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NO. COA02-51

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Lenoir County
No. 96 CRS 11146

GREGORY KELLY,
Defendant

Appeal by defendant from judgment entered 5 September 2001 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 18 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

John T. Hall for defendant.

TYSON, Judge.

Defendant appeals from a judgment entered upon his guilty plea to trafficking cocaine on the basis that his motion to withdraw the plea should have been granted. We affirm.

I. Facts

On 18 December 1996, nineteen-year-old Gregory Kelly ("defendant") appeared before Judge James D. Llewellyn and entered a guilty plea pursuant to the provisions of *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970). Defendant pled guilty to trafficking more than 28 grams, but less than 200 grams, of cocaine. The factual basis for the plea was the State's

statement that law enforcement officers found defendant in possession of more than 28 grams of cocaine. This fact was stipulated to by defense counsel. Judgment was continued after the plea was entered. Thereafter, defendant served prison time in Virginia.

On 5 September 2001, defendant returned to North Carolina and appeared before Judge Jones. Defendant's trial counsel stated that defendant was misinformed at the time of entry of the plea and that he did not commit the crime charged. Defense counsel moved to set aside entry of the judgment.

Defendant addressed the court and explained that he was "completely misinformed" when he entered the plea. Defendant stated he was never in possession of any illegal drugs, that he had been arrested under a false assumption and that an officer told defendant to either sign the plea agreement or not go home. Defendant maintained his innocence. Judge Jones denied the motion and sentenced defendant to a minimum of 35 months and maximum of 42 months in the North Carolina Department of Corrections. A statutory minimum fine of \$50,000.00 was also imposed.

II. Assignments of Error

Defendant argues that the trial court committed plain error by accepting defendant's guilty plea: (1) after the court was informed that the defendant's plea was not intelligently, willingly, freely or knowingly made and (2) failing to allow defendant's motion violated defendant's constitutional rights.

III. Standard of Review

Our standard of review for the right to withdraw a guilty plea is whether, after conducting an independent review of the record and considering the reasons given by the defendant and any prejudice to the State, it would be fair and just to allow the motion to withdraw. See *State v. Marshburn*, 109 N.C. App. 105, 107-108, 425 S.E.2d 715, 718 (1993); *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990).

IV. Validity of Guilty Plea

Defendant's motion to set aside the entry of judgment is most appropriately viewed as a motion to withdraw a guilty plea. Defendant argues that his guilty plea is invalid because it was not intelligently, willingly, freely or knowingly made and resulted in a violation of defendant's constitutional rights.

Defendant has no absolute right to withdraw a guilty plea. Our Supreme Court has weighed several factors after its independent review of the record to determine whether defendant showed a "fair and just reason" to support his motion to withdraw his plea. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Factors favoring withdrawal include: (1) whether defendant has asserted his legal innocence, (2) the length of time between the entry of the guilty plea and defendant's desire to withdraw it, (3) the strength of the State's evidence offered, (4) whether the accused had competent counsel at all relevant times, (5) misunderstanding of the plea's consequences, (6) confusion, and (7) coercion. *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (citing *Handy* at 539, 391 S.E.2d at 163 (citation omitted)).

Cases place heavy reliance on the length of time between entry of the guilty plea and the defendant's desire to withdraw the plea. See *State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993); *State v. Graham*, 122 N.C. App. 635, 637, 471 S.E.2d 100, 101-02 (1996). In *Marshburn*, the motion to withdraw the guilty plea was made at least eight months after entry. *Marshburn*, 109 N.C. App. at 106, 425 S.E.2d at 716-17. In *Graham*, defendant moved to withdraw his plea over a month after entry. *Graham*, 122 N.C. App. at 637, 471 S.E.2d at 101-02. In both cases, this Court refused to allow defendant's plea to be withdrawn. In *Marshburn*, this Court elaborated,

[t]his context [referring to the eight month period between entry of the plea and the motion to withdraw] requires that the reasons given by a defendant 'must have considerably more force' than would be the case if the 'motion comes only a day or so after the plea was entered' or if the defendant did not have competent counsel at the time he entered the plea.

Marshburn, 109 N.C. App. at 109, 425 S.E.2d at 718 (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

Here, defendant moved to withdraw a plea nearly five years old. This fact aligns the case closely to *Marshburn* where relief from the plea was denied, and distinguishes *Handy* which allowed the plea withdrawal where the plea had been entered 24 hours earlier. *Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718-19; *Handy*, 326 N.C. at 534, 391 S.E.2d at 160.

Although the length of the delay in moving to withdraw the plea is critical, there are other factors that support the trial court's decision not to allow defendant to withdraw his plea.

Defendant was represented by counsel at all relevant times, including at the time of plea entry and at the attempted withdrawal. Defendant has not alleged nor is there evidence that defendant's trial attorney was incompetent, other than the attorney's motion to set aside judgment which was more properly a motion to withdraw a plea.

The strength of the State's evidence is unknown. Defendant contends that drugs were never found in his possession, but he stipulated to the factual basis of the charge when he entered the plea. That basis was the finding of cocaine by an officer on the defendant. Because of this stipulation, there is strong evidence against the defendant, and a full examination of the evidence is not available and not needed.

Defendant contends that he misunderstood the consequences of the plea, was confused about the plea proceedings, felt forced to enter it, and is innocent of the charges. His statement to the court just before sentencing and after denial of the motion to withdraw the plea explains his contention. These later statements are inconsistent with his prior testimony under oath that he did understand the nature of the plea when the plea was entered.

The merit of defendant's contention that he was misled and confused is unknown. In light of the other facts of the case and the prejudice to the State in reopening a case nearly five years old, we find that there is no "*fair and just reason*" to allow defendant to withdraw his plea.

Defendant also contends that the denial of defendant's plea withdrawal deprived him of his constitutional rights provided in

the Sixth Amendment of the U.S. Constitution and Section 23 of Article I of the North Carolina State Constitution. Defendant asserts that he was not allowed to confront his accuser and the witnesses against him. Defendant was informed upon entering the guilty plea that he would forfeit these rights. Because defendant has not shown that there is no "fair and just" reason to withdraw his plea, the plea bars defendant from asserting a denial of these rights. The judgment of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).