

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002542-MR

MITCHELL DARNELL HAWKINS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00650

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Mitchell Darnell Hawkins was indicted for murder and first degree burglary. Pursuant to a plea agreement, on the third day of trial Hawkins entered a guilty plea to first degree manslaughter and the Commonwealth recommended fifteen years' imprisonment and dismissal of the

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

burglary charge. Represented by new counsel, Hawkins appeared at the sentencing and made an oral motion to withdraw his guilty plea on the basis that his prior counsel had rendered ineffective assistance. No request for an evidentiary hearing was made and the circuit court summarily denied the motion. We affirm.

At any time before judgment the court may permit the defendant to withdraw a guilty plea. RCr 8.10. Although the court has discretion whether to permit withdraw of a voluntary plea, once it is determined that a plea was involuntary, the motion to withdraw must be granted. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002).

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 the voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004) quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001) (footnotes omitted).

Advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Id.* To succeed, the defendant must establish: "(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 error of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." *Id.*

Hawkins contends that although he did not request a hearing at the time he moved to withdraw his plea, the court erred when it summarily denied his motion. "[G]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing." *Id.* at 289. However, an appellate court's analysis of a decision on a motion to withdraw a guilty plea on the basis of ineffective assistance of counsel is dependent on the law applicable to RCr 11.42 motions. See *Bronk, supra; Rodriguez, supra; Rigdon, supra*. It seems reasonable, therefore, that the same standard applicable to the hearing requirements in an RCr 11.42 proceeding are likewise relevant to the same inquiry on a motion to withdraw a guilty plea. Thus, a hearing is not required where the motion is based on nothing more than conclusory allegations unsupported by specific facts. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003).

At the time Hawkins moved to withdraw his plea, he was given the opportunity to be heard concerning the basis for his motion. He cited no facts in support of his motion and stated only that he felt pressured by his attorney to take the plea because she told him that "there wasn't anything she could do for him." Hawkins's allegations are totally conclusory in nature and, therefore, he was not entitled to a full evidentiary hearing.

The trial court determined that under the totality of the circumstances, Hawkins's plea was voluntarily entered. This conclusion is supported by the record which reveals that at the time of the plea, the trial court conducted a hearing in compliance with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Hawkins acknowledged that he understood the charges, had conferred with counsel, and was not forced or coerced into entering his plea. Additionally, having observed three days of trial, the trial court was able to assess counsel's performance as well as the Commonwealth's case. Under the totality of the circumstances, we find no error in the trial court's finding that the plea was voluntarily entered. *Rigdon, supra*, at 287-288.

The only issue remaining is whether the trial court abused its discretion when it denied Hawkins's motion to withdraw his voluntary plea. There is nothing in the record

which indicates that its decision was arbitrary, unreasonable, unfair, or unsupported by legal principles. *Rigdon, supra*, at 288. As a result of the plea, one felony charge against Hawkins was dismissed and the remaining murder charge reduced to manslaughter. We find no error in the trial court's refusal to permit Hawkins to withdraw his plea.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky