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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000836-MR

KENNY WAYNE COLLINS — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 13-CR-00013-002

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2016-CA-000837-MR

KENNY WAYNE COLLINS — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 13-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant Kenny Wayne Collins appeals from the Clay Circuit Court denying his motion to withdraw his guilty plea. As the evidence of record shows the court did not abuse its discretion, we affirm.

Background

On March 20, 2013, Collins was indicted by a grand jury on one count of first-degree unlawful transaction with a minor and one count of criminal complicity to commit murder. Additionally, on April 3, 2013, Collins was indicted on one count of second-degree trafficking in a controlled substance. In the first indictment, the Commonwealth offered to amend the murder charge to second-degree manslaughter and to dismiss the unlawful transaction with a minor charge. The Commonwealth recommended ten years on the manslaughter charge to run consecutive to a one-year sentence on the trafficking in a controlled substance charge.

On September 22, 2015, Collins took the Commonwealth's offer and pled guilty to second-degree manslaughter and second-degree trafficking in a controlled substance, while the unlawful transaction with a minor charge was dismissed. At this hearing, the trial court conducted a plea colloquy. During the plea colloquy, Collins explained that he could not read or write but answered that

his attorney had explained the charges to him. The court explained that by accepting a plea Collins was waiving his right to a bench or jury trial and waiving his right to an appeal. Collins stated he did not need additional time to speak with his attorney and that he was satisfied with his attorney. His responses were mostly "I think so," but his answers were affirmative.

Sentencing was scheduled for January 2016. On October 30, 2015, Collins, through counsel, filed a motion to withdraw his guilty pleas. His counsel also asked to withdraw because part of Collins's reasons for withdrawing his pleas implicated his representation. Collins was appointed new counsel and on February 29, 2016, a hearing was held on his motion. At the hearing, Collins contended that his pleas were not voluntary. In support of this, he explained that his previous counsel "had [him] thinking [he was] going to get 20 to 50 years. 85%. [And he didn't] feel like [he] would today."

He also alleged that his counsel had his mother come to the jail and beg him to take the pleas by telling him she would be dead by the time he got out. Additionally, he explained that he didn't feel he had much of a chance of being found not guilty because of his previous counsel's age and because his counsel would not subpoena the witnesses he wanted. Finally, Collins testified to having mental health issues for which he had been hospitalized on many occasions, but did not recall if he was on any medications at the plea colloquy. He ultimately said he was "foolish" for taking the pleas and now thinks he would not have been found guilty and sentenced to 20-plus years.

The trial court found that Collins's pleas were entered knowingly, intelligently, and voluntarily. The court denied his motion and this appeal followed.[1]

Standard of Review

We review a trial court's finding that a plea was voluntary under a clearly erroneous standard. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (citation omitted). "A decision which is supported by substantial evidence is not clearly erroneous." *Id*. If the plea was voluntary, a trial court's ruling on a motion to withdraw a voluntary guilty plea is reviewed under an abuse of discretion standard. *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), *citing Commonwealth v. English*, 933 S.W.2d 941, 945 (Ky. 1995). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Analysis

On appeal, Collins contends that his guilty plea was not entered knowingly, intelligently, and voluntarily. He also contends that even if this court finds that his plea was knowingly, intelligently, and voluntarily entered, we have

[1] Collins filed two notices of appeals. The appeals were consolidated for all purposes by Court order entered on October 13, 2016.

the discretion to, and should, grant his request because it is the "fair and just thing to do."

Kentucky Rules of Criminal Procedure (RCr) Rule 8.10 states that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." For a guilty plea to be valid, it must be "entered intelligently and voluntarily." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). In evaluating whether a plea is voluntary, and if counsel is implicated, a trial court is required 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 plead guilty, but would have insisted on going to trial.

Id. at 486-87 (citations omitted). While generally an evidentiary hearing is preferred and necessary to evaluate whether counsel was ineffective, it is not always required when evaluating whether a plea was involuntary due to ineffective counsel. *Rigdon*, 144 S.W.3d at 290, *citing Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002).

Reviewing the totality of circumstances revolving around a 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.'" *Bronk*, 58 S.W.3d at 487, *quoting Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990). Additionally, "the validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken[.]" *Id*. (internal quotation marks omitted), *quoting Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

Here, the trial court conducted a plea colloquy on September 22, 2015, which complied with the *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), standard. The trial court informed Collins that by accepting the plea he was waiving his right to a trial and an appeal. The trial court ensured that Collins understood what the Commonwealth was offering and that by accepting the plea he would be guilty of those crimes. The court also asked if Collins felt his counsel was adequate and if he needed more time to speak with his counsel. The court asked other questions as well, ensuring that Collins was not impaired and was making a knowing, voluntary, and intelligent plea.

Collins responded to most of the questions with "yes, I think so." On appeal, Collins points to this equivocal language as demonstrating that he was uncertain about the plea. However, as explained in *Bronk*, there are no magic words that make a plea sufficient. The totality of his answers, including his tone and demeanor, show that his answers were affirmative.

At the February 29, 2016, hearing on the motion to withdraw his guilty plea, Collins raised several factors as supporting his contention that his prior counsel was ineffective. In particular, he pointed to her age and condition, the fact that she would not subpoena the witnesses he wanted called at trial, for emphasizing the lengthy sentence he possibly faced by not taking the plea, and that counsel had his mother come to the jail and beg him to take the plea. None of his allegations concerning his counsel were errors. Furthermore, any alleged errors did not meet the standard of "errors so serious that counsel's performance fell outside the wide range of professionally competent assistance . . . ." *Bronk*, 58 S.W.3d 482 at 486. He also alleged that he has psychiatric problems that made his plea involuntary, but offered no proof of this. At the plea colloquy he stated he was not impaired. The trial court was aware that Collins is unable to read or write, and ensured that Collins was fully informed of the conditions of his plea during the colloquy. Finally, Collins' primary contention is that he now believes he would not be sentenced to such a lengthy sentence by the jury as he did when he took his plea. This is the epitome of "buyer's remorse" and is not sufficient to justify withdrawing a guilty plea or overturning a trial court's finding that a guilty plea should not be withdrawn.

There was substantial evidence supporting the voluntary, knowing, and intelligent nature of the plea. It was therefore not clearly erroneous for the trial court to find that the plea was voluntary. Similarly, it was not an abuse of discretion for the trial court to find that there were "no legal grounds to allow

[Collins] to withdraw his plea." This finding was supported by sound legal principles.

Finally, Collins contends that under Federal Rules of Criminal Procedure Rule 11(d)(2)(B) we may find that his guilty plea should be withdrawn based on him showing "a fair and just reason." We note briefly that Kentucky law regarding the withdraw of pleas is articulated in RCr 8.10. Regardless, even if FRCRP Rule 11 applied, we would see no fair and just reason for allowing Collins' plea to be withdrawn.

Conclusion

For the reasons expressed herein, we affirm the judgment of conviction of the Clay Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

James Havey
Frankfort, Kentucky