IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-14-05 Ella Growth, D.C.

2005-SC-000038-MR

HENRY LEE COLSTON APPELLANT

V.

APPEAL FROM OWEN CIRCUIT COURT
HON. STEPHEN L. BATES, JUDGE
NO. 04-CR-00034

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from the Owen Circuit Court's final judgment entered December 1, 2004, sentencing Appellant to a total of 35 years imprisonment on his guilty plea to two counts of first degree burglary, kidnapping, receiving stolen property and second degree burglary; and one count of first degree robbery, rape and sodomy. Appellant appeals to this Court as a matter of right, pursuant to Ky. Const. §110(2)(b), arguing the trial court abused its discretion in not allowing him to withdraw his guilty plea prior to final sentencing. We disagree, and affirm the trial court.

I. Facts

On June 8, 2004, Appellant was indicted for the above cited offenses, including a charge of first degree persistent felony offender. The charges were based largely upon statements given by Appellant and his co-defendant to the police, which Appellant

unsuccessfully tried to suppress. At an October 12, 2004 preliminary hearing, the trial judge spoke to Appellant saying:

> [I]t is my obligation at this time—I do this in criminal cases as well as civil cases just to make sure everybody understands what's going on because most people haven't spent their lives in the Courtroom as I have; and my intention is not to persuade you to go one way or the other but to explain to you what will happen next Thursday when you come in here [for trial].

The judge proceeded to warn Appellant that he should carefully consider whether he "want[s] to live with or not" any deal he had been offered because otherwise, what the jury returns as his sentence would most likely be what he would have to accept since in his Court, jury verdicts are enforced "99.5%" of the time as recommended.

On October 19, 2004, Appellant entered a guilty plea to the charged offenses with the exception of the PFO count. As part of the plea agreement, the Commonwealth agreed to dismiss the PFO charge and recommend a sentence of thirty-five years imprisonment.

Appellant testified before entering his plea that he understood he was giving up his rights to a trial by judge or jury, to confront witnesses, not to incriminate himself and to an appeal. He also stated he had enough time to speak with his attorney about his case and felt comfortable entering his guilty plea. Appellant assured the court his attorney had answered all his questions regarding the plea and had investigated his case to his satisfaction. Finally, Appellant testified he was entering a plea of guilty because he is guilty of the crimes charged. The trial court accepted the guilty plea. Sentencing was set for November 23, 2004.

Approximately one month later, on November 17, 2004, Appellant filed a written motion to withdraw his guilty plea. The motion was heard on the date of final sentencing. Appellant testified that he felt he was "pressured into signing [the] plea"

and did not commit the crimes for which he was charged. On cross-examination, Appellant admitted the judge had explained his rights to him and that he had told the court no one had pressured him into pleading guilty prior to entering such a plea.

The judge did not believe Appellant had shown sufficient grounds warranting revocation or withdrawal of his guilty plea, and therefore, denied his motion. Appellant was then sentenced in accordance with the plea agreement.

Notice of Appeal was served on December 31, 2004 and filed on January 12, 2005, following the court's granting Appellant's motion to prosecute the appeal *in forma pauperis*.

II. Issue

The sole issue in this appeal is whether the trial court abused its discretion and denied Appellant due process of law by refusing to allow him to withdraw his guilty plea prior to sentencing.

RCr 8.10 says a court *may* permit the plea of guilty to be withdrawn and a plea of not guilty substituted. It does not say *must*. This Court has held in Rodriguez v. Commonwealth, 87 S.W.3d 8 (Ky. 2002), that a motion to withdraw *must* be granted only if the plea was determined to be involuntary. Otherwise, it is within the discretion of the trial court to determine whether to permit a Plaintiff to withdraw a guilty plea. Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001).

The trial judge in this case allowed the defendant to "put in proof", i.e. testify, regarding his claim of "being pressured" into entering his guilty plea. From this testimony, the judge determined the defendant had not shown sufficient grounds to warrant revoking or withdrawing his guilty plea. We now review this decision under the abuse of discretion standard. Bronk, 58 S.W.3d at 487.

"The validity of a guilty plea depends 'upon the particular facts and circumstances ... including the background, experience, and conduct of the accused.'" Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (quoting Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). The trial court is in the best position to evaluate the totality of the circumstances surrounding the plea. Id. Here, the trial court determined, and the record supports, that Appellant voluntarily entered a guilty plea with a full understanding of the consequences of that decision. Appellant signed a motion to enter the guilty plea which fully explained the choice he was making to plead guilty. The judge ensured the defendant had the ability to read and that he had reviewed the motion thoroughly with his attorney. Appellant testified in open court that he had reviewed the motion and had no questions. He also testified he was not under the influence of any alcohol or drugs and that he understood the rights he was waiving by pleading guilty. The signed motion, along with the thoroughness of the plea colloquy, is sufficient to show that Appellant knowingly, voluntarily, and intelligently entered a guilty plea.

Under these circumstances, the trial judge found the defendant had not shown any basis in support of his motion to withdraw his guilty plea. We cannot say that the trial court abused its discretion in refusing to allow Appellant to withdraw his plea. Accordingly, there was no error.

For the above-stated reasons, we affirm the judgment of the Owen Circuit Court.

All concur.

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