

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001738-MR

BILLIE JO THOMPSON

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY D. BURRESS, JUDGE
ACTION NO. 14-CR-00509

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND D. LAMBERT, JUDGES.

CLAYTON, JUDGE: Billie Jo Thompson appeals from a final sentence of imprisonment entered by the Bullitt Circuit Court following her plea of guilty to multiple charges. She argues that the trial court erred in denying her motion to withdraw her guilty plea without conducting an evidentiary hearing.

Thompson was indicted on five counts of second-degree rape and one count of second-degree sodomy after she admitted to having sexual relations with a juvenile. Two psychologists who evaluated Thompson testified at a hearing to determine her competency to stand trial. Defense witness Dr. Eric Drogin, a clinical and forensic psychologist and attorney, testified that Thompson had a sufficient understanding of the nature and potential consequences of the legal proceedings, but that in his opinion, she would not be able to participate rationally in her own defense. He attributed her real problem to an inability to come to terms with and discuss the behaviors in which she was alleged to have engaged. Thompson told Dr. Drogin she suffered a closed head brain injury early in her life. He opined that this injury presented a plausible explanation for her functional deficits.

The Commonwealth's witness, Dr. Beth Johnson, an outpatient evaluator for the Kentucky Correctional Psychiatric Center, testified that Thompson demonstrated signs of malingering during her evaluation. She rated Thompson's verbal and perceptual reasoning skills as "low average," and did not find any intellectual disability that would affect Thompson's capacity to work with her attorney in a rational manner. Dr. Johnson reported that she also conducted a structured interview with Thompson to determine how well she understood the legal process, and explained that Thompson's answers showed that she understood

the nature of the charges against her, understood that the charges were felonies, understood the concepts of guilt and innocence, the roles of the public defender, the Commonwealth's attorney and the judge, the concept of a plea bargain, and appropriate courtroom behavior. After hearing the experts' testimony, the trial court entered an order finding that Thompson was competent to stand trial.

Trial proceedings commenced a week later. After voir dire was completed, defense counsel abruptly moved for a mistrial and continuance, informing the court that Thompson had every one of her teeth pulled the day before, and was medicated with prescription painkillers. Defense counsel told the court he did not "feel comfortable" going forward under the circumstances. The Commonwealth's attorney objected on the grounds that the defense did not present any medical evidence of Thompson's condition. He also noted that although defense counsel had informed him of the dental issue before voir dire, he had announced ready and proceeded through voir dire nonetheless.

The trial court denied the motion, stating that defense counsel had not provided evidence of the degree and nature of the dental procedure and there was no evidence in the record that Thompson was in any way incapacitated or unable to assist in her defense as a result of any medication. Defense counsel offered to have Thompson show the trial court that she had no teeth in order for the court to take judicial notice of the fact, and stated that he could show the court her current

prescriptions, including one for hydrocodone. He reiterated that he still believed she had competency issues and that these were exacerbated by the influence of the pain and medication. He opined that she was “not of sound mind.”

The Commonwealth’s attorney informed the court that one of the key prosecution witnesses, the victim’s father, was seriously ill. He expressed concern that the defense was hoping a delay would prevent the Commonwealth from putting its case together.

The trial court denied the continuance, noting four previous trial-date continuances in the case and questioning why Thompson would have had a voluntary dental procedure performed the day before she was set for trial. The trial court found that her use of hydrocodone that day did not mean that she was not capable of assisting in her own defense and noted that she had behaved appropriately in the courtroom.

The trial commenced. The victim’s father testified that he had noticed Thompson and his son behaving in an affectionate manner. He returned home unexpectedly one day and found her with his son, who was thirteen years of age at the time, locked in the bathroom. It took several minutes before Thompson opened the door. His son was seated on the toilet with his pants down. Thompson claimed to be brushing her teeth. The victim’s father confronted Thompson who admitted

that she had been sleeping with his son. The initial responding officer testified that Thompson told him she had sexual relations with the victim once.

When the parties returned following a break, Thompson entered a plea of guilty. During the guilty plea colloquy, Thompson appeared alert and responded to the trial court's questions without hesitation. When she was asked if she suffered any mental illness or defect that would affect her ability to think and reason, she explained that she was currently in the care of Seven Counties and was taking "all kinds of medications." Thompson also confirmed that she was taking hydrocodone but that it was not affecting her ability to think or reason.

The trial court continued by reciting the specific charges within the indictment and the range of possible penalties. Thompson testified that she understood the charges, the penalties, and that she knew she was not eligible for probation. She also acknowledged the constitutional rights she was relinquishing by entry of the plea. She affirmed that she was pleading guilty because she was guilty of the offenses. She expressed satisfaction with the services of her attorney. The trial court accepted the plea, finding that it had been entered knowingly, voluntarily and intelligently.

Two months later, at the commencement of the sentencing hearing, Thompson's counsel told the trial court that she wanted to set aside her plea, and

had informed him that she was absolutely innocent of the charges and not of sound mind when she entered the plea.

The trial court stated that it was apparent to the court during the guilty plea colloquy that Thompson knew what she was doing, and that the plea was made voluntarily, without pressure. The trial court also found that the plea was made intelligently during the course of the trial as the facts were being presented to the jury.

The trial court issued a written order denying the motion, which stated in part:

The court is not presented with any specific allegation relating to a basis for setting aside the Defendant's guilty plea other than the Defendant now maintains she is not guilty. During the colloquy of the Defendant on February 25, 2016 the Court made a finding the Defendant knowingly, voluntarily and intelligently entered her plea. At that time the Defendant admitted to her guilt in this action.

The sentencing hearing was rescheduled. Thompson appeared with new counsel, who explained that Thompson had suffered brain trauma in a car accident in 1986 when she was fourteen years of age. As a result, she lost her memory, was set back in school, and suffered from slow thinking and judgment. Thompson told the court that what occurred was wrong, that she did not want to harm children, she wanted to complete her treatment and that she was very sorry. She stated that she understood she was being punished for committing sexual

abuse against the victim, but stated that she could not remember the specifics of the incident.

The trial court imposed a total sentence of sixteen years. This appeal by Thompson followed.

Thompson argues that the trial court (1) should have held an evidentiary hearing on her motion to withdraw the guilty plea and (2) should have granted the motion.

Under the terms of Kentucky Rules of Criminal Procedure (RCr) 8.10, a criminal defendant who has pled guilty may withdraw the plea under certain conditions. “If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion.” *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations omitted). The trial court’s determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. *Id.* A decision which is supported by substantial evidence is not clearly erroneous. *Id.* If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. *Id.* A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Id.*

“The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970)). “There must be an affirmative showing in the record that the plea was intelligently and voluntarily made.” *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969)).

Thompson argues that the trial court was required to hold an evidentiary hearing on the motion to withdraw her guilty plea. Defense counsel brought the withdrawal motion orally, without notice, at the sentencing hearing. He did not request a formal evidentiary hearing on the motion. The claim is consequently unpreserved. Thompson has requested palpable error review pursuant to RCr 10.26, which permits unpreserved error to be reviewed if it affected “the substantial rights” of a defendant and resulted in “manifest injustice.” “[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

A trial court is generally required to hold an evidentiary hearing on a properly supported motion to withdraw a guilty plea. “If a Criminal Rule 8.10 motion alleges that the plea was not entered into knowingly, intelligently, or

voluntarily, then the defendant is entitled to an evidentiary hearing to determine the validity of the plea.” *Russell v. Commonwealth*, 495 S.W.3d 680, 683 (Ky. 2016) (citing *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006); *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002)). In the context of post-conviction ineffective assistance of counsel claims, for instance, a hearing is particularly valuable as the trial court is required to delve into the relationship between the defendant and his or her attorney. “Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing.” *Rodriguez*, 87 S.W.3d at 11.

By contrast, in this case, the sole basis for the motion was Thompson’s informing her attorney that she was innocent of the charges and not of sound mind when she entered her plea. “[T]he trial court is free to deny a motion under RCr 8.10 without an evidentiary hearing, ‘if the allegations in the motion are . . . not supported by specific facts[.]’” *Zapata v. Commonwealth*, 516 S.W.3d 799, 801–802 (Ky. 2017) (quoting *Ruano v. Commonwealth*, No. 2014-SC-000469-MR, 2015 WL 9243549, at *2 (Ky. Dec. 17, 2015) (quoting *United States v. Harris–Thompson*, 751 F.3d 590, 603 (8th Cir. 2014) (citation omitted))).

Although Thompson claims that the trial court did not allow her to provide any evidence in the form of testimony or medical records, she did not proffer such

evidence at the time, nor does she specify the nature of this evidence, beyond reiterating that she was taking pain medication for her dental procedure and had earlier raised competency issues. The trial court had already conducted a formal competency hearing and heard extensive testimony about Thompson's mental state from two experts. The trial court was also fully aware of the dental procedure and medications at the time of the entry of the plea.

Thompson also contends that the trial court focused too narrowly on the content of the guilty plea colloquy. "[W]e do not go so far as to say a trial court may always simply rely on its *Boykin* colloquy when faced with a motion to withdraw a guilty plea; but we do say that a defendant must present a colorable argument before a trial court is *required* to hold an evidentiary hearing on the motion to withdraw a guilty plea." *Id.* at 802. Thompson did not provide the trial court with sufficient grounds to justify a hearing.

Under the circumstances, the resolution of this matter without a formal evidentiary hearing was sufficient "for the circuit court to determine the totality of circumstances surrounding [Thompson's] guilty plea." *Rigdon*, 144 S.W.3d at 290. The lack of a formal hearing certainly did not rise to the level of palpable error.

Next, Thompson argues that she should have been allowed to withdraw her plea, urging us to adopt the reasoning of the courts of some of our

sister states, which construe motions to withdraw guilty pleas liberally and grant them freely. *See e.g. State v. Slater*, 966 A.2d 461, 467 (N.J. 2009) (“Before sentencing, courts are to exercise their discretion liberally to allow plea withdrawals.”); *Commonwealth v. Carrasquillo*, 115 A.3d 1284, 1287 (Pa. 2015) (“a presentence motion to withdraw a guilty plea should be granted if supported by a fair and just reason and substantial prejudice will not inure to the Commonwealth[.]”); *State v. Bollig*, 605 N.W.2d 199, 206 (Wis. 2000) (“a circuit court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced.”). She also relies on Federal Rules of Criminal Procedure 11(d)(2)(B), which allows withdrawal of a guilty plea if the movant can “show a fair and just reason for requesting the withdrawal.”

Her reliance on these precedents is misplaced. “[A]s an intermediate appellate court, this Court is bound by established precedents of the Kentucky Supreme Court. SCR [Kentucky Supreme Court Rules] 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court.” *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000) (internal citation omitted). Kentucky’s highest court has emphasized, without qualification, that “[a]t its heart, a motion to withdraw a voluntarily entered guilty plea is an appeal to the discretion of the trial court.” *Greene v. Commonwealth*,

475 S.W.3d 626, 630 (Ky. 2015). Our review of the trial court’s decision must proceed under that standard.

Thompson’s mental state was the subject of a competency hearing at which defense expert Dr. Drogin testified that she understood the nature and consequences of the proceedings. Thompson’s replies to the trial court’s questions throughout the pre- and post-trial proceedings were coherent and cogent. The trial court was familiar with her alleged mental issues as well as with the compelling evidence of the Commonwealth’s case, which had proceeded to trial. Under the circumstances, the trial court’s decision to deny the withdrawal motion was not arbitrary, unreasonable, unfair or unsupported by sound legal principles.

For the foregoing reasons, the final sentence of imprisonment is affirmed.

ALL CONCUR.

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