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Supreme Court of Kentucky

2015-SC-000699-MR

DAJUAN MALONE

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
NOS. 13-CR-0698 and 13-CR-02651

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

Appellant, Dajuan Malone, was convicted by a Jefferson Circuit Court jury of first-degree assault and pleaded guilty to being a persistent felony offender (PFO) in the second degree pursuant to a plea agreement. The trial court approved the agreement and sentenced Malone to twenty years' imprisonment in conformity with its terms. Twenty days after the trial court's entry of the final judgment in his case, Malone filed a motion to withdraw his guilty plea, which the trial court denied. It is from this denial that Malone now appeals. He argues that the trial court abused its discretion in accepting the plea agreement and that the trial court erred in failing to appoint conflict-free counsel to argue the motion to withdraw the plea. The Commonwealth argues that the circuit court lacked jurisdiction to consider Malone's motion to withdraw the plea. Agreeing with the Commonwealth that the trial court lacked jurisdiction, we vacate the trial court's ruling on Malone's motion to

withdraw his plea and remand for that court to dismiss the motion for lack of particular-case jurisdiction.

I. BACKGROUND

A Jefferson County Grand Jury indicted Malone on four charges: first-degree assault, possession of a firearm by a convicted felon, illegal use or possession of drug paraphernalia while in possession of a firearm, and illegal possession of a controlled substance while in possession of a firearm. The first-degree assault charge was severed from the remaining charges. A day before trial began on the assault charge, Malone was also arraigned on a second-degree PFO charge. At the conclusion of a four-day trial, the jury convicted Malone of first-degree assault. If the jury convicted Malone on the PFO charge, he faced a minimum sentence of twenty years' imprisonment.

On the same day as his conviction, Malone's counsel entered into negotiations with the Commonwealth, and the two sides reached an agreement. Under the terms of the plea agreement, Malone agreed to plead guilty to the PFO charge and waive his right to appeal in exchange for the Commonwealth dropping the three severed charges (which included two felonies) and recommending a twenty-year sentence. In reviewing the plea deal, the trial court asked Malone if he wished to give up his right to appeal as part of the deal—to which Malone responded in the affirmative. Malone waived formal sentencing and the court entered the judgment four days later, on October 15, 2013.

On November 4, Malone's counsel filed a motion to withdraw his guilty plea, arguing it was not knowingly or intelligently made. In December, Malone also requested to withdraw his plea in a letter he mailed to the trial judge. In the letter, Malone claimed he was under pressure and stress when he agreed to the plea and that his counsel did not explain that he was waiving his right to an appeal. Under oath, Malone later contradicted his claim that counsel did not explain the plea deal to him.

The trial court conducted a hearing on December 18, 2013. Malone's trial counsel represented him at the hearing. The trial court denied the motion to withdraw. Malone filed a pro se motion to file a belated appeal to this Court, which we granted and designated the Department of Public Advocacy as his counsel.

II. ANALYSIS

A motion to withdraw a plea falls under RCr 8.10, which reads in pertinent part: "At any time *before judgment* the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." (Emphasis added.) However, it is undisputed that Malone's motion was filed well after the judgment was entered in his case.

The highest Court in this Commonwealth held long ago:

While section 174 of the Criminal Code of Practice [now RCr 8.10] provides that at any time before judgment, the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted, such right of the withdrawal of the plea does not extend, by the very terms of the provision, beyond the entering of judgment. Nor, according to the general rule, will the court so exercise its judicial discretion by allowing

the withdrawal of the plea after sentence, unless it appears that the accused's consent to plead guilty was unwillingly given and made under circumstances of fear, deceit, or coercion.

Kidd v. Commonwealth, 74 S.W.2d 944 (Ky. 1934). We have never departed from either the pertinent language in the rule or this interpretation. We also note that *Kidd* draws a distinction between a post-judgment motion to withdraw (which is not allowed by the rule) and a post-sentence motion to withdraw, which would require a showing of fear, deceit or coercion. Even if we were to apply the latter standard, Malone's assertion still fails.

While Malone asserts that he entered into his plea deal involuntarily,¹ at the hearing on his motion to withdraw, Malone stated under oath that his attorney "broke it down" for him, but that he was going through a lot and did not fully understand what he was signing. In its response to the motion, the Commonwealth pointed out that it was not an issue of Malone being threatened or coerced in any way. Malone simply never argued that his plea was induced by fear, deceit, or coercion, as existed in *Little v. Commonwealth*, 133 S.W. 1149, 1151 (Ky. 1911). In that case, the "appellant pleaded guilty to the charge against him. But, what else could he have done? He had suddenly presented

¹ In discussing motion to withdraw a plea based on alleged involuntariness, this Court often references the timing of the motion. For instance, in *Commonwealth v. Tigue*, 459 S.W.3d 372, 384 (Ky. 2015), we discussed "when the validity of the plea is called into question *before final sentencing*." (Emphasis added.) The timing of the motion is critical in our analysis. In the present case, not only was Malone's motion post-judgment, it was more than ten days post-judgment.

before him while confined in the county jail the alternative of being hung by a jury or by a mob. Being advised that he must make a quick choice between the two, he selected the jury as the least objectionable instrument of death.” Our predecessor Court held that Little could not be bound to his plea under those circumstances.

While it is likely that Malone was shaken by having just been convicted of a Class B felony, which was almost certain to be enhanced by a PFO charge, his circumstances simply do not rise to the level of fear, deceit, or coercion. In fact, Malone never so much as *asserted* that he made his plea “under circumstances of fear, deceit, or coercion.” *Id.* Therefore, the trial court properly denied Malone’s post-judgment motion to withdraw his plea, albeit on other grounds (the trial court looked at the voluntariness of the plea rather than whether it was a result of fear, deceit, or coercion).

Furthermore, even had Malone asserted the proper grounds for the post-sentence, post-judgment withdrawal of his plea, the Commonwealth argues that the trial court had lost jurisdiction over this particular case when it held the hearing on Malone’s motion. We have gone to great lengths to clarify the difference between subject matter jurisdiction (which either exists at the outset of a case or does not, and any error related to it cannot be waived, *Commonwealth v. Steadman*, 411 S.W.3d 717, 722 (Ky. 2013)) and jurisdiction over a particular case. As we have held, it is not so much a matter of the

existence of the trial court's jurisdiction over a particular case, but of the propriety of exercising that jurisdiction:

A court's power to affect its own judgment within ten days of entry or after the filing of a notice of appeal is . . . jurisdiction over a particular case. Such questions go more accurately to the propriety of the exercise of jurisdiction rather than to the *existence* of jurisdiction. . . . [T]he decisions describing a lack of jurisdiction under such circumstances limit it to "this case." That alone shows that we are talking not about limits on the court's power over an entire category of cases, but whether the court has exceeded its power with respect to *this* case.

Steadman, 411 S.W.3d at 722–23.

It is clear the trial court here had power over this type of case. What is at issue is whether the trial court retained that jurisdiction in Malone's particular case longer than ten days after its judgment. As we stated in

Steadman:

Admittedly, this Court has said repeatedly in the past that a trial court *loses jurisdiction* of a case ten days after entry of a final order or judgment. See, e.g., *Commonwealth v. Marcum*, 873 S.W.2d 207, 211 (Ky. 1994) ("[J]udgment became final once ten days had elapsed with no action taken to alter, amend or vacate it; and . . . the court had *lost jurisdiction* over the case." (citation omitted)); *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979) ("The court had lost jurisdiction of the case . . .").

Id. at 721. However, we went on to hold that the appellant in *Steadman* had waived his argument that the trial court lacked particular-case jurisdiction, as he had "all but consented to having the restitution hearing after his final sentencing." This case differs from *Steadman* in this regard. Here, the Commonwealth did not consent to Malone's belated motion; nor did it waive the issue of particular-case jurisdiction. We specifically constrained the

holding in *Steadman*, stating, “[o]ur conclusion today is limited to facts like those presented in this case.” 411 S.W.3d at 725.

Therefore, Malone did not make a proper motion under RCr 8.10—which only applies pre-judgment absent circumstances of fear, deceit, or coercion. Furthermore, even had Malone’s post-judgment motion to withdraw his plea asserted such fear, deceit or coercion, the motion was made after the trial court had lost jurisdiction over his particular case.

Because Malone did not assert in his post-judgment, post-sentence motion that he had entered his plea “under circumstances of fear, deceit, or coercion” and because he filed his motion more than ten days after the entry of the judgment, his motion was properly denied.

Finally, we address Malone’s argument that the trial court erred in failing to appoint conflict-free counsel. First, Malone never argued before the trial court that a conflict of interest existed. While, in his unsworn letter to the trial judge, he indicated that his counsel did not explain that he gave up his right to appeal in the plea deal, he later recanted this statement under oath. In short, there was no reason for the trial court to appoint conflict-free counsel when the effectiveness of Malone’s counsel was not called into question. Second, because the trial court lacked particular-case jurisdiction at the time of the hearing, the issue of whether Malone was entitled to conflict-free counsel is moot.

III. CONCLUSION

For the foregoing reasons, we vacate the trial court's ruling on Malone's motion to withdraw his plea and remand for that court to dismiss the motion for lack of particular-case jurisdiction.

All sitting. All concur.

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