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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000605-MR

BRANDON MCMANOMY — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 10-CR-00157

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND DISMISSING IN PART

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: Brandon McManomy appeals from the trial court's denial of his motion to set aside his guilty plea. Finding no error in the denial of his motion, we affirm. Additionally, McManomy appeals the trial court's bond revocation. After our review of this issue, we conclude that the failure to include the surety as an indispensable party on appeal renders this Court without

jurisdiction to address this matter. Therefore, we dismiss solely that portion of the appeal.

On September 16, 2010, McManomy was indicted by the Calloway County grand jury for rape in the first degree, sodomy in the first degree, kidnapping, attempted assault in the first degree, and violation of a foreign Emergency Protective Order (EPO). The charges arose from a sexual assault on August 31, 2010, when McManomy abducted, raped, and sodomized his former girlfriend.

Bond was set at $100,000 cash. On October 1, 2010, McManomy posted bail; his father, Bradley McManomy was the surety. Thereafter, on February 1, 2011, the Commonwealth moved to revoke his bond. The Commonwealth alleged that McManomy was observed in a nightclub on January 30, 2011, at 1:30 a.m., which they contended violated the conditions of his bond, specifically his curfew.

On February 25, 2011, McManomy's surety, Brad McManomy, entered his appearance as surety and requested a hearing; Brad was represented by counsel. The court issued a bench warrant for McManomy's arrest and ordered a hearing on the matter. On March 2, 2011, the Commonwealth moved to supplement its motion to revoke bond. The Commonwealth alleged that on February 3, 2011, McManomy stabbed a deputy sheriff who was serving the bench warrant issued by the trial court. According to McManomy, the officer was injured when McManomy was tased after he attempted to take his own life. A hearing was

held on the motion to revoke bond and on May 5, 2011, the court entered its findings of fact and conclusions of law.

On September 23, 2011, the Commonwealth offered a plea on amended charges. The Commonwealth offered to amend: first-degree rape to first-degree criminal abuse (ten years); first-degree sodomy to first-degree criminal abuse (ten years concurrent); and kidnapping to unlawful imprisonment (five years consecutive). McManomy was to plead guilty to violating a foreign EPO (twelve months concurrent) and the charge of attempted first-degree assault was to be dismissed. McManomy was to serve a total of 15 years' imprisonment. McManomy accepted this deal and plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

On November 7, 2011, McManomy moved to withdraw his guilty plea, arguing that it was not intelligently made because counsel erroneously informed him that any sentence imposed in Kentucky would run concurrently with any sentence imposed in Indiana. McManomy claimed that after he pled guilty, he learned that as a matter of law any sentence received in Indiana would run consecutively to his Kentucky sentence. A hearing was held on this issue.

On February 22, 2012, the trial court entered an extensive fifteen-page order setting forth its findings of fact and conclusions of law denying the motion to withdraw the guilty plea. After detailing the September 23, 2011 guilty plea colloquy and the February 6, 2012 hearing on the motion to withdraw the guilty plea in which McManomy, his father, and McManomy's counsel at the time of the

guilty plea testified, the trial court found McManomy's attorney's testimony that McManomy was properly advised to be more credible than that given by McManomy. The trial court found that in light of the entire colloquy of the guilty plea, McManomy was not reluctant to enter said plea. Upon considering the entire record, the court found that McManomy "knew exactly what he was doing, and has since decided that he does not like the result." The court then assessed the applicable jurisprudence and concluded that McManomy's guilty plea was knowingly, intelligently, and voluntarily made, regardless of whether McManomy had been advised of the concurrent/consecutive sentencing requirements. It is from this order that McManomy now appeals.

On appeal, McManomy presents two issues, namely: (1) that the trial court erred in not permitting him to withdraw his guilty plea; and (2) McManomy's bond should be reinstated or in the alternative, returned to his father who posted the bond. The Commonwealth asserts that the trial court did not err. The Commonwealth additionally argues that McManomy lacks standing to appeal the forfeiture of the bond posted by his surety. The surety is the real party in interest and not a party to this appeal. With these arguments in mind we turn to the issues presented on appeal.

First, McManomy argues that the trial court erred in not permitting him to withdraw his guilty plea because counsel misinformed him of the sentencing requirements in Indiana, rendering his plea involuntary and unintelligently made. The law in this Commonwealth is clear:

A guilty plea is valid only when it is entered intelligently and voluntarily. Thus, RCr 8.08 requires a trial court, at the time of the guilty plea, to determine "that the plea is made voluntarily with understanding of the nature of the charge," to fulfill "the dual purpose of having a judicial determination that the guilty plea is made voluntarily and understandably and providing an appropriate court record demonstrating those important facts." Under RCr 8.10, trial courts have the discretion to permit a defendant to withdraw his or her guilty plea before final judgment and proceed to trial. In cases where the defendant disputes his or her voluntariness, a proper exercise of this discretion requires trial courts 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* inquiry into the performance of counsel[.]

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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.

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 [.]" The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and "caused the defendant to lose what he otherwise would probably have won" and "whether counsel was so

> thoroughly ineffective that defeat was snatched from the hands of probable victory." Because "[a] multitude of events occur in the course of a criminal proceeding which might influence a defendant to plead guilty or stand trial," the trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.
>
> Because of the factual determinations inherent in this evaluation, Kentucky appellate courts have recognized that "the trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty" at the time of the guilty plea and in a "superior position to judge [witnesses'] credibility and the weight to be given their testimony" at an evidentiary hearing. Accordingly, this Court reviews a trial court's ruling on a defendant's motion to withdraw his guilty plea only for abuse of discretion by "ascertain[ing] whether the court below acted erroneously in denying that appellant's pleas were made involuntarily."

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001)(internal citations and footnotes omitted).

We agree with the Commonwealth that the trial court did not abuse its discretion in denying the motion to set aside McManomy's guilty plea. The trial court undertook an extensive review of the record, held an evidentiary hearing, and concluded that McManomy's guilty plea was intelligently, knowingly, and voluntarily made in light of the totality of the circumstances; thereafter, it denied McManomy's motion. Such was not an abuse of discretion. Accordingly, we find no error on this basis.

Turning now to the second issue raised on appeal, whether McManomy's bond should be reinstated or, in the alternative, returned to his father

who posted the bond, we must assess whether the surety's not being a named party to this appeal, as the Commonwealth contends, renders McManomy without standing. After our review of the parties' arguments, the record and the applicable law, we disagree with the Commonwealth that this is a matter of standing. Instead, we conclude that this issue should be dismissed for a lack of jurisdiction for failure to name an indispensible party.[1]

Recently, in *Nelson County Bd. of Educ. v. Forte,* 337 S.W.3d 617, 626 (Ky. 2011), the Kentucky Supreme Court discussed the failure to name an indispensible party to an appeal:

> In an appeal, the notice of appeal is the means by which an appellant invokes the appellate court's jurisdiction. *Stallings*, 795 S.W.2d at 957. Under the appellate civil rules, failure to name an indispensable party in the notice of appeal is "a jurisdictional defect that cannot be remedied." *Id.* Neither the doctrine of substantial compliance nor the amendment of the notice after time had run could save such a defective notice because the appellant "cannot ... retroactively create jurisdiction.

In *Clemons v. Commonwealth*, 152 SW3d 256 (Ky. App. 2004), this Court's jurisdiction was properly invoked when both the defendant and the surety were named parties to the appeal. While not discussed by the *Clemons* Court, we

[1] We note that while not specifically argued by the parties, we are required to address the lack of jurisdiction *sua sponte* if necessary. *See Kentucky High School Athletic Ass'n v. Edwards,* 256 S.W.3d 1, 4 (Ky. 2008):

> Finally, it should be noted that neither of the parties has objected on the basis of a lack of jurisdiction. This Court, however, is required to address the issue *sua sponte* if necessary. *See Hook v. Hook,* 563 S.W.2d 716, 717 (Ky.1978) ("Although the question is not raised by the parties or referred to in the briefs, the appellate court should determine for itself whether it is authorized to review the order appealed from.").

believe that such a template is the logical application of our jurisprudence regarding bond forfeiture.

RCr 4.42 discusses procedurally both the defendant and the defendant's surety:

> (1) If at any time following the release of the defendant and before the defendant is required to appear for trial the court is advised of a material change in the defendant's circumstances or that the defendant has not complied with all conditions imposed upon his or her release, the court having jurisdiction may order the defendant's arrest and require the defendant or the defendant's surety or sureties to appear and show cause why the bail bond should not be forfeited or the conditions of release be changed, or both.
> (2) A copy of said order shall be served on the defendant and the defendant's surety or sureties. The court shall order the arrest of the defendant only when it has good cause to believe the defendant will not appear voluntarily upon notice to appear.
> (3) Where the court is acting on advice that the defendant has not complied with all conditions imposed upon his or her release, the court shall not change the conditions of release or order forfeiture of the bail bond unless it finds by clear and convincing evidence that the defendant has willfully violated one of the conditions of his or her release or that there is a substantial risk of nonappearance.
> (4) Where the court is acting on advice of a material change in the defendant's circumstances, it shall not change the conditions of release or order forfeiture of the bail bonds unless it finds by clear and convincing evidence that a material change in circumstances exists and that there is a substantial risk of nonappearance.
> (5) Before the court may make the findings required for change of conditions or forfeiture of bail under this rule, the defendant and the defendant's surety or sureties shall be granted an adversary hearing comporting with the requirements of due process. Whenever the court changes conditions of release (except upon motion of the

> defendant) or orders forfeiture of bail, it must furnish the defendant and the defendant's surety or sureties with written reasons for so doing.

See also RCr 4.48 and Kentucky Revised Statutes (KRS) 431.545 (notice to both the defendant and his surety). Indeed, our Rules of Criminal Procedure and our statutes require notice to both the defendant and his surety or sureties. Such a designation recognizes that both parties are necessary for the court to exercise its jurisdiction. Therefore, we must dismiss the portion of McManomy's appeal concerning forfeiture of the bond because his surety is not a party to this appeal, thereby rendering this Court without jurisdiction to hear such a claim for failure to name an indispensible party.

In light of the aforementioned, we affirm in part, and dismiss that part of the appeal concerning the forfeiture of the bond.

ALL CONCUR.

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