of course, retains subject matter jurisdiction over those arguments because they can be raised post-judgment "within three years after the judgment becomes final[.]" RCr 11.42(10).

Gambill challenges the circuit court's denial of his oral motion to withdraw his guilty plea. Kentucky Rules of Criminal Procedure (RCr) 8.10 instructs that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." When a defendant seeks to withdraw a guilty plea, the trial court must engage in a two-step process.

First, the trial court must conduct "a factual inquiry into the circumstances surrounding the plea," taking into consideration the totality of the circumstances, "to ascertain whether [the guilty plea] was voluntarily entered." *Rigdon II v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (citation omitted). The "totality of the circumstances" is the touchstone to be used when conducting this assessment because "the voluntariness of a guilty plea 'can be determined only by considering all of the relevant circumstances surrounding it.'" *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). Merely referring to the plea colloquy to resolve the voluntary inquiry is insufficient. *See Rigdon II*, 144 S.W.3d at 290. Instead, the circuit court must look "beyond the plea colloquy to determine whether [the defendant's] plea was voluntarily entered under the totality of the circumstances surrounding his plea." *Id.* We review the trial court's decision regarding whether the plea was voluntarily entered for clear error. *Id.* at 288. A decision not supported by substantial evidence is clearly erroneous. *Id.*

Second, if the trial court concludes the plea was entered involuntarily, it must then grant the defendant's motion to withdraw. *Rodriguez*, 87 S.W.3d at 10; [*Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 \(Ky. 2006\)](#) ("If a guilty plea is

found to have been entered involuntarily, considering the totality of the circumstances, a trial court must grant a defendant's motion to withdraw the plea."). Conversely, if the trial court concludes the plea was entered voluntarily, it may, "within its discretion, either grant or deny the motion." Williams v. Commonwealth, 229 S.W.3d 49, 51 (Ky. 2007). Absent an abuse of discretion, we will not disturb the trial court's decision. *Rigdon II*, 144 S.W.3d at 288. An abuse of discretion occurs when the trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by legal principles." *Id.*

Gambill contends the circuit court erred when it summarily denied his motion to withdraw his plea of guilty. Gambill argues the circuit court could not possibly have adequately measured, under the totality of the circumstances, whether Gambill voluntarily entered his guilty plea because the circuit court declined to hold an evidentiary hearing on Gambill's motion to withdraw despite case law firmly indicating that an evidentiary hearing is contemplated by RCr 8.10, not merely an opportunity for oral argument.

In response, the Commonwealth posits Gambill was not entitled to an evidentiary hearing because substantial evidence in the record conclusively proves Gambill entered his guilty plea voluntarily. The Commonwealth relies on Gambill's plea colloquy, during which Gambill related he had voluntarily read and signed the plea offer; affirmed he was not forced or threatened to plead guilty; acknowledged he was not impaired by drugs, alcohol, or mental defect; and expressed satisfaction with this attorney's representation. The Commonwealth

further asserts Gambill's plea colloquy belies his assertions that he was rushed into pleading guilty because he specifically stated he had been given sufficient time to discuss his case with his attorney. Because the circuit court followed the required procedures outlined in *Boykin*, the Commonwealth suggests, the record demonstrates Gambill's plea was entered voluntarily. Moreover, the Commonwealth argues the hearing concerning Gambill's motion to withdraw his guilty plea, while brief, was adequate for the circuit court to comprehend Gambill's arguments, for the Commonwealth to refute those arguments, and for the circuit court to make an informed and proper ruling denying Gambill's motion.

In reply, Gambill proffers that, notwithstanding his seemingly irrefutable plea colloquy, he raised particularized facts of coercion to warrant looking beyond the plea colloquy to determine the voluntariness of his guilty plea. Likewise, without affording him an opportunity in an evidentiary hearing to personally explain why he felt coerced into entering a plea of guilty, the circuit court certainly could not have assessed "the totality of the circumstances surrounding his plea." *Rigdon II*, 144 S.W.3d at 290.

We reject the Commonwealth's position that the trial court need not look beyond a *Boykin* colloquy in determining whether a defendant's guilty plea was voluntarily entered. The plea colloquy is but one of several factors the trial court must consider in examining the voluntary nature of the defendant's guilty plea. As explained in *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001):

Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of “the accused’s demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.” While “[s]olemn declarations in open court carry a strong presumption of verity,” “the validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken[.]”

Id. at 487 (footnotes omitted); *Rigdon II*, 144 S.W.3d at 290 (“[T]he circuit court needed to look beyond the plea colloquy to determine whether [the defendant’s] plea was voluntarily entered under the totality of the circumstances surrounding his plea.”).

Our Supreme Court has also spoken on the issue of whether an evidentiary hearing is necessitated when a defendant seeks to withdraw a plea of guilty: “[T]hough an RCr 8.10 motion is generally within the sound discretion of the trial court, *a defendant is entitled to a hearing* on [a motion to withdraw a guilty plea] whenever it is alleged that the plea was entered involuntarily.” [*Edmonds*, 189 S.W.3d at 566](#) (emphasis added); *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007) (“[W]here it is alleged that the plea was entered involuntarily the defendant is entitled to a hearing on the motion.”). Argument of counsel as to the merits, legal and factual, of the underlying motion will not suffice. The defendant is entitled to an evidentiary hearing. *Rodriguez*, 87 S.W.3d at 11 (“[T]he word “may” in RCr 8.10 does not give a trial judge unfettered discretion to deny a motion to withdraw a guilty plea without affording the defendant a[n evidentiary] hearing on the motion.”). “[G]enerally, an evaluation of the circumstances

supporting or refuting claims of coercion and ineffective assistance of counsel [when a guilty plea was supposedly entered involuntarily] requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing.” *Rodriguez*, 87 S.W.3d at 11.

Here, Gambill was not afforded a full evidentiary hearing. Gambill claimed his guilty plea was entered involuntarily because it was the product of coercion; Gambill related specific facts to support his motion. While Gambill’s attorney was given the opportunity, before sentencing, to set forth the reasons why Gambill desired to withdraw his plea, this effort was inadequate to satisfy the evidentiary hearing required by *Rodriguez*. During the oral advocacy of the motion, Gambill’s attorney was not placed under oath, no testimony was taken, and no exhibits were produced or admitted into evidence. Gambill himself was deprived of any opportunity to explain to the circuit court how he was coerced into pleading guilty and why he should be permitted to withdraw his plea. Gambill was denied his right to have the circuit court “look beyond the plea colloquy to determine whether [the] plea was voluntarily entered under the totality of the circumstances surrounding [the] plea.” *Rigdon II*, 144 S.W.3d at 290.

The circuit court failed to hold an evidentiary hearing to inquire into the factual circumstances necessary to make an informed decision concerning the voluntariness of Gambill’s guilty plea, and failed to issue any finding whether Gambill’s plea was entered voluntarily. *Rigdon II*, 144 S.W.3d at 289 (emphasizing the circuit court must first “make the *required finding* that [the

defendant's] guilty plea was made voluntarily under the totality of the circumstances" (emphasis added)); *Rodriguez*, 87 S.W.3d at 10 (trial court may permit a defendant to withdrawal a plea of guilty only after first determining that the plea was voluntary).

For the foregoing reasons, we reverse the Johnson Circuit Court's December 16, 2011 Judgment and Sentence on Plea of Guilty, and remand with instructions to hold an evidentiary hearing and to make a subsequent determination whether Gambill entered his plea voluntarily.

STUMBO, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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