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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001833-MR

JOSEPH GOREE — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NOS. 11-CR-00014 & 11-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Joseph Goree, appeals from an order of the Pendleton Circuit Court denying his motion to withdraw his guilty pleas to possession of a firearm by a convicted felon, first-degree assault, first-degree wanton endangerment, and fourth degree assault. Finding no error, we affirm.

On April 20, 2011, Appellant was indicted by a Pendleton County Grand Jury for two counts of first-degree wanton endangerment, first-degree

assault, and fourth-degree assault. In a second indictment handed down the same day, Appellant was also indicted for possession of a handgun by a convicted felon. All charges stemmed from a domestic incident that occurred in February 2011, during which Appellant shot his sister and threatened other family members.

During the pendency of the proceedings, defense counsel attempted to negotiate a plea deal with the Commonwealth resulting in a fifteen year offer and a subsequent twelve year offer, both of which Appellant rejected. On September 7, 2011, when the parties appeared for a final pretrial conference prior to the scheduled trial date the following week, the Commonwealth offered to recommend a sentence of ten years' imprisonment in exchange for a plea of guilty on all charges. It was understood that Appellant would have to serve eighty-five percent of the sentence pursuant to the violent offender statute. Appellant's case was moved

to the end of that day's docket to permit defense counsel to discuss the offer with Appellant. Thereafter, Appellant appeared in open court with counsel and entered a guilty plea to all charges. The trial court conducted the required plea colloquy wherein Appellant acknowledged that he was fully advised of his rights and understood the charges to which he was voluntarily pleading guilty. The trial court accepted Appellant's guilty plea but postponed sentencing pending the completion of a presentence investigation report.

On October 13, 2011, however, Appellant filed a motion to withdraw his guilty plea on the grounds that it was not knowingly, intelligently and

voluntarily entered. Therein, Appellant acknowledged that his counsel fully discussed with him all of the possible outcomes if the case went to trial, including the fact that the maximum possible sentence he could receive was thirty-five years' imprisonment, and further advised him that the Commonwealth's plea offer was in his best interest. Nevertheless, Appellant claimed that he was forced to make an immediate decision on September 7th as to whether to accept the plea deal and, as a result, did not have sufficient time to consider the consequences of entering a guilty plea.

The trial court conducted a hearing on Appellant's motion on November 2, 2011. Appellant testified that his trial counsel told him on September 7th that if he did not immediately accept the plea, he would receive thirty-five years imprisonment if the case went to trial. Further, Appellant claimed that he knew he did not want to plead guilty at the time he entered the plea and engaged in the colloquy with the trial court but that he felt threatened and coerced to do so.

Appellant's trial counsel also appeared at the hearing and testified that he and Appellant fully discussed all of the possible options and that he did, in fact, tell Appellant that he believed accepting the deal was in Appellant's best interest given the evidence against him. However, counsel unequivocally denied telling Appellant that a jury would recommend the maximum sentence at trial if he did not plead guilty. Finally, counsel stated that although Appellant was required to make a decision in a short time period, as September 7th was the final hearing before the trial was to begin the following week, counsel did not perceive any doubt on the

part of Appellant and believed that he knowingly and voluntarily entered his guilty plea.

At the conclusion of the hearing, the trial court ruled that based upon the testimony presented, as well as its plea colloquy with Appellant, that his guilty plea was voluntarily, knowingly, and intelligently made. The trial court commented that last minute plea negotiations are not uncommon in criminal matters and that, to some extent, any defendant at a final pretrial hearing feels pressure to make a decision as to whether to proceed to trial or accept a plea. The trial court noted that scheduling a final hearing before a pending trial date is "by design" to aid in the resolution of cases; if there is no pressure of some sort, no decisions are made. However, the trial court concluded that Appellant understood all of his options at the time of the plea and entered such based upon what he thought was in his best interest. Appellant's subsequent desire to withdraw the plea was not based upon any misunderstanding or misinformation, but rather his general dissatisfaction, after the fact, with his attorney. As such, the trial court determined that although it had the discretion under RCr 8.10 to grant Appellant's motion, it did not believe that the testimony at the hearing nor any evidence of record warranted exercising that discretion.

On November 9, 2011, a final judgment was entered sentencing Appellant to a total of ten years' imprisonment in accordance with the plea agreement. Appellant thereafter appealed to this Court as a matter of right.

When a criminal defendant pleads guilty, RCr 8.10 requires the trial court receiving the guilty plea to determine on the record whether the defendant is knowingly, freely, and voluntarily pleading guilty. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). Further, the trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. *Bronk*, 58 S.W.3d at 487.

Once a criminal defendant has pled guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. To be entitled to relief under RCr 8.10, the defendant "must allege with particularity specific facts which, if true, would render the plea involuntary under the Fourteenth Amendment's Due Process Clause, would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid." *Commonwealth v. Pridham*, 394 S.W.3d 867, 874 (Ky. 2012), *cert. denied, Cox v. Kentucky*, ___ U.S. ___ (Oct. 7, 2013) (*Citing Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001)). If the plea was involuntary, the motion to withdraw it must be granted. *Rodriguez,* 87 S.W.3d at 10. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. *Id.* When a trial court denies a defendant's motion to withdraw his guilty plea, this Court will not reverse the denial unless the trial court has abused its discretion. *Bronk*, 58 S.W.3d at 487. A trial court has abused its discretion when its actions were

arbitrary and capricious under the circumstances. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). A court acts arbitrarily and capriciously when its actions are not supported by substantial evidence. *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 85 (Ky. 2001).

Appellant first argues that his plea was not knowing and voluntary because he was pressured to make a decision without adequate time to consider the consequences and counsel threatened that he would receive the maximum sentence if the case went to trial. We find this argument to be without merit.

Appellant's claim must be considered under the general test for the validity of guilty pleas. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). The validity of a guilty plea under this standard depends "upon the particular facts and circumstances ... including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Or as our Supreme Court has stated, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978) (*Citing Brady*, 397 U.S. at 749, 90 S.Ct. at 1469). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the

defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 112 (1970).

Appellant's claim of involuntariness is simply not supported by the record. He was fully aware of all the evidence that was available at the time of his plea and, as the trial court found, there is no evidence that he did not understand the charges against him. There is no suggestion that the trial court failed to engage in an appropriate colloquy, as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), when Appellant entered his plea of guilty. Furthermore, when considering Appellant's subsequent motion to withdraw his plea, the trial court reviewed the record of Appellant's guilty plea and the *Boykin* colloquy, and reiterated its finding that under the totality of the circumstances Appellant's plea was knowing, intelligent, and voluntary.

The simple fact that a defendant would make a different decision at a later time does not render the earlier guilty plea involuntary; otherwise, the validity of most guilty pleas would potentially be challenged after defendants come to understand the reality of incarceration. Hindsight alone does not render the guilty plea unintelligent and involuntary. As a factual finding, the trial court's determination of the voluntariness of Appellant's plea is subject to review only for clear error, that is, whether the decision was supported by substantial evidence. Given the totality of the circumstances we conclude the trial court's finding in this regard was supported by substantial evidence and therefore not clearly erroneous.

Appellant next argues that even if a plea is voluntarily entered, RCr 8.10 grants the trial court the discretion to allow a defendant to withdraw the plea. Appellant contends that the trial court herein abused such discretion and that its decision not to allow him to withdraw his plea was arbitrary, unreasonable, unfair, and unsupported by legal principles. We disagree.

Appellant contends that once he established a fair and just reason for withdrawing his guilty plea, the burden shifted to the Commonwealth to establish what, if any, prejudiced resulted from its reliance on Appellant's plea. However, Appellant cites no law or precedence to support such a proposition and we find none. We are of the opinion that the trial court was in the best position to evaluate Appellant's and trial counsel's testimony and determine who was more credible. The trial court evaluated Appellant's grounds for seeking to withdraw his motion and determined that such did not warrant relief. We believe that Appellant has shown no compelling reason for us to second-guess the trial court's decision. As a panel of this Court held in *Kennedy v. Commonwealth*, 962 S.W.2d 880 (Ky. App. 1997),

> It is not the function of this court upon review to second-guess the wisdom of permitting the plea bargaining process. It exists as a matter of judicial practice in order to expedite the disposition of heavy criminal dockets. The Commonwealth is assured that an accused will be punished—perhaps to a lesser degree than what might have been the case had it elected to prosecute to the full limit provided by statute. In the interest of either judicial or prosecutorial economy, the Commonwealth may so elect to mitigate punishment in exchange for a negotiated, certain sentence. The

> same balancing process is true for the criminal defendant. He may "make a deal" for a lesser punishment that is ascertainable rather than risk the full panoply of reprisals that might result from a trial on the merits.

As noted above, the trial court's ability to deny a motion to withdraw a guilty plea arises only after the plea has been shown to be voluntary. Once that showing is made, however, the decision to grant or deny the motion falls firmly within the trial court's discretion. *Rodriguez*, 87 S.W.3d at 10. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999). The trial court herein concluded that Appellant's testimony was neither credible nor supported by any evidence of record. Based upon the totality of the circumstances, we conclude that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea.

The order of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

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