

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001427-MR

DELMAR WASH

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 14-CR-00407

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Delmar Wash brings this belated appeal from a July 23, 2015, Order of the Hardin Circuit Court denying his motion to withdraw guilty plea.¹ We affirm.

¹ On September 16, 2015, Delmar Wash filed a Motion for Belated Appeal in the Court of Appeals, and the Court granted the motion by Order entered November 16, 2015.

On July 3, 2014, the Hardin County Grand Jury indicted Wash upon the offenses of sodomy in the first degree (Kentucky Revised Statutes (KRS) 510.070), incest (KRS 530.020), and sexual abuse (KRS 510.110). Eventually, the Commonwealth offered Wash a plea agreement. On April 2, 2015, Wash signed a document entitled “Commonwealth’s Offer on a Plea of Guilty” (plea offer). Under the terms of the plea offer, the Commonwealth recommended a total sentence of twelve-years’ imprisonment with parole eligibility after serving 85 percent of the sentence.

After Wash signed the plea offer, he formally entered a guilty plea which the circuit court accepted by order entered April 3, 2015. Before final sentencing, Wash filed a *pro se* motion to withdraw his guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10. In the motion to withdraw, Wash claimed that defense counsel grossly misadvised him concerning parole eligibility and affirmatively informed him that he would be eligible for parole after serving only 20 percent of the twelve-year sentence. According to Wash, he discovered that he would, in fact, be parole eligible after serving 85 percent of the sentence only after entering the guilty plea.

The circuit court conducted an evidentiary hearing on July 13, 2015. Wash was represented by substitute defense counsel. Two witnesses testified – Wash’s original defense counsel and Wash. Their testimonies were directly contradictory upon the issue of counsel’s advice concerning parole eligibility.

After the evidentiary hearing, by order entered July 23, 2015, the circuit court denied Wash's motion to withdraw the guilty plea. By judgment and sentence on plea of guilty also entered on July 23, 2015, the circuit court sentenced Wash to a total of 12 years imprisonment. Consistent with the terms of the plea offer, Wash was required to serve 85 percent of the sentence before becoming parole eligible. This belated appeal follows.

Wash contends that the circuit court erred by denying his motion to withdraw guilty plea. For the reasons hereinafter stated, we disagree.

To withdraw a guilty plea, a defendant may file a motion pursuant to RCr 8.10, which provides:

At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report.

Under RCr 8.10, a well-recognized ground for withdrawing a guilty plea is ineffective assistance of counsel. *Greene v. Com.*, 475 S.W.3d 626 (Ky. 2015).

To prevail, a defendant must demonstrate that counsel's performance was deficient and that there exists a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Com. v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (quoting *Premo v. Moore*, 562 U.S. 115, 131, S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011)). The Supreme Court has specifically held that counsel's misadvice concerning the application of an extended period of parole ineligibility under the violent offender statute (KRS 439.3401) renders a guilty plea invalid as it was not knowingly and intelligently entered. *Pridham*, 394 S.W.3d 867.

In its order denying Wash's motion to withdraw, the circuit court found that counsel did not misinform Wash concerning the 85 percent parole eligibility requirement:

5. At the July 13, 2015[,] hearing, McIntosh testified that he was Wash's attorney at the time of the guilty plea. McIntosh was retained by Wash in February 2015. McIntosh testified that, shortly after being retained, he discussed the case with Wash at the Hardin County Detention Center. McIntosh testified that the maximum sentence was for forty-five years if Wash were convicted. McIntosh testified that he informed Wash that the Commonwealth's current offer was fifteen years at 85% parole eligibility but that he would attempt to get the offer down to ten years at 20%. McIntosh testified he never guaranteed any certain amount of parole eligibility.

6. McIntosh testified that the Commonwealth then changed its offer to twelve years at 85% parole eligibility and that this was the Commonwealth's best offer. McIntosh testified that he informed Wash that the

Commonwealth would seek the maximum sentence if the case went to trial. McIntosh testified he informed Wash that, with a twelve-year sentence at 85% parole eligibility, he would be parole eligible within approximately ten years. McIntosh testified that he informed Wash he would probably not be released on parole but would ideally be released at ten years with good time credit. McIntosh testified that he informed Wash he would also get credit for time served. McIntosh testified that he informed Wash he would be required to complete the sexual offender treatment while in prison. McIntosh testified this treatment usually had a waiting list of approximately two years and took approximately three years to complete.

7. Wash testified that McIntosh stated “off the record” that Wash would be parole eligible within five to seven years if he took the Commonwealth’s deal. . . . Wash testified he felt pressured to take the deal as McIntosh informed him that the Commonwealth would seek the maximum penalty if the case went to trial. Wash testified he never “did the math” regarding parole eligibility until after he took the deal. Wash testified that he has a bachelor’s degree in criminal justice.

. . . .

Wash was placed under oath when he entered his guilty plea. Such sworn statements, while not conclusive, “carry a strong presumption of verity.” *Johnson v. Commonwealth*, 412 S.W.3d 157, 168 (Ky. 2013). Review of the plea colloquy shows that Wash was satisfied with his plea and his attorney’s work and understood the parole eligibility guidelines. At the hearing, Wash stated he understood at the time of his plea that parole was never guaranteed and that he may have to serve his entire twelve-year sentence.

There is a dispute of fact as to what McIntosh told Wash regarding his parole eligibility. As the finder of fact, the Court determines McIntosh to be the more

credible witness. McIntosh's testimony shows that he never promised Wash would be parole eligible within five to seven years and fully informed Wash of the 85% parole eligibility. Wash's testimony shows that he is an educated individual capable of performing rudimentary mathematics. Based on the totality of the circumstances, Wash has failed to demonstrate that his plea was anything less than voluntary.

July 23, 2015, Order at 2-6. The circuit court specifically found that counsel correctly informed Wash that he would only be parole eligible after serving 85 percent of his twelve-year sentence. This finding was supported by defense counsel's testimony at the hearing and, thus, is not clearly erroneous. And, while Wash's testimony was directly contradictory, judging the credibility of a witness is within the sole province of the circuit court, and the circuit court viewed defense counsel as the more credible witness. Moreover, the plea offer that Wash signed specifically stated that parole eligibility would be at 85 percent. As to Wash's ability to understand the terms of the plea offer, we observe that Wash holds a bachelor degree in criminal justice. Based upon the totality of the circumstances, we cannot conclude that the circuit court abused its discretion by denying Wash's motion to withdraw guilty plea. *See Williams v. Com.*, 229 S.W.3d 49 (Ky. 2007).

For the foregoing reasons, the Order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky