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Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000165-MR

DONNIE LEWIS RICHARDSON

APPELLANT

APPEAL FROM HART CIRCUIT COURT
LARRY D. RAIKES, JUDGE
v. INDICTMENT NO. 02-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: MINTON, SCHRODER and TAYLOR, Judges.

MINTON, Judge: The primary issue in this appeal is whether the circuit court erred in denying Richardson's motion to withdraw his plea of guilt to first-degree assault and first-degree unlawful imprisonment. Because we find no error in the refusal of the circuit court to allow withdrawal of the plea, we affirm the judgment in this case.

The charges against Richardson stem from an incident on June 26, 2002, in which he held his wife at knifepoint inside a motel room, cutting her several times before she was able to

flee and call police. Because of the severity of a five and one-half inch cut on her throat, the victim was hospitalized having lost as much as 30-35% of her blood volume. The officer responding to her call testified at a suppression hearing as to the severity of the victim's wounds, the large amount of blood inside the motel room, and the trail of blood leading from the motel room to the phone.

On November 12, 2002, Richardson entered into a plea agreement with the Commonwealth. In exchange for a guilty plea to first-degree assault and first-degree unlawful imprisonment, the Commonwealth would recommend a sentence of 15 years on each count, to be served concurrently, and would dismiss four misdemeanor counts. The plea agreement also stated that the Commonwealth would oppose probation.

The circuit judge conducted a thorough and extensive colloquy concerning Richardson's understanding and acceptance of the plea. During the course of this colloquy, Richardson was given ample opportunity to consult with his attorney and to change his mind about giving up the right to trial. In response to the circuit judge's question concerning Richardson's satisfaction with the representation afforded by his attorney, appellant states "Yes, I am. Very." Richardson's responses to the circuit judge's questions clearly established his understanding of the charges, the rights he was waiving by the

entry of a plea, his satisfaction with the representation afforded by counsel, and the voluntary nature of his plea. Accordingly, the circuit judge accepted the plea as knowingly and voluntarily entered and scheduled sentencing for January 7, 2003.

On the day set for sentencing, however, Richardson told the circuit judge that he wanted to withdraw his plea and be appointed a different public defender. After informing Richardson that he was not entitled to counsel of his own choosing, the circuit judge nevertheless continued the matter to allow Richardson time to file a written motion. With the assistance of his appointed counsel, Richardson filed a motion to withdraw the plea based upon allegations that he felt pressured by time constraints to accept the plea; that counsel had been unavailable to discuss the plea on Saturday, November 9, 2002; that counsel had failed to advise the prosecutor of information that would have led to a lesser offer; and that he needed a different public defender because he had "lost confidence" in his current counsel.

In response to this motion, the Commonwealth argued that Richardson had originally rejected the offer at a pre-trial conference conducted on Friday, November 8, 2002, but that counsel had advised the prosecutor by fax on Sunday, November 10, 2002, of Richardson's decision to accept the offer.

The Commonwealth also contended that the colloquy reflected the knowing, intelligent, and voluntary nature of Richardson's action. Richardson's counsel subsequently moved to withdraw from the case asserting a conflict of interest because, if called upon, she would be forced to verify that she had visited Richardson at the jail on Sunday, November 10, and that he informed her that he wished to accept the Commonwealth's offer.

The circuit judge subsequently conducted a hearing on these post-plea motions at which he noted that Richardson was not a "newcomer" to the criminal justice system as he had previously been convicted of murder and assault in the second degree. As the Commonwealth asserts in its brief, Richardson's extensive record includes a 1975 murder conviction, an additional homicide conviction in 1985, a second-degree assault conviction in 1986, as well as several misdemeanor assault/domestic violence convictions. Furthermore, the circuit judge considered the fact that Richardson had originally rejected the plea and was afforded every opportunity to change his mind at the time of the plea colloquy. The circuit judge's ultimate decision to deny Richardson's motion and sentence him in accordance with the plea agreement precipitated this appeal.

In regard to the decision whether to permit withdrawal of a plea alleged to have been involuntarily entered, the

Supreme Court of Kentucky made clear in Bronk v. Commonwealth¹ that a proper exercise of the trial court's discretion presupposes a consideration of the totality of the circumstances surrounding the plea and the standard to be utilized in reviewing its decision:

Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made."

Because of the factual determinations inherent in this evaluation, Kentucky appellate courts have recognized that "the trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness or incompetence to plead guilty" at the time of the guilty plea and in a "superior position to judge [witnesses'] credibility and the weight to be given their testimony" at an evidentiary hearing. Accordingly, this Court review a trial court's ruling on a defendant's motion to withdraw his guilty plea only for abuse of discretion by "ascertain[ing] whether the court below acted erroneously in denying that appellant's pleas were made involuntarily."²

Applying these criteria to the circuit court's decision in this case, we have little difficulty upholding his decision. A review of the record discloses the following

¹ Ky., 58 S.W.3d 482 (2001).

² *Id.*, at 487, footnotes omitted.

factors relevant to the decision: (1) Richardson's written acceptance of the Commonwealth's offer; (2) a comprehensive colloquy, with ample opportunity afforded to elect to proceed to trial; (3) Richardson's previous experience with the criminal justice system; (4) his statement concerning the level of his satisfaction with counsel; (5) the fact of his initial rejection of the Commonwealth's offer and his subsequent decision to accept it; and (6) counsel's statement in her motion to withdraw that she had discussed the plea offer with Richardson before he appeared in court on November 11, 2002. Taken as a whole, these factors can only be construed as supporting the circuit judge's decision with regard to the voluntariness of Richardson's plea. Furthermore, in light of the gruesome nature of the injuries inflicted on the victim in this case, the acceptance of a reasonable plea appears to have been a prudent decision.

Similarly, with regard to the circuit court's refusal to grant Richardson's motion for a different appointed counsel, there was no denial of due process. The "conflict of interest" alleged in this case has nothing to do with counsel's representation of Richardson up to and including the acceptance of his plea, but relates only to her inability to confirm his version of the facts concerning his acceptance of the plea. In this case, where the record clearly supports the circuit judge's

exercise of discretion, no legitimate basis for the appointment of substitute counsel can be demonstrated. The only conflict between Richardson and his lawyer is his claim that she was unavailable to discuss the plea on Saturday and her statement that they did discuss the case on Sunday. Considered in light of all the factors evident in the record in this case, there is not even a remote possibility that appointment of substitute counsel would have affected the circuit court's decision on withdrawal of the guilty plea. The analysis set out in Cody v. United States,³ as to what kind of "conflict" constitutes ineffective assistance of counsel, proves instructive in resolving Richardson's claim in this case:

In order to succeed on an actual conflict of interest theory, Cody must show that his counsel (1) could have pursued some plausible line of argument at the plea withdrawal hearing but (2) failed to do so due to a conflict with counsel's other interests or loyalties.

As was the case in Cody, Richardson's conflict argument cannot succeed because there was no plausible basis for his claim that the plea was involuntary. Thus, Richardson has failed to demonstrate prejudice in the denial of his motion for appointment of substitute counsel.

³ 249 F.3d 47, 53 (1st Cir. 2001), *citing* Bucuvalas v. United States, 98 F.3d 652 (1st Cir. 1996).

Accordingly, the judgment of the Hart Circuit Court is
in all respects affirmed.

ALL CONCUR.

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