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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000531-MR

STEVEN ARD — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 04-CR-00423

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM,[1] HENRY, AND VANMETER, JUDGES.

VANMETER, JUDGE: Steven Ard appeals from a judgment and sentence entered by the Campbell Circuit Court after the court refused to permit Ard to withdraw his guilty plea. For the reasons stated hereafter, we affirm.

Ard was charged with second-degree assault after he struck a man in the head with a baseball bat. The charge subsequently was upgraded to first-degree assault because of the

[1] Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

seriousness of the victim's injuries. Some six months later, on the scheduled trial date, Ard pled guilty to both an amended charge of second-degree assault, and a separate charge of wanton endangerment. The court conducted a hearing and Ard responded affirmatively to the court's questions[2] regarding the voluntary nature of his plea. The Commonwealth recommended, in accordance with the parties' written and signed plea offer, that Ard should be sentenced to consecutive terms of ten years on the assault charge, and five years on the wanton endangerment charge, for a total of fifteen years. Ard's attorney confirmed that the terms reflected his understanding of the recommendation.

Some four weeks later, during the sentencing hearing, the Commonwealth again recommended that the two sentences run consecutively for a total of fifteen years, and Ard's attorney reiterated that the plea had been negotiated in order to avoid a first-degree assault conviction. However, Ard made a pro se request to withdraw his guilty plea, asserting for the first time that he had felt pressured into making the plea because his attorney advised him that if he was convicted of first-degree assault and was sentenced to the maximum twenty-year term of imprisonment, he would have to serve a minimum of seventeen years before becoming eligible for parole. He claimed that his witnesses had not been told when the trial was scheduled, that

[2] *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

he didn’t think his attorney had done his job, and that he didn’t think he was guilty, especially as to the wanton endangerment charge. He stated that he had agreed to a total sentence of ten years rather than fifteen, and that his attorney had indicated in front of a sheriff that the two sentences in fact would run concurrently for a total of only ten years. Ard sought the withdrawal of his plea so that he could obtain another attorney and fight the charges against him. The Commonwealth opposed the motion, citing to Ard’s prior written and verbal admission to the offenses. The prosecutor described his numerous pretrial contacts with Ard’s attorney regarding discovery and negotiations, he stated that the matter was set for trial and the attorneys were prepared to go forward on the date of the guilty plea, and he noted that Ard provided no legal basis for withdrawing his plea. The court denied Ard’s motion without conducting an additional hearing, and the recommended sentence was imposed. This appeal followed.

Ard contends that the trial court abused its discretion by failing to conduct an evidentiary hearing to determine both whether his guilty plea was intelligent, knowing and voluntary, and whether he was afforded ineffective assistance of counsel. We disagree.

The applicable legal standards were well summarized in *Rigdon v. Commonwealth*[3] as follows:

> When a criminal defendant pleads guilty, Rule 8.10 of the Kentucky Rules of Criminal Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires "a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered." The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles.

[3] 144 S.W.3d 283, 287-88 (Ky.App. 2004) (citations omitted).

> A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:
>
> > (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professional competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.
>
> Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel.

Finally, a trial court's failure to make a finding of fact as to the voluntariness of a guilty plea does not constitute grounds for reversal or remand unless the failure was timely brought to the trial court's attention.[4]

The circuit court videotape shows that during his guilty plea hearing, Ard responded to the judge's inquiries

[4] *Id.* at 289-90.

calmly, appropriately, and without hesitation or prompting from his attorney. Ard confirmed that nothing prevented him from understanding the nature of the proceeding, that he had sufficient time to discuss the plea with his attorney, that he understood and voluntarily signed the guilty plea offer, that he understood the charges and acknowledged his guilt, that he understood the range of possible sentences, and that no threats or promises were made to obtain his agreement to the plea offer. Further, the videotape shows no objection or visible reaction from Ard when the Commonwealth stated that the parties had agreed that the recommended ten-year and five-year sentences would run consecutively for a total of fifteen years, or when Ard's attorney described the reasons for entering the guilty plea despite the possibility of raising several defenses at trial. Ard's attorney unambiguously opined, and the court found, that Ard entered his plea freely, intelligently and voluntarily.

We cannot say that the court clearly erred by failing to subsequently find that Ard's guilty plea was involuntary, given the totality of the circumstances surrounding the entry of the plea. Ard signed the guilty plea offer which specifically recommended the concurrent running of the sentences for fifteen years, and he was present in the courtroom during the guilty plea hearing when that offer was described. Given the absence

of any evidence to suggest that Ard did not voluntarily agree to the plea offer, as well as the absence of any specific request for a more complete evidentiary hearing, the trial court did not err by failing to either conduct an additional hearing or find that the guilty plea was involuntarily entered.[5] Further, under these circumstances we cannot find that the court abused its discretion by denying Ard's request to withdraw his guilty plea.

Finally, the trial court did not err by failing to find that Ard involuntarily entered his guilty plea as a result of the ineffective assistance of counsel.[6] Although Ard claims that he felt pressured into agreeing to the plea offer, he specifically indicated on the record during the guilty plea hearing that he was guilty of the charges, that he'd had adequate time to confer with his attorney, and that he was satisfied with his representation. Moreover, "it is not improper for an attorney to influence a client to reach" a decision to plead guilty in order to "escape possible greater

[5] Ard relies on *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002), as support for his contention that the trial court was required to conduct a more complete evidentiary hearing on his motion to withdraw his guilty plea. Here, during the sentencing hearing no one was placed under oath or cross-examined, but Ard and the prosecutor both spoke regarding Ard's allegations. Although conducting an evidentiary hearing would have been the prudent course of action pursuant to *Rodriguez* we find, as a panel of this court found in *Rigdon* under similar circumstances, that the informal hearing was "sufficient under these circumstances for the circuit court to determine the totality of circumstances surrounding [the] guilty plea." 144 S.W.3d at 290.

[6] *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

punishment,"[7] and counsel's advice to a client "to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel."[8] This is especially true here, given the severity of the first-degree assault charge against Ard, and the fact that a conviction on that charge would have subjected him to the substantial reduction in privileges and parole eligibility provided to violent offenders pursuant to KRS 439.3401. Further, Ard's claim that he was advised by his attorney that his sentences would run concurrently is not compelling, given his admission during the sentencing hearing that he knew the recommendation was for ten-year and five-year sentences, coupled with the fact that he signed the plea offer document which specifically stated that the sentences would run "consecutively for a total sentence of 15 years," and the fact that he was present in the courtroom during the guilty plea hearing when the recommendation was made for the consecutive running of the sentences for a total of fifteen years. Under these circumstances, we cannot say that the trial court erred by failing to find that counsel's performance was deficient and

[7] *Glass v. Commonwealth,* 474 S.W.2d 400, 401 (Ky. 1971).

[8] *Rigdon,* 144 S.W.3d at 288, citing *Beecham v. Commonwealth,* 657 S.W.2d 234, 236-37 (Ky. 1983).

resulted in prejudice to Ard's defense,[9] or that Ard was afforded ineffective assistance of counsel.

The court's judgment is affirmed.

ALL CONCUR.

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[9] *Strickland,* 466 U.S. 668.