

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002772-MR

KEVIN RHEA MORRISON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 02-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: SCHRODER, TAYLOR, AND VANMETER; JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a guilty plea entered after the guilt phase of a jury trial.

Appellant argues that his plea should have been allowed to be withdrawn because he was not apprised of the significance of a juror falling ill during the guilt phase of his trial. Because appellant's plea was entered voluntarily, knowingly, and intelligently, the trial court did not abuse its discretion in

denying appellant's motion to withdraw his plea. We also reject appellant's argument that the trial court erred in imposing the fine in this case. Hence, we affirm.

In April 2002, appellant, Kevin Morrison, was indicted on one count of theft by unlawful taking over \$300 for shoplifting merchandise from a Wal-Mart store. He was also indicted for being a persistent felony offender in the second degree. The jury trial on the charges was held on May 14, 2003. That same day the jury reached its verdict finding Morrison guilty of theft by unlawful taking over \$300. After the verdict was announced, the trial court told the jury that their work for the day was over and that they should return the next day for the penalty phase of the trial.

The next morning when the parties appeared before the court, it was announced that the parties had reached an agreement. At that point, the trial court informed the parties that a juror on the case had fallen ill with a possible heart attack during the night. The court then proceeded to explain the options to the parties - they could proceed with the agreement that had been reached or the penalty and PFO phase would have to be tried to a different jury panel. Defense counsel indicated that they would probably proceed with the agreement, but he first wanted to confer with his client about the situation. As defense counsel was discussing the sentencing

options with appellant, the trial judge explained in open court to the eleven remaining jurors that the twelfth juror may have had a heart attack overnight, and it was believed that she began getting ill during the trial. After discussing the situation with his client for over twenty minutes, defense counsel and Morrison approached the bench to enter the guilty plea. On the record, the court makes it clear that the parties had reached the plea agreement before they were aware of the juror's illness. The court then explained to Morrison the various rights he was waiving by pleading guilty. Defense counsel acknowledged that the plea was being entered voluntarily, knowingly, and intelligently, but questioned whether his client could nevertheless challenge the jury's guilty verdict. The prosecution explained that the plea agreement required Morrison to plead guilty to both counts in the indictment and waive his appellate rights. Defense counsel then asked if this still left open the possibility of an appeal based on juror misconduct in the event anything improper occurred during the trial. At this point, the court stated that it would not accept the plea unless there was complete agreement between the parties relative to the plea. The Commonwealth then reiterated the terms of the plea agreement (a guilty plea to both counts in the indictment - not just the PFO charge - in exchange for a recommendation of seven years' imprisonment) and stated unequivocally that the plea must

be entered as if the jury's verdict did not exist. At this point, defense counsel asked Morrison if he understood this, to which Morrison replied, "Yeah, it's over."

The court then continued on with the plea colloquy, specifically asking Morrison if he was under the influence of drugs that would impair his ability to understand the proceedings. Morrison replied that he was not. The court also asked Morrison if he was aware that he was waiving his right to have a different jury fix his sentence and his right to appeal to a higher court. Morrison stated that he was aware he was waiving these rights. Morrison then entered his guilty plea.

In June 2003, the court entered an order documenting the jury's verdict of guilty, but also stating that Morrison had entered a guilty plea in the case reflected in a separate order. The separate order, entered on the same date, specifically stated that Morrison entered a plea to both counts in the indictment and waived his right to appeal all matters, including issues relating to the trial. Subsequently, at the sentencing hearing on August 5, 2003, Morrison asked to withdraw his guilty plea on grounds that he was under a lot of stress at the time he entered his plea.

On September 8, 2003, the court held a hearing on Morrison's motion to withdraw his plea. The court limited the hearing to a determination of whether Morrison understood what

he was doing when he entered his guilty plea. Morrison testified at the hearing that he did not fully understand what he was doing when he entered his guilty plea because he was under the influence of pain medication on that day. After questioning by the defense, the Commonwealth and the trial court, the court stated that it would review the guilty plea hearing and then render a decision. On October 27, 2003, the court entered its findings of fact and order denying the motion to withdraw the plea.

Morrison's sentencing hearing was finally held on December 2, 2003. Thereafter, the court entered its final judgment sentencing Morrison according to the Commonwealth's recommendation of seven years' imprisonment, and imposing a fine of \$1,000. This appeal followed.

Morrison first argues that the trial court erred when it refused to allow him to withdraw his guilty plea. Morrison maintains that his plea was not entered knowingly or voluntarily because he was never apprised of the significance of having an incapacitated juror serving on the panel in his case.

RCr 8.10 provides that the court may allow a defendant to withdraw his plea any time before the judgment. Whether a plea can be withdrawn under this rule is within the sound discretion of the trial court. Hurt v. Commonwealth, 333 S.W.2d 951 (Ky. 1960). "This provision would appear to connote, though

we have not so held, that a voluntary plea of guilty, once made, cannot thereafter be withdrawn as a matter of right.” Allen v. Walter, 534 S.W.2d 453, 455 (Ky. 1976). The trial court found that Morrison’s guilty plea was voluntary and knowing in all respects. Upon review of the guilty plea proceeding, we agree.

Contrary to Morrison’s claim that he did not understand the ramifications of an ill juror serving on his jury panel, the record is clear that Morrison and his counsel were fully informed of the juror’s illness and discussed the situation before he entered his guilty plea. To the extent Morrison is actually claiming his counsel’s advice on the matter was deficient, said claim is not proper on direct appeal, but must first be raised in the trial court via a post-trial motion. White v. Commonwealth, 695 S.W.2d 438 (Ky.App. 1985); see RCr 11.42.

During Morrison’s plea proceeding, the trial court and the Commonwealth made it absolutely clear that Morrison was agreeing to plead guilty to both charges in the indictment as if the jury trial and verdict had never taken place. When defense counsel raised the prospect of challenging the verdict because of the possibility of some impropriety related to the ill juror, the Commonwealth again stressed that the plea was not conditional in any way and that the defendant must waive his appellate rights under the plea agreement. The court

specifically informed Morrison of his right to have a different jury fix his sentence. Morrison expressed his desire to waive this right and enter a guilty plea pursuant to a plea agreement. The court also made sure Morrison understood that, by pleading guilty, he was waiving his right to appeal his case to a higher court. Morrison likewise expressly stated that he understood he was waiving this right. A guilty plea is valid if it represents a voluntary and intelligent choice by a competent and counseled defendant to waive all trial-related constitutional rights.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). "The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). We agree with the trial court that Morrison's plea was entered voluntarily, knowingly and intelligently. Hence, the court did not abuse its discretion in denying the motion to withdraw the plea.

We would also note that the primary argument made in this appeal, that the plea was involuntary because Morrison did not understand the ramifications of having an ill juror on the panel in his trial, was not raised below. The sole argument made before the trial court at the hearing on the motion to withdraw his plea was that Morrison was under the influence of drugs at the time he entered his plea. Morrison cannot raise

the issue herein for the first time on appeal. Ruppee v. Commonwealth, 821 S.W.2d 484 (Ky. 1991). Hence, the issue was not preserved. RCr 10.12.

Morrison's remaining argument is that the trial court erred in imposing the \$1,000 fine when he was found by the court to be indigent. The trial court imposed the fine at the sentencing hearing on December 2, 2003, during which Morrison was represented by private retained counsel. No objection was made to the fine at that time. Morrison was not found indigent until the order granting *in forma pauperis* status was entered on December 23, 2003. Accordingly, we cannot say that the fine was imposed in error.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Hoffman
Assistant Public Advocate
Office of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky