

RENDERED: October 22, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002136-MR

WILBURN DARNELL

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 00-CR-00255

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * **

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: The single question in this appeal is whether the trial court erred in refusing to allow appellant to withdraw his plea of guilty to second-degree sodomy and to being a persistent felon in the second degree. Because we agree with the trial court that the totality of the circumstances surrounding the entry of the plea confirm that it was the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

product of a knowing and voluntary waiver, we affirm the denial of appellant's motion to withdraw the plea.

Appellant was indicted on charges of first-degree sodomy and being a first-degree persistent felony offender stemming from an incident involving an eleven-year-old child. At arraignment, appellant appeared with appointed counsel and entered a plea of not guilty, with bond being set at \$10,000 full cash. Appellant subsequently asked the trial court to amend his bond to \$20,000 property. The trial court denied the motion on the basis of appellant's record of failing to appear.

Appellant subsequently negotiated an agreement with the Commonwealth under which the charges against him would be amended to second-degree sodomy and second-degree persistent felony offender in exchange for his plea of guilt. The Commonwealth also agreed to recommend a sentence of ten years, to run consecutively with any other sentences appellant might be serving. Appellant thereafter filed a motion to withdraw his previous plea of not guilty and enter a plea of guilt to the amended charges. After being satisfied that appellant understood the nature of the charges, that the plea was knowing, intelligent and voluntary, and that there was a factual basis for the plea, the trial court accepted appellant's plea and set sentencing. Appellant was then released on an amended property bond until such time as he was finally sentenced. The trial

court also ordered a sex offender risk assessment to be prepared prior to sentencing.

Shortly before the scheduled sentencing date, appellant filed a motion to substitute counsel and to withdraw his guilty plea. In a affidavit filed with the motion to withdraw his plea, appellant stated that he was not guilty of the offense charged; that he had been unable to post bond and was thus unable to significantly participate in the preparation of his defense; that he believed his case was not being properly prepared by appointed counsel; and that in order to have any chance of proving his innocence, he firmly believed that he had to get out of jail. He asserted that he accepted the Commonwealth's offer and agreed to plead guilty as his only option of being let out of jail so that he could prepare a defense.

The denial of appellant's motion to withdraw his guilty plea precipitated an appeal to this court, which affirmed the decision of the trial court. Upon motion for discretionary review, the Supreme Court of Kentucky remanded the case for an evidentiary hearing in light of its opinion in Rodriguez v. Commonwealth.² The trial court, after conducting a thorough evidentiary hearing, again denied the motion to withdraw appellant's plea on the basis of finding that appellant fully

² Ky., 87 S.W.3d 8 (2002).

understood his options and that the plea resulted from a free and voluntary waiver of his known rights. This appeal followed.

Having carefully reviewed the evidence adduced at the evidentiary hearing, we find no basis for setting aside the trial court's determination. At the hearing, the trial court heard testimony from the Commonwealth's Attorney, appellant's attorney at the time he entered the guilty plea and appellant himself. The trial court also posed his own questions to the witnesses and counsel, taking pains to establish the accuracy of the record of the facts surrounding the guilty plea. Viewing the evidence adduced at that hearing in light of the Rodriguez directive that a motion to withdraw a plea may be denied only upon a determination that the plea was in fact voluntary, we are convinced of the propriety of the decision of the trial court.

As noted by the trial court in its thorough and well-reasoned order, the totality of the circumstances confirms the voluntary nature of the plea. There is no showing that appellant's appointed counsel was ineffective; no showing that his illiteracy impacted his understanding of the nature of the proceedings or the consequences of his plea; and no showing that appellant's decision was in any way coerced. In fact, appellant's trial counsel stated that he was aware appellant was illiterate and thus took extra care in explaining to him the particulars of the Commonwealth's offer and the consequences of

entering a guilty plea. Appellant himself testified that he did not inform counsel of his "plan" to plead guilty in order to get out of jail and prepare a better defense, again reiterating that he believed a guilty plea was his best option to get out of jail. It is significant however, that appellant was no stranger to the criminal justice system, having previously entered at least one guilty plea before the trial court in this case. Finally, like the trial court, we place great emphasis upon the colloquy conducted at the time of acceptance of the plea in which appellant acknowledged his guilt, his understanding of the charges, his satisfaction with his counsel, and his understanding of the rights he would give up by entering a plea of guilt.

In sum, there is substantial evidence in the record of the evidentiary hearing supporting the trial court's finding that appellant had entered a knowing and voluntary plea of guilt. We therefore find no abuse of the discretion afforded the trial court under RCr³ 8.10 and affirm the denial of appellant's motion to withdraw his guilty plea.

ALL CONCUR.

³ Kentucky Rules of Criminal Procedure.

BRIEF FOR APPELLANT:

J. Fox DeMoisey
Jonathan E. Breitenstein
DeMOISEY LAW OFFICE
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky