

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001639-MR

PAUL D. WYATT

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 01-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Paul D. Wyatt (hereinafter appellant) entered a conditional guilty plea in the Casey Circuit Court to one count of sodomy in the first degree. Pursuant to the plea agreement, the trial court dismissed additional charges of sodomy in the first degree, rape in the first degree, and sexual abuse in the first degree. Appellant now argues that the court should have allowed his motion to withdraw his guilty plea. Further, pursuant to the conditional plea he challenges the

trial court's denial of his motion to suppress his confession. We vacate the Court's judgment and remand for an evidentiary hearing on appellant's motion to withdraw the plea. We affirm the court's ruling on the motion to suppress.

On the day of sentencing, appellant's counsel asked the court to allow appellant to withdraw his conditional guilty plea. Counsel informed the court that he had misadvised appellant as to the parole consequences of his plea, and submitted an affidavit to that effect. Counsel stated he had told appellant that appellant would be eligible for parole after having served 20% of his sentence. However, following the plea of guilty to sodomy in the first degree appellant was a "violent offender," which meant that he would not be eligible for parole until he had served 85% of his sentence. KRS 439.3401. Counsel informed the court below that appellant would not have plead guilty if he had had the correct parole information. Appellant now argues that he plead guilty not knowing the "real consequences" of his plea. Appellant also asserts that "gross misadvice" concerning parole eligibility is ineffective assistance of counsel, citing Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988).

On appeal, the Commonwealth points out that appellant never directly stated that he would have rejected the plea agreement and gone to trial if he had known his correct parole

eligibility. The Commonwealth asserts that this issue has not been properly preserved for appeal because appellant must show that, but for the alleged erroneous advice of counsel, he would have gone to trial rather than accept the Commonwealth's offer and plead guilty. The Commonwealth claims that appellant's counsel's representation to that effect is insufficient. The Commonwealth asserts, on the other hand, if the issue is preserved that there was not a reasonable probability that appellant would have insisted on a trial given the charges, the sentencing ranges on the charged offenses, and the facts elicited in the statement appellant gave to police.

RCr 8.10 states that at any time before judgment the court *may* permit a plea of guilty to be withdrawn and a plea of not guilty substituted. But the word "may" does not give the court unfettered discretion to deny the motion without affording the defendant a hearing on the motion. Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8, 10 (2002). The discretion to deny a motion to withdraw a guilty plea exists only after a determination has been made that the plea was voluntary; if the plea was involuntary, the motion to withdraw it must be granted. Id. A guilty plea may be considered valid only when entered intelligently and voluntarily. Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001). The voluntariness of a guilty plea can be determined only by considering all the relevant circumstances

surrounding it. Rodriguez, 87 S.W.3d at 10. A defendant may raise a claim of ineffective assistance of counsel in a motion to set aside a guilty plea. Id., at 11-12.

We conclude that the trial court should have held an evidentiary hearing. We do not regard this issue as unpreserved, since Bronk and Rodriguez suggest that the trial court should have held a hearing once appellant's attorney indicated appellant wanted to withdraw his plea based on his erroneous advice. The questions the Commonwealth raises about appellant's willingness to plead and desire to go to trial are ones that should be answered at an evidentiary hearing if they are not already clear from the record. Appellant has effectively asserted that his plea was not voluntarily made because it resulted from erroneous information and ineffective assistance from his attorney. The trial court must determine if appellant's plea was willingly made.

Next, we proceed to address the appeal of the denial of appellant's suppression motion. Appellant argues that his statement should have been suppressed because at the time the detective began asking appellant questions about the allegations he had not informed him of his constitutional rights. The trial court concluded that at the time appellant was interviewed at home, he was not in custody. The court also found that when appellant was subsequently taken into custody, the detective did

not question him any further about the alleged incidents until he read appellant his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As a result, the court concluded, the detective did not violate appellant's rights.

On appeal, appellant argues that he was in custody when the detective questioned him behind his house because he was not free to leave, even to go in and clean up, and the detective accompanied him when he went to talk to his wife. A defendant is in custody under Miranda when there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 1124, 103 S. Ct. 3517, 3519, 77 L. Ed. 2d 1275 (1983).

We believe the trial court correctly concluded that appellant was not in custody when the detective approached him at home to talk to him. We affirm the trial court's finding that the detective told appellant he was not under arrest, he was not in custody and he did not have to talk to the detective. The detective considered appellant in custody soon afterward when appellant said he "wanted to talk about it" and the officer decided to take appellant to the station and obtain a taped statement. The officer acknowledged it was at this point that he would not let appellant go into the house to change or to

talk to his wife alone. He stated this was for reasons of "officer safety" and because he considered appellant to be in custody. Furthermore, the officer stated once appellant was in custody, he diligently avoided further questioning until he read appellant his rights on audiotape at the station.

We agree that facts in the record refute appellant's argument that he was in custody and his movement was restricted while he first was being questioned by the police. The trial court's findings of fact are supported by substantial evidence, and so they are conclusive. RCr 9.78. Further, we agree that the trial court correctly applied the law to the facts of this case.

Appellant also argues that the warnings were required sooner because he was being interrogated by the police. The United States Supreme Court held that "the Miranda safeguards come into play whenever a person *in custody* is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980)(emphasis provided). In this case, the trial court expressly found that appellant was not in custody and so his Miranda warnings were not required to be provided. We agree with the trial court that no warnings were required at the time the police first asked appellant about the allegations.

The detective read appellant his rights when he initiated custodial interrogation.

For the foregoing reasons, we remand for an evidentiary hearing in accordance with the precedent cited in this opinion. We affirm the order of the Casey Circuit Court which denied the motion to suppress.

ALL CONCUR.

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