

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001699-MR

WHITNEY GOVER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 04-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: DIXON, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: Appellant Whitney Gover appeals the Kenton Circuit Court's decision overruling his motion to withdraw his guilty plea to the charge of sale or transfer of a simulated controlled substance, second or subsequent offense, a violation of Kentucky Revised Statute (KRS) 218A.350(2). After a careful review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In April 2005, Appellant moved to enter a guilty plea to the charge of sale or transfer of a simulated controlled substance, second or subsequent offense, in violation of KRS 218A.350(2). The motion was signed by Appellant, and in the motion, Appellant stated the following: "No one, including my attorney, has promised me any benefit in return for my guilty plea, nor has anyone forced or threatened me to plead 'GUILTY.'"

During the plea colloquy, the circuit court asked Appellant, a high school graduate, if he had read and signed the motion, and he responded in the affirmative. Additionally, Appellant acknowledged that his attorney, Mr. Kenneth E. Rylee, Jr., had reviewed with Appellant the rights that Appellant was waiving by moving to enter a guilty plea. Furthermore, during the plea hearing, Appellant's trial counsel stated as follows: "For the record, [Appellant] and I have had, spent numerous, many hours discussing options in light of other things coming down the track. This is in his best interest." Appellant attested during his plea hearing that he had no complaints about how Mr. Rylee had represented him.

Subsequently, while trial counsel was out of town, Appellant was able to get Mr. Rylee's secretary to type Appellant's *pro se* motion to withdraw his guilty plea. The motion provided that Appellant wished to withdraw his guilty plea because "he was unaware of the consequences of entering a guilty plea in this matter." At Appellant's sentencing hearing, the circuit court noted that the motion had been filed *pro se*, and Mr. Rylee joined in the motion. A bench conference was held and at that time Mr. Rylee

explained to the court that Appellant pled guilty in this case because he thought that he was going to be indicted on federal charges in addition to the present charge, but he was never arrested on federal charges, so he wanted to go to trial on the present state charge.

Following the bench conference, the circuit court overruled Appellant's motion to withdraw his guilty plea, reasoning that Appellant was indicted for a crime in Kenton County, and what may or may not have happened with the federal authorities was irrelevant to the crime he committed under state law. Appellant was then given an opportunity to speak, and he alleged that he pled guilty to the present charge because Mr. Rylee had told him that the federal prosecutor was intending to arrest and indict him on charges concerning events that occurred years ago and that any federal sentence he would have to serve would "overrule" the time he would have to serve on the present state charge. The circuit court opined that Appellant knew exactly what he was doing when he pled guilty to the present charge because during the plea colloquy, the court had gone over the rights that Appellant was waiving by pleading guilty. Therefore, the court reiterated its decision overruling Appellant's motion to withdraw his guilty plea. At the conclusion of the July 25, 2005 sentencing hearing, Appellant was sentenced to serve two years of imprisonment.

Appellant now appeals, raising the following claim: "The trial court erred when it failed to hold an evidentiary hearing to determine if the Appellant's guilty plea was knowing, intelligent and [voluntary]." (Capitalization changed). Appellant alleges he pled guilty to the present charge because Mr. Rylee informed him that the federal

prosecutor advised that his state sentence would be subsumed by any sentence he would receive for the federal charges that might be brought against him. Appellant also contends that he is entitled to an evidentiary hearing to determine if his guilty plea was knowing, intelligent, and voluntary because his trial counsel was permanently disbarred after Appellant's sentencing "for various failings and for affirmative attempts to pilfer money that he was not entitled to receive." (Appellant's Br. at p. 2). Appellant reasons that "Counsel Rylee's admitted lack of character and rectitude, his representations to the trial court concerning his discussions with his client of the consequences of a guilty plea, and . . . the reasons why he induced [Appellant] to enter a guilty plea, must be questioned." *Id.*

## II. STANDARD OF REVIEW

After pleading guilty, a criminal defendant

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.

*Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (emphasis removed; internal quotation marks and citations omitted).

### III. ANALYSIS

Appellant asserts that he received the ineffective assistance of trial counsel and that he is, therefore, entitled to an evidentiary hearing to determine whether his guilty plea is valid.

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally 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.

*Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001).

Appellant alleges that he pled guilty to the present charge because his attorney told him that he was going to be arrested on federal charges and his state sentence would be subsumed by any sentence he received on those federal charges. First, we should note that, as discussed previously, in his motion to enter a guilty plea, Appellant stated the following: "*No one, including my attorney, has promised me any benefit in return for my guilty plea, nor has anyone forced or threatened me to plead 'GUILTY.'*" (Emphasis added). Therefore, his current claim directly contradicts the

statement that he made in his motion to enter a guilty plea, and he acknowledged during his plea colloquy that he had read and signed the motion.

Second, even if Appellant pled guilty with the hopes that his state sentence would be subsumed by his potential federal sentence, his claim lacks merit. Pleading guilty in order to avoid a harsher sentence that may follow if a defendant is convicted of other crimes alleged does not constitute coercion, duress, or intimidation, rendering a guilty plea involuntarily entered and thus, invalid. *See Kidd v. Commonwealth*, 255 Ky. 498, 74 S.W.2d 944, 946-47 (Ky. 1934). Therefore, Appellant's guilty plea was voluntarily, knowingly and intelligently entered when he elected to plead guilty to the present charges with the hope that he would get a lighter sentence when his state sentence was subsumed by his possible federal sentence. Thus, Appellant's guilty plea was valid.

Furthermore, to the extent that Appellant contends that Mr. Rylee's disbarment is a reason that the circuit court should have held an evidentiary hearing, his claim lacks merit. Simply because Appellant's trial counsel, Mr. Rylee, was subsequently disbarred for acts unrelated to Appellant's case does not render the assistance he provided Appellant incompetent or ineffective. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002). "A reviewing court should consider the overall performance of counsel throughout the case in order to determine whether the acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Id.*

In the present case, we fail to see how counsel's advice that Appellant's state sentence would be subsumed by any federal sentence he might receive constitutes

ineffective assistance. Even if this advice constituted a deficient performance on the part of counsel, Appellant cannot establish a reasonable probability that he would not have pled guilty but for this alleged deficient performance because Appellant had not been indicted on the federal charges when he pled guilty to the present charge. *See generally Bronk*, 58 S.W.3d at 486-87. Thus, Appellant should have been aware that this advice from counsel was based on a mere *possibility* that he would be indicted on federal charges, and that if he was not indicted on those charges, he would have only his present state sentence to serve, based on his guilty plea.

Moreover, as noted by the circuit court, we are only concerned with the state crime that Appellant committed in Kenton County, not any alleged federal crimes he may or may not have committed years ago. Therefore, we fail to see how the federal charges that Appellant thought he *might* face bear any relevance to the present state charge. We find no merit to Appellant's claim that he is entitled to an evidentiary hearing to determine whether his plea was voluntarily, knowingly, and intelligently entered, due to the ineffective assistance of counsel that he allegedly received based on counsel's advice concerning these non-existent federal charges. Finally, the circuit court's decision that Appellant's guilty plea was entered voluntarily, knowingly, and intelligently was not clearly erroneous, and the circuit court did not abuse its discretion when it overruled Appellant's motion to withdraw his guilty plea. *See generally Rigdon*, 144 S.W.3d at 288.

Accordingly, the decision of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky