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OPINION OF APRIL 12, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000179-MR

BILLY ADDISON

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 16-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES

GOODWINE, JUDGE: Billy Addison appeals from a conviction on multiple felony counts after the trial court denied the motion to withdraw his guilty plea.

He argues that the trial court erred in not: (1) permitting him to withdraw his guilty plea; and (2) appointing substitute counsel to represent him on his motion to withdraw. After careful review, finding no error, we affirm.

BACKGROUND

On April 20, 2016, Addison was indicted on the following: (1) Sexual Abuse, first degree¹; (2) Promoting a Sexual Performance by a Minor²; (3) Possessing or Viewing of Matter Portraying a Sexual Performance by a Minor³ -- 18 counts; (4) Possession of Marijuana;⁴ and (5) Possession of Drug Paraphernalia.⁵ At arraignment, he entered a plea of not guilty and was appointed a public advocate.

Addison's trial counsel filed several motions on Addison's behalf, including: (1) a motion for bond reduction; (2) a motion to compel the Commonwealth to produce a copy of the forensic interview done on the child victim; and (3) a motion to continue the trial date to allow sufficient time to investigate and conduct discovery.

On November 17, 2017, Addison agreed to mediate his case. He acknowledged "the mediator [had] no authority to force a settlement on the

¹ Kentucky Revised Statute (KRS) 510.110 (Class C felony) (victim less than 12 years old).

² KRS 531.320 (Class B felony) (minor less than 16 years old).

³ KRS 531.335 (Class D felony).

⁴ KRS 218A.1422 (Class B misdemeanor).

⁵ KRS 218A.500(2) (Class A misdemeanor).

participants” and that he could “choose another means to resolve [his] conflict at any time before mediation is completed, including, but not limited to, the court system.” *See R.* at 84. Addison and Cooper signed the mediation agreement.

Immediately following mediation, Addison moved to enter a plea of guilty. In the motion, which Addison also signed, he stated: (1) his judgment was not impaired by drugs, alcohol, or medication; (2) he reviewed the indictment and fully discussed the charges with counsel; (3) he could plead “not guilty” to any charge against him; (4) he waived certain constitutional rights by entering his plea; (5) he made no claim of innocence; (6) he made the plea freely, knowingly, intelligently, and voluntarily; and (7) his conviction would have certain collateral consequences. *See R.* at 85.

The trial court conducted a thorough plea colloquy with Addison under *Boykin v. Alabama*, which lasted approximately seventeen minutes. 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The trial court inquired whether Addison believed he was treated fairly by the mediator and by the process itself. Addison hesitated before explaining that “there were a lot of extenuating circumstances to this situation. I pled . . . admitted the guilt to what I know in my heart and in my mind that I was guilty to.” After further questioning, Addison agreed that he was unhappy with the result but that the mediator did not do anything unfair and that “he was treated fairly by the individuals involved.”

Addison further stated that he: (1) had sufficient time to discuss his case with counsel; (2) was satisfied with his counsel's legal services; (3) "fully understood" that mediation was a voluntary process; (4) was waiving many constitutional rights by pleading guilty; (5) acknowledged signing his motion to enter a guilty plea and the Commonwealth's offer on a plea of guilty; (6) understood the documents before he signed them and that he signed them freely and voluntarily; and (7) understood he had agreed to serve eighteen years in prison. The trial court then went through Addison's charges, and he admitted guilt to each one.

Addison's trial counsel stated: (1) he had sufficient time to discuss the case with Addison; (2) he believed Addison understood the constitutional rights he was waiving and the collateral consequences of the plea; (3) the plea was consistent with his advice; and (4) he believed Addison made the plea knowingly, intelligently, and voluntarily.

In exchange for Addison's guilty plea to a myriad of offenses,⁶ the Commonwealth agreed to amend count two from promoting a sexual performance by a minor under the age of sixteen, a Class B felony, to possessing or viewing matter portraying a sexual performance by a minor, a Class D felony. The

⁶ Sexual abuse, first degree, eighteen counts of possessing or viewing matter portraying a sexual performance by a minor, possession of marijuana, and possession or use of drug paraphernalia.

Commonwealth recommended a sentence of 18 years' imprisonment. Addison acknowledged he understood the Commonwealth's plea offer and recommendation. The trial court found Addison entered the plea knowingly, intelligently, and voluntarily.

Several weeks later, Addison changed his mind and decided he wanted a jury trial. On December 11, 2017, Addison's trial counsel filed four motions: (1) a motion for new attorney; (2) a motion to withdraw his guilty plea; (3) a motion for mental health evaluation; and (4) a motion for change of venue.

On January 10, 2018, at the call of the case, Addison's trial counsel argued the motion to withdraw the guilty plea should be addressed first, contending that the other motions would be moot if that motion was denied. The trial court orally denied the motion to withdraw the guilty plea and gave Addison and his trial counsel an opportunity to argue the remaining motions. Both declined. The trial court sentenced Addison consistent with the Commonwealth's recommendation. It entered an order denying Addison's motion to withdraw his guilty plea and a final judgment. This appeal followed.

STANDARD OF REVIEW

Under Kentucky law, a plea must be knowing, intelligent, and voluntary to be valid. *Williams v. Commonwealth*, 229 S.W.3d 49, 50-51 (Ky. 2007) (citing *Haight v. Commonwealth*, 760 S.W.2d 84, 88 (Ky. 1988)). Before

accepting a plea, a trial court must determine that the defendant made it voluntarily and with the understanding of the nature of the charge. RCr⁷ 8.08.

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). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Id.*

Under RCr 8.10, a criminal defendant who has pleaded 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.” *Sturgill v. Commonwealth*, 533 S.W.3d 204, 208 (Ky. App. 2017) (citation omitted). We review this decision under the abuse of discretion standard. *Id.* A trial court abuses its discretion when it renders a decision that is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Id.*

The trial court’s determination of whether the plea was voluntarily entered is fact sensitive and reviewed under the clearly erroneous standard. *Id.* A decision that is supported by substantial evidence is not clearly erroneous. *Id.* “Substantial evidence has been defined as facts of substance and relative

⁷ Kentucky Rules of Criminal Procedure.

consequence having the fitness to induce conviction in the minds of reasonable persons.” *Morton v. Commonwealth*, 232 S.W.3d 566, 568 (Ky. App. 2007) (citation omitted.).

ANALYSIS

Addison argues on appeal that the trial court erred by not permitting him to withdraw his guilty plea and not appointing substitute counsel to represent him on his motion to withdraw. Addison argues the trial court was aware of an inherent conflict of interest with his trial counsel. We disagree.

On December 11, 2017, with the assistance of his trial counsel, Addison filed four motions, one being a motion for a new attorney. As grounds, Addison argued “the complexity of these charges and evidence-intensive facts necessitates another attorney with more trial experience.” Addison alleged neither coercion nor misconduct on the part of his trial counsel.

On January 10, 2018, trial counsel zealously argued the motion to withdraw the guilty plea as follows:

As stated in court when entering the guilty plea, Mr. Addison suffers from bipolar disease, depression, and anxiety. Additionally, since this case has begun, Mr. Addison has been unable to take the medication for these conditions because of his incarceration status. Mr. Addison feels that he was backed into a corner during the mediation and did not get a chance to process and think about the offer before accepting it. He feels like he was pressured into taking a deal. This pressure in conjunction with his unmedicated bipolar disease, depression, and

anxiety, led him to enter a guilty plea that was not totally knowing and voluntary. Additionally, it should be noted that Mr. Addison was very reluctant during the taking of the plea and this hesitation was another indication that Mr. Addison did not enter into the plea with a sound mind and with the right frame of thinking.

Following counsel's arguments, the trial court placed Addison under oath. Addison stated he felt bombarded by the potential consequences of taking the charges to trial and the mediator made statements that confused, upset, and cornered him.

Under Kentucky law, a trial court does not *per se* abdicate its discretion when denying a motion to withdraw a guilty plea where the motion is based on an argument that the defendant suffered from mental disorders. *Prater v. Commonwealth*, 421 S.W.3d 380, 386 (Ky. 2014). Here, rather than summarily denying the motion, the trial court allowed counsel to argue the motion and Addison to put on evidence in support of his motion. Addison offered sworn testimony in open court regarding his decision to seek withdrawal but did not put on any additional evidence that he suffered from a mental disorder that affected his ability to reason. Rather, he merely contradicted the statements he made during the plea colloquy.

The trial court orally denied the motion to withdraw his guilty plea and gave Addison and his trial counsel an opportunity to argue the remaining motions. Trial counsel stated the remaining motions were moot. Addison did not

object or indicate that he wished to be heard on the motion for new counsel. The trial court then proceeded with final sentencing.

On appeal, Addison argues, in support of his claim that the trial court erred in denying his motion to withdraw his plea, that once he put the trial court on notice that he wished to withdraw his guilty plea and that he was not happy with his attorney . . . “his accusation place[s] his attorney in the position of having to defend himself, and potentially to contradict [the defendant], in open court.”

Commonwealth v. Tigue, 459 S.W.3d 372, 387 (Ky. 2015) (citation omitted). We disagree.

It is well settled that “a criminal defendant has a right to be represented by counsel that extends beyond the actual trial to every critical stage of the proceedings.” *Stone v. Commonwealth*, 217 S.W.3d 233, 237 (Ky. 2007). “[A] motion to withdraw a guilty plea made before entry of the final judgment of conviction and sentence is a ‘critical stage’ of the criminal proceedings to which the right to counsel attaches.” *Tigue*, 459 S.W.3d at 384.

Tigue is factually distinguishable from this case. In *Dorsey v. Commonwealth*, 565 S.W.3d 569 (Ky. 2018), our Supreme Court again examined a defendant’s motion to withdraw his guilty plea based on coercion and conflict.⁸ It

⁸ This was the Court of Appeals’ second opinion in which the Kentucky Supreme Court granted discretionary review. It focused on Dorsey’s claim of coercion. “Focusing on the trial court’s

held: 1) a conflict of interest for plea counsel was not created by defendant's motion to withdraw [his] guilty plea; and 2) plea counsel did not coerce defendant into pleading guilty to multiple felonies. *Id.* *Dorsey* is directly on point.

In *Dorsey*, the Supreme Court compared the facts of both *Tigue* and *Zapata v. Commonwealth*, 516 S.W.3d 799 (Ky. 2017), wherein it found clear conflicts of interests. The factual scenarios in *Tigue* and *Zapata* were distinguishable from *Dorsey*'s case, and, likewise, are distinguishable from the facts here. The Supreme Court's comparison of the facts in *Tigue* and *Zapata* is worth presenting:

In *Tigue*, soon after pleading guilty Tigue called his family and counsel to tell them he wanted to withdraw his plea. 459 S.W.3d at 380. Tigue repeatedly attempted to contact counsel, but counsel never acknowledged his requests and did not file a motion to withdraw the plea on Tigue's behalf prior to sentencing. *Id.* During the sentencing hearing, Tigue orally asked the trial court to withdraw his plea, stating that his plea was false and involuntary. *Id.* at 381. Since there was no motion filed by counsel, Tigue proceeded *pro se* but failed to provide sufficient legal grounds for withdrawal of the plea. *Id.* The trial court denied the request. *Id.*

On appeal, this Court held that "Tigue's right to counsel was violated when his counsel refused to help him seek to withdraw his plea. . . ." *Id.* at 382. This important factor distinguishes *Tigue* from *Dorsey*'s case. Unlike in *Tigue*, *Dorsey*'s counsel filed the motion on his behalf. Counsel discussed the motion to withdraw the plea with

plea colloquy and the fact that *Dorsey*'s motion to withdraw his plea made no allegations of coercion, the Court of Appeals again affirmed the trial court." *Dorsey*, 565 S.W.3d at 574.

Dorsey, prepared and filed it, and then participated in the hearing on the motion. Whereas Tigue was forced to proceed *pro se*, Dorsey had counsel assisting him throughout the process. Although a “pre-judgment proceeding at which a defendant seeks to withdraw his guilty plea is a critical stage of the proceedings at which he is entitled to the assistance of counsel[,]” Dorsey, unlike Tigue, was not deprived of this constitutional right. *Id.*

Further, Tigue alleged that he was coerced and manipulated into making his guilty plea by his defense team because they refused to prepare a defense for him, thus forcing him to plead guilty. *Id.* at 387. At the hearing on his oral motion to withdraw his plea, Tigue claimed that he was threatened and that counsel “never showed any interest in defending [him],” which is an allegation of ineffective assistance. *Id.* This Court considered these hearing statements in tandem with letters Tigue and his family sent to the trial court containing details of alleged misconduct by counsel. *Id.*

Dorsey, 565 S.W.3d at 574-75.

Addison did not file such a claim nor allege such a conflict at the hearing on his motion to withdraw his guilty plea. Addison, like Dorsey, had full opportunity, both during the *Boykin* litaney and during the hearing on his motion to withdraw the plea, to inform the court that he was coerced into his plea or that he received ineffective assistance, but he did not make either of those allegations.

In *Dorsey*, during the hearing on the motion, the trial court asked Dorsey if he had any other comments to make regarding his desire to withdraw the

plea and he did not. *Id.* Here, the trial court placed Addison under oath and asked him if there was anything he would like to add to trial counsel's arguments.

Addison stated he felt bombarded by the potential consequences of taking the charges to trial and that the mediator made statements that confused, upset, and cornered him. Addison did not make any allegations of coercion against trial counsel. On the claim of coercion, the Supreme Court stated:

While this Court recognized in *Tigue* that a claim of coercion during a plea withdrawal hearing places counsel in a position where he has to defend himself or contradict his client in open court, this simply is not the case for Dorsey. *Id.* at 387. In response to the trial court's question, Tigue's counsel stated he believed the evidence in Tigue's case was "rather overwhelming" and that he discussed his recommendation to take the plea with Tigue and his family numerous times. *Id.* at 388. This Court held that in making these responses, counsel "put his own interests ahead of his client's by denying the truth of Tigue's allegations and thereby attacking his own client's credibility[,]'" which created an actual conflict of interest. *Id.* Here, Dorsey's counsel did not put his own interests ahead of his client's and did not attack Dorsey's credibility. Dorsey was not accusing his attorney of making misrepresentations or neglecting to tell him critical information regarding the plea.

Dorsey, 565 S.W.3d at 575. Here, trial counsel zealously advocated for withdrawing Addison's plea.

Addison's case, like Dorsey's, is also distinguishable from *Zapata*.

In *Zapata*, the trial court granted Zapata's request to act as hybrid counsel. *Id.* at 800. Prior to trial, Zapata entered an *Alford* plea and the trial court conducted a

proper *Boykin* colloquy. *Id.* Before sentencing, Zapata’s counsel filed a motion to withdraw the plea, indicating that “undersigned counsel takes no position on this motion.” *Id.* at 801. Zapata filed an additional motion to withdraw his plea and requested an evidentiary hearing. *Id.* The trial court conducted a hearing but did not take sworn testimony or allow Zapata to present evidence. *Id.* Zapata argued that his plea was involuntary and that “counsel deceived him when she informed him he could withdraw his plea any time before sentencing with ‘no problem. . . .’” *Id.*

This Court held that an actual conflict existed in Zapata’s case and that Zapata was deprived of his right to counsel during this critical stage in the proceedings. *Id.* at 803. “Zapata’s counsel was placed in the untenable position of defending her own interests which were adverse to her client’s.” *Id.* Similar to *Tigue*, “to argue in favor of her client’s motion would require admitting serious ethical violations and possibly subject her to liability for malpractice; on the other hand, any contention by counsel that defendant’s allegations were not true would . . . contradict her client.” *Id.* [Like] *Tigue*, the facts in *Zapata* are distinguishable from the present case.

Zapata’s motion to withdraw his plea was premised on his counsel’s alleged deception, and his counsel readily acknowledged that Zapata’s allegations against her “put her in an awkward position.” *Id.* at 801. Zapata claimed ineffective assistance, whereas Dorsey claimed a misunderstanding which he never attributed to his counsel.

Dorsey, 565 S.W.3d at 576.

Unlike in *Tigue* and *Zapata*, Addison’s trial counsel, like Dorsey’s, was not placed in a situation where he had to defend his client, while also serving as a witness on behalf of the plea that he negotiated. Trial counsel never had to

defend his advice or potentially admit to ethical violations. Addison expressed displeasure with the mediator, not trial counsel, during the hearing. A conflict of interest did not exist in this situation.

Like Dorsey, Addison argues he was denied counsel at a critical stage of the proceedings because his trial counsel represented him while under a conflict of interest; however, we disagree. “Although there is no doubt that seeking to withdraw a guilty plea constitutes a critical stage in the proceedings, [Addison had] competent representation during the hearing to withdraw his guilty plea and counsel was not placed at odds with representing [Addison’s] interests., *i.e.*, he was not laboring under a conflict.” *Dorsey*, 565 S.W.3d at 574. As grounds for requesting a new attorney, Addison argued “the complexity of these charges and evidence-intensive facts necessitates another attorney with more trial experience.” Addison never alleged coercion or misconduct by his trial counsel.

Addison’s testimony during the *Boykin* colloquy refutes any allegation of coercion. Like Dorsey during the plea hearing, Addison affirmed he: (1) had enough time to talk to his attorney; (2) was satisfied with the advice given; (3) was not under any coercion or threats that induced him to plead guilty; and (4) was pleading guilty of his own free will. *Dorsey*, 565 S.W.3d at 577. The record did not support Dorsey’s claims of coercion in entering his guilty plea, and the same is true here.

Moreover, the record contains insufficient evidence of an actual conflict of interest, which would have warranted the appointment of conflict counsel or which would now require reversal of Addison's conviction. Addison never alleged misconduct by counsel, and Addison's counsel argued zealously to have the plea withdrawn.

Because Addison did not request new counsel on the basis that his appointed counsel was burdened with a conflict with regard to the withdrawal motion, the alleged error is unpreserved. *Sturgill*, 533 S.W.3d at 211. Thus, we review for palpable error. A palpable error is one that affects the "substantial rights" of the party and results in "manifest injustice[.]" RCr 10.26.

Addison's counsel did not "adamantly oppose[Addison]'s attempt to withdraw the plea he negotiated with the Commonwealth." *Sturgill*, 533 S.W.3d at 210. Nor "did counsel advise the trial court that the motion was against his advice" or indicate that "if the trial court granted the motion, he no longer wanted to represent [Addison]." *Id.*; *Zapata*, 516 S.W.3d at 802. There was no "actual conflict of interest" based upon which we could presume prejudice or presume that Addison was denied effective assistance of counsel. *Tigue*, 459 S.W.3d at 386. Addison's counsel "abide[d] by [Addison's] determination, after a plea of guilty [had] been entered, to seek its withdrawal." *Id.* (citation omitted.).

Trial counsel was not burdened by an actual conflict. He prepared the motion to withdraw and argued zealously in its favor. Thus, Addison received effective assistance in moving to withdraw his guilty plea as required by the Sixth Amendment. Consequently, we hold there was no manifest injustice.

CONCLUSION

Based on the foregoing analysis, we affirm the Trigg Circuit Court's denial of Addison's motion to withdraw his guilty plea, and, thus, his subsequent conviction.

JONES, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Newberg, II
Assistant Attorney General
Frankfort, Kentucky