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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002172-MR

GARY BARNETT APPELLANT

v.

APPEAL FROM ROBERTSON CIRCUIT COURT
HONORABLE ZARING P. ROBERTSON, JUDGE
ACTION NO. 12-CR-00003

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Gary Barnett, appeals from an order of the Robertson Circuit Court denying his motion to withdraw his guilty plea. Finding no error, we affirm.

In February 2011, Appellant was indicted by a Robertson County Grand Jury for seventeen counts of third-degree terroristic threatening, one count of first-degree attempted burglary, one count of first-degree wanton endangerment,

and one count of murder. Pursuant to a plea agreement, Appellant appeared before the Robertson Circuit Court on September 10, 2012, and pled guilty to an amended charge of first-degree manslaughter, first-degree wanton endangerment, and seventeen counts of third-degree terroristic threatening. In exchange for the plea, the Commonwealth recommended a sentence of eighteen years' imprisonment. Appellant was represented by private counsel, Gwen Pollard, and informed the trial court during the plea colloquy that he had reviewed the plea documents, that he had no questions, and that he was voluntarily relinquishing his rights to a jury trial and appeal. Appellant further acknowledged that he would have to serve at least eighty-five percent of his sentence, a minimum of fifteen years. The trial court accepted Appellant's plea but postponed sentencing pending preparation of a presentence investigation report.

Approximately two months later, Appellant informed the trial court that he had discharged Ms. Pollard, was obtaining new counsel, and that he wished to withdraw his guilty plea. At a December 10, 2012, hearing Appellant appeared with new counsel. Appellant testified that his guilty plea was involuntary because he did not understand the elements of the charged offenses or any possible lesser-included offenses. Appellant claimed that Ms. Pollard pressured him to accept the plea deal because she was not prepared and if the case went to trial he would likely be sentenced to life imprisonment. Appellant conceded that although Ms. Pollard did explain that first and second-degree manslaughter were lesser-included offenses of murder, she did not tell him that a jury could also find him guilty of

reckless homicide or acquit him of all charges. As such, Appellant claimed he felt "hopeless" and that he had no other choice than to plead guilty. However, when asked whether he was forced to plead guilty he responded, "No, I done that on my own."

Ms. Pollard also appeared at the hearing and testified that she and Appellant had discussed all lesser-included offenses of murder including reckless homicide. The record confirms that Ms. Pollard specifically spoke with the Commonwealth's attorney about reckless homicide but the best agreement that could be reached was first-degree manslaughter. Ms. Pollard unequivocally claimed that Appellant fully understood his options and decided to accept the plea offer because it was in his best interest.

On December 14, 2012, the trial court entered an order denying Appellant's motion to withdraw his guilty plea, finding that there was no evidence that Appellant did not understand the charges against him or that his plea was involuntary. The trial court noted that Appellant discussed the plea form with Ms. Pollard and that he was fully informed of all of his rights. Further, the trial court stated that prior to accepting the plea, it had engaged in a colloquy with Appellant and confirmed that he understood the charges to which he was pleading guilty, and that he was voluntarily waiving his rights to a trial and appeal. As such, the trial court concluded that Appellant knowingly and voluntarily entered his guilty plea. 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, even though he believed at the time of the plea he understood all relevant information, had he been aware of the possibility of either being found guilty of only reckless homicide or being acquitted he would have gone to trial. Although acknowledging that he was not physically coerced into pleading guilty, he contends that his plea was nonetheless made under duress because he assumed he had no other choice. 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. Appellant all but admits that at the time he entered his guilty plea, it was intelligently and voluntarily made. That is all that is required. Subsequent events that do not conform to a defendant's expectations do

not automatically render an otherwise voluntary and intelligent guilty plea 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 has shown no compelling reason for us to second-guess the trial court in denying his motion to withdraw the guilty plea. The trial court was in the best position to evaluate Appellant's and Ms. Pollard's testimony and determine who was more credible. Further, as the Commonwealth points out, Appellant offered no evidence to establish why Ms. Pollard's failure to inform him of reckless homicide, if indeed she did fail to do so, prejudiced his case. In fact, although Appellant makes the broad claim that he would have gone to trial had he been aware of the potential for a reckless homicide offense, he fails to set forth any facts to justify that he would have even been entitled to such lesser-included instruction had his case gone to trial. Significantly, during the hearing the trial court stated,

> Just because [reckless homicide is] potentially a lesser-included offense of a charge does not mean it will ever come in to play in a particular case, in my opinion, because nobody has stated anything, evidentiary wise, that would indicate that it ever would have been.

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 Robertson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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