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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001885-MR

JOEL CATLETT — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NO. 14-CR-00315

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JOHNSON, AND TAYLOR, JUDGES.

JOHNSON, JUDGE: Joel Catlett appeals from the Christian Circuit Court's judgment and sentence entered September 16, 2015, following the court's denial of his *pro se* motion to withdraw his guilty plea. We AFFIRM.

BACKGROUND

The events of this case stem from an incident of gunfire in the streets of Hopkinsville on May 7, 2014. An individual, later identified by the victims as Catlett, fired upon an orange Dodge Neon with four people inside the vehicle.

Three of these individuals suffered gunshot wounds. Following police investigation, the Christian County grand jury indicted Catlett on three counts of first-degree assault[1] and one count of first-degree wanton endangerment.[2]

Catlett thereafter negotiated a guilty plea whereby the Commonwealth would amend two of the three first-degree assault charges to second-degree assault[3] and would recommend a concurrent term of ten years' incarceration on all charges. He signed the Commonwealth's plea offer agreeing to these terms as well as the motion to enter a guilty plea. Catlett also signed a separate and confidential "memorandum of understanding" as part of the plea arrangement. The memorandum provided, *inter alia*, if Catlett complied with certain other conditions (the exact terms and conditions are sealed and not relevant to resolution of the case *sub judice*), his last charge of first-degree assault would be amended to second-degree assault. This distinction was important to Catlett because first-degree assault is considered a violent offense under Kentucky statutes, whereas second-degree assault is not. KRS 439.3401(1)(c) states, "As used in this section, 'violent offender' means any person who has been convicted of or pled guilty to the commission of . . . [a] Class B felony involving the death of the victim or serious physical injury to a victim." Although the term of ten years would remain unchanged on its face, a violent offense conviction would require Catlett to serve

[1] Kentucky Revised Statutes (KRS) 508.010, a Class B felony.

[2] KRS 508.060, a Class D felony.

[3] KRS 508.020, a Class C felony.

eighty-five percent of his sentence before becoming eligible for parole. KRS 439.3401(3)(a) states, "A violent offender who has been convicted of a . . . Class B felony shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." The memorandum stipulates that Catlett's original plea agreement, with its remaining single charge of first-degree assault, would be enforced if he was unable to comply with the terms of the memorandum. Catlett signed the memorandum agreeing to these provisions. Unfortunately, he was later unable or unwilling to fulfill the terms provided by the memorandum of understanding.

Approximately three months after agreeing to the plea offer and memorandum, and failing to perform according to the memorandum, Catlett filed a *pro se* motion to withdraw his guilty plea. In a private hearing held in chambers, defense counsel permitted Catlett to assert his motion before the Commonwealth and the court. Catlett argued he should be permitted to withdraw his plea because he had not personally viewed the discovery, relying instead upon defense counsel's representations regarding the evidence. Catlett explicitly declined to assign wrongdoing to his defense counsel in this regard. However, he wanted to see the X-ray of the victim's injury. Catlett indicated he wished to ensure his first-degree assault charge was indeed supported by evidence of "serious physical injury" suffered by the victim, a requirement under KRS 508.010.

At this point, the Commonwealth pointed out that the victim still had a bullet lodged in her, which her doctors could not remove because of the risk of

nerve damage. The victim still suffered a great deal of pain, more than one year after the shooting. Under these circumstances, the Commonwealth asserted the plea offer containing the first-degree assault charge was "more than fair." The Commonwealth also emphasized Catlett's plea was entered knowingly, voluntarily, and intelligently.

After hearing these and other arguments, the court elected to defer Catlett's sentencing and its ruling on the *pro se* motion, allowing time for Catlett to view the X-ray for himself. The court also stated, however, that it had heard nothing to indicate the plea was not knowingly, voluntarily, and intelligently entered. The court then informed Catlett when he returned in a few weeks, he could either withdraw his motion to withdraw the guilty plea, or the court would rule on the motion at that time.

At the subsequent hearing, held September 9, 2015, the court was informed by defense counsel that Catlett had filed another *pro se* motion, this one to relieve him of his current counsel. The court stated the current matter was with regard to the withdrawal of the guilty plea, and inquired as to whether Catlett had viewed the X-ray. Defense counsel affirmed Catlett did get to view the X-ray. Catlett stated there was other evidence he had yet to see in this case – he wanted to see "all" of the medical evidence. At this point, the Commonwealth asserted that Catlett's current statements were in direct contradiction to what he swore in his plea colloquy and he had no basis to withdraw his guilty plea. The court then denied Catlett's motion, finding the guilty plea was knowingly, voluntarily, and

intelligently made. The court then proceeded directly to judgment, sentencing Catlett to a concurrent term of ten years' imprisonment, in accord with his plea agreement. This appeal follows.

STANDARD OF REVIEW

Catlett presents two issues on appeal. For his first issue, he argues the circuit court erred by denying the motion to withdraw his guilty plea. RCr[4] 8.10 provides, in relevant part, as follows: "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." The Kentucky Supreme Court provides the following standard of review for denial of a motion to withdraw a plea:

> To be valid, a plea must be knowing, intelligent and voluntary, and a trial court shall not accept a plea without first determining that it is made voluntarily with understanding of the nature of the charge. . . . A motion to withdraw a plea of guilty under RCr 8.10 is generally addressed to the sound discretion of the court; however, where it is alleged that the plea was entered involuntarily the defendant is entitled to a hearing on the motion. If the plea was involuntary, the motion to withdraw it must be granted; if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles. The inquiry into the circumstances of the plea as it concerns voluntariness is inherently fact-sensitive. Accordingly, the trial court's determination as to whether the plea was voluntarily entered is reviewed under the clearly erroneous standard.

Williams v. Commonwealth, 229 S.W.3d 49, 50-51 (Ky. 2007) (citations omitted).

[4] Kentucky Rules of Criminal Procedure.

ANALYSIS

Here, Catlett argues his plea was not "intelligent," because he did not have the opportunity to review the evidence. He further argues his plea was not "voluntary," because it was carried out against his will. We disagree with both contentions.

> A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court. A guilty plea is intelligent if a defendant is advised by competent counsel regarding the consequences of entering a guilty plea, including the constitutional rights that are waived thereby, is informed of the nature of the charge against him, and is competent at the time the plea is entered.

Edmonds v. Commonwealth, 189 S.W.3d 558, 566 (Ky. 2006) (citations omitted). Prior to taking his plea, the circuit court engaged Catlett in a very thorough plea colloquy in accord with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Among other things, Catlett swore an oath to the following: his testimony was truthful; he was not under the influence of alcohol or drugs, and thus able to think clearly; he wished to go forward with this plea; he affirmed the plea was given of his own free will, after consultation with defense counsel; he had no complaints about defense counsel; he was guilty of the pleaded offenses; he acknowledged signing the plea offer form and the motion to enter his guilty plea; and he had no questions about entry of the plea. Therefore, Catlett was fully informed about the nature of his rights he was waiving, was represented by

competent counsel, and was competent at the time he entered the plea. These factors render his plea an "intelligent" one under *Edmonds*.

With regard to voluntariness, the record reflects that Catlett also had "full awareness" of the consequences of his plea. "[A] defendant who expressly represents in open court that his guilty plea is voluntary may not ordinarily repudiate his statements to the sentencing judge." *Edmonds*, 189 S.W.3d at 568 (citation and internal quotation marks omitted). Catlett was completely aware of the consequences of his plea, to the point where the sentencing distinction between first- and second-degree assault was a major factor in his negotiations with the Commonwealth. It was not clearly erroneous for the court to find Catlett's plea to have been voluntary. Furthermore, "[a] change of heart—even a 'good faith change of heart'—is not a fair and just reason that entitles [one] to withdraw his plea." *Commonwealth v. Pridham*, 394 S.W.3d 867, 885 (Ky. 2012) (citation omitted). We therefore decline to find abuse of discretion in the circuit court's denial of Catlett's motion to withdraw his guilty plea.

For his second argument, Catlett contends he should have been permitted to withdraw his guilty plea because his defense counsel was laboring under a conflict of interest at the hearing on his *pro se* motion, citing *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015). Catlett concedes the argument was not preserved below and asks for review pursuant to *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010). "[A] defendant who raised no objection at trial must demonstrate that an *actual conflict of interest* adversely

affected his lawyer's performance." *Id*. at 646 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)) (emphasis added).

We find *Tigue* distinguishable on the facts from this case. The *Tigue* case involved allegations that defense counsel made actual threats to discontinue defense of the client if the client did not take the plea. Consequently, in the evidentiary hearing on the motion to withdraw the guilty plea, Tigue's counsel placed himself in a position of either admitting the truth of his client's allegations, and therefore stating he committed ethical violations, or else denying he committed the acts, and therefore contradicting his client. *Tigue*, 459 S.W.3d at 388. The attorney's interests were thus directly antithetical to those of his client. The Kentucky Supreme Court found Tigue's counsel was "burdened by an actual conflict of interest." *Id*.

Catlett makes no similar claims of threats or coercion. Indeed, Catlett even admitted in his initial hearing on the motion that he did not necessarily blame his lawyer. Although defense counsel explained his defensive strategies and negotiations with the Commonwealth before the court, he did not take an adversarial position with regard to Catlett's motion in doing so. Catlett's defense counsel facilitated Catlett's expressed wishes to the circuit court and gave him the opportunity to examine the medical evidence himself, following the hearing on his *pro se* motion. The situation certainly contained the *potential* for conflict, but it did not ripen into and there was no *actual* conflict. *See Kirkland v. Commonwealth*,

53 S.W.3d 71, 74-75 (Ky. 2001). Because no "actual conflict of interest adversely affected his lawyer's performance," *Beard*, 302 S.W.3d at 646, we find no error.

For the foregoing reasons, we AFFIRM the Christian Circuit Court.

ALL CONCUR.

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