

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001991-MR

THOMAS E. CARTER

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 14-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: KRAMER, NICKELL, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Thomas E. Carter appeals from a judgment of the

Breckinridge Circuit Court denying his motion to withdraw his guilty plea.¹

¹ Carter also entered a guilty plea in Breckinridge Case Number 17-CR-00082. That case was presented as an Information. The offenses in 17-CR-00082 arose from the same incident as the instant action. Carter's pleas were entered separately, but on the same date. Carter does not appeal action number 17-CR-00082. He was sentenced to twelve years' incarceration in that case, to be served consecutively with the instant action, for a total of twenty-two years' imprisonment.

Having reviewed the arguments of the parties, the record and the applicable law, we find no reversible error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Carter was indicted by a grand jury on November 6, 2014. The indictment contained three counts: assault in the first degree; assault in the fourth degree; and persistent felony offender (PFO) in the second degree. The allegations in the indictment were that Carter intentionally caused serious physical injury to victim Jeremy Harper by repeatedly hitting him with a wooden club. Carter also intentionally caused minor physical injury to Karen Harper (Jeremy's mother and Carter's paramour at the time) by striking her with his hand.

The case moved slowly on the trial court's docket. Carter, both through counsel and *pro se*, filed numerous motions. Defense counsel requested a competency evaluation pursuant to RCr² 8.06 and KRS³ 504.100. The trial court granted the motion. After the Kentucky Correctional Psychiatric Center conducted competency and criminal responsibility evaluations, the trial court held a hearing and found that Carter was competent to stand trial. Defense counsel also moved to suppress Carter's murder conviction in the state of Indiana in 1983. The trial court granted the motion, but ordered that the Commonwealth could introduce the

² Kentucky Rule of Criminal Procedure.

³ Kentucky Revised Statute.

murder conviction during the PFO and sentencing phases of the trial, or if Carter attempted to introduce character evidence of the victims during the guilt phase. The record also contains a handwritten, six-page letter from Carter to the trial court requesting DNA testing of various pieces of evidence. His attorney followed up by filing a motion requesting same. The trial court granted the motion. Over the course of the next year, the parties waited on DNA analysis from the Kentucky State Police Crime Laboratory. After the results were returned, Carter made numerous *ex parte* motions which were granted by the trial court. He also sent another handwritten letter to the trial court which stated that the county jail lacked computers, law books, and a law library and that, consequently, he could not research his case.

On June 28, 2017, Carter entered a guilty plea in the instant action. In exchange for his plea, the Commonwealth agreed to amend the assault charge to assault in the second degree. The Commonwealth also agreed to dismiss the PFO and the charge of assault in the fourth degree. Carter agreed to a sentence of ten years' imprisonment to be served consecutively with Breckinridge Case No. 17-CR-00082. Carter motioned the trial court for immediate sentencing. His reason, as stated to the trial court, was that he had been incarcerated in the county jail for approximately three years at that point and wished to "get on down into the system." The trial court denied the motion upon objection by the Commonwealth

because the victims, who were not present for the plea, had previously indicated they wished to be present for Carter's sentencing.

On or about July 11, 2017 (*i.e.*, after Carter had entered his guilty plea, but prior to sentencing), the primary victim and witness for the Commonwealth, Jeremy Harper, was tragically struck and killed by lightning. On September 19, 2017, Carter filed a motion to withdraw his guilty plea, arguing that the plea was not voluntary. The trial court held a hearing on the matter on September 20, 2017. Carter's motion was denied by the trial court, and he was finally sentenced to ten years' imprisonment in the instant action. This appeal followed. Further facts will be developed as necessary.

STANDARD OF REVIEW

"We review a trial court's finding regarding voluntariness for clear error, *i.e.*, whether the determination was supported by substantial evidence, and we review a trial court's ruling on a motion to withdraw for abuse of discretion, *i.e.*, whether it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Porter v. Commonwealth*, 394 S.W.3d 382, 386 (Ky. 2011).

ANALYSIS

The validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea. These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily

made. The trial court is in the best position to determine if there was any . . . involuntariness . . . to plead guilty. Solemn declarations in open court carry a strong presumption of verity.

Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky. App. 1990) (citations omitted).

Carter argues that the trial court erred in denying his motion to withdraw his guilty plea because his plea was not voluntary. Carter claims, essentially, that his attorneys coerced the plea from him by telling him: 1) the “first thing” the Commonwealth would do is bring up the prior murder conviction, which would result in the jury sentencing him from fifty years to life in prison; 2) he would be unable to get a fair trial because of his prior murder conviction; and 3) they would not go to trial for a lost cause.

Carter’s argument that his counsel told him he would be unable to get a fair trial because the “first thing” the Commonwealth would do is bring up his prior murder conviction is without merit. The record before us shows that defense counsel motioned the trial court to suppress the introduction of Carter’s prior murder conviction. The trial court granted the motion and ordered suppression of the conviction during the guilt phase of the trial (unless and until Carter introduced character evidence of the victims). We agree with the Commonwealth that Carter’s testimony failed to specify whether his prior counsel indicated that the prior murder conviction would have been presented in the guilt or sentencing phase

of the trial. If Carter had been advised that the Commonwealth would present evidence of the murder conviction for purposes of proving the PFO charge⁴ and during the sentencing phase,⁵ counsel's advice would not have been inaccurate.

As to his second and third arguments, the trial court properly considered the totality of circumstances surrounding Carter's plea. At the initial hearing, the trial court ascertained that Carter understood the charges. Carter affirmed that his attorneys explained, to his complete satisfaction and understanding, the nature of the charges; the potential penalties; the likelihood of success at a jury trial; and possible defenses. Carter affirmed his understanding that he was giving up his constitutional rights to a jury trial; to confront and cross-examine witnesses; his constitutional protection against self-incrimination; and his right to appeal the conviction. He stated that he was not under the influence of drugs or alcohol. He testified that he had not been threatened, forced, *or in any way coerced* to enter the plea. He acknowledged that his attorneys read the plea paperwork to him; that he had no difficulty understanding the English language; and that he understood each and every provision set forth. When the trial court presented him with the motion to enter a guilty plea, Carter stated that he recognized the document and acknowledged he signed it as his voluntary act and

⁴ See KRS 532.080.

⁵ See KRS 532.055(2)(a)(1)-(5).

deed of his own free will. Finally, Carter testified that he was entering the plea because he was in fact guilty and for no other reason. Carter's counsel confirmed he had read the paperwork to Carter; discussed it with him; and advised him of his constitutional rights.

At the hearing on his motion to withdraw his guilty plea, however, Carter testified that his prior murder conviction was "all [his attorneys] talked about" and that they repeatedly told him he would not get a fair hearing because of the prior conviction. When the trial court questioned Carter about the responses he had given during his plea colloquy – reviewing each individual answer with him – Carter acknowledged his responses; but, stated over and over that he "had no other choice" at the time. When the trial court asked what happened between entry of his plea and the present, Carter responded that he "borrowed a pair of glasses in jail . . . so I read the plea agreement and I couldn't believe what I was reading. When [my attorney] read it to me, I didn't comprehend what was being read to me. I had to read it for myself and I said, 'Are you kidding me?' I couldn't believe it." Carter testified that he only *assumed* his counsel would not go to trial with him.

The trial court was faced with an issue of credibility (*i.e.*, whether to believe Carter's statements during his plea colloquy or his testimony during the motion to withdraw). Credibility is a question for the factfinder. *Cochran v. Downing*, 247 S.W.2d 228, 229-30 (Ky. 1952). This court cannot substitute its

judgment as to credibility of a witness for that of the trial court. *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987). The trial court found Carter's testimony during the hearing on his motion to withdraw lacked credibility. Indeed, the trial court specifically found that the motion was unrelated to the voluntariness of the plea. Rather, the trial court found that the likely reason for Carter's motion to withdraw his guilty plea was that he felt he would have a better chance at trial after the Commonwealth's primary victim and witness died unexpectedly.

There was substantial evidence before the trial court to support its finding that Carter's plea was voluntary. Accordingly, we discern no error.

The trial court's decision to deny Carter's motion to withdraw was reasonable, fair, and supported by sound legal principles. An evaluation of the circumstances supporting or refuting claims of coercion require an inquiry into what transpired between attorney and client that led to the entry of the plea (*i.e.*, an evidentiary hearing). *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002). The trial court properly held a hearing on Carter's motion. It considered Carter's testimony, the briefs submitted by the parties after the hearing, and the record. During the hearing, the court questioned Carter regarding the statements he gave during his plea colloquy and paid particular attention to the plea paperwork that Carter had acknowledged signing and approving. The trial court did not abuse its

discretion in finding that Carter's plea was voluntary and denying his motion to withdraw.

Accordingly, we affirm the judgment of the Breckinridge Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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