

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000257-MR

TERRY SMALLWOOD

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CR-00313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND TAYLOR; JUDGES; EMBERTON,¹ SENIOR JUDGE.

ACREE, JUDGE: Terry Smallwood appeals from two orders of the Pike Circuit Court.

The first is a judgment finding him guilty of two counts of trafficking in a controlled substance, charges to which he entered an unconditional guilty plea. The second order denies his request to withdraw his guilty plea wherein he claimed to have been coerced into pleading guilty. Smallwood failed to attach a copy of this second judgment in the appendix of his brief as required by Kentucky Rule of Civil Procedure (CR)

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.

76.12(4)(c)(vii). We also note that his brief failed to include both an introduction and a statement concerning oral argument as required by CR 76.12(4)(c)(i-ii).² We note that this is not the first time this legal counsel has failed to comply with rules of appellate procedure³ and we caution him to be mindful of the strictures of Supreme Court Rule 3.130(1.1) that a lawyer undertake only such representation as he can discharge with competence. The judgments of the trial court are affirmed.

On December 6, 2004, the Pike County Grand Jury returned an indictment against Bobby Smallwood, a.k.a. Batman, charging him with two counts of first-degree trafficking. Smallwood appeared in court for a pretrial conference on February 21, 2005, at which time it became apparent that there was confusion regarding his first name. Some materials in the prosecutor's file showed the defendant's first name to be Bobby, while others showed it as Terry. Early in the proceeding, the trial judge asked Smallwood what his first name was and whether he had ever gone by the nickname "Batman." Smallwood confirmed that his first name was Terry and answered affirmatively to the question about being called Batman. The indictment was amended to reflect Smallwood's proper first name.

The case went to trial that September. While testifying in his own defense, Smallwood denied that he had ever gone by the name Batman. On cross-examination, Smallwood admitted that some people had called him Batman but, apparently intending to make a distinction, denied that he had ever gone by that name. The Commonwealth

² The Appellant has entitled his Statement of the Case as "Introduction."

³ *Smallwood v. Commonwealth*, No. 2005-CA-000714.

also asked Smallwood whether he had ever appeared in court and admitted to going by the nickname Batman. Smallwood responded that he had not. Over Smallwood's objection, the Commonwealth was permitted to call the prosecutor who had been in court on the day of his pretrial conference. The Commonwealth was also allowed to introduce the videotape of the trial court asking Smallwood for his correct name and whether he had ever been known as Batman. Smallwood requested a mistrial, arguing that he was prejudiced by the Commonwealth and the trial judge becoming witnesses against him. He also argued that his answers during the pretrial conference should be suppressed as improper self-incrimination. Nevertheless, the trial court overruled all his objections and allowed the evidence to be admitted.

Facing a sentence of five to ten years on each count, Smallwood decided to plead guilty to the Commonwealth's offer of five years on each charge, to be served concurrently, and an agreement to refrain from seeking an indictment on a pending felony charge. Although trial counsel expressed his reluctance to advise his client to plead guilty, Smallwood chose to enter an unconditional plea to the charges against him. The trial court ordered a presentence investigation and scheduled him for a sentencing hearing. Two months before his sentencing date, Smallwood filed a motion to withdraw his guilty plea. He alleged that his plea of guilty was involuntary, the result of coercion and intimidation which occurred when the trial judge and a prosecutor were permitted to testify against him. The trial court entered a judgment of conviction against Smallwood on October 11, 2005, eight days after his motion to withdraw his guilty plea was filed.

Smallwood argued his motion to withdraw his guilty plea before the trial court at a hearing on January 13, 2006. The trial court overruled the motion and imposed the agreed upon sentence on January 24, 2006. Smallwood filed notices of appeal as to both the judgment of conviction and the order denying his motion to withdraw his guilty plea.

On appeal, Smallwood argues that the trial judge was incompetent to testify as a witness in a trial over which he was presiding, pursuant to Kentucky Rule of Evidence 6.05. Smallwood contends the acceptance of his guilty plea denied him his constitutional right to a fair trial by a neutral tribunal. Further, Smallwood claims the trial judge ignored his obligation to recuse under the Judicial Canon of Ethics 3(c)(1)(a). Of all these arguments, only the alleged denial of his constitutional rights was raised in front of the trial court. It is a well-established principle that “appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Thus, we will only address Smallwood's argument that his constitutional rights were denied. “A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.” *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. 1990). (Citation omitted.) By entering an unconditional guilty plea, Smallwood waived his right to challenge the trial court's decisions with regard to admitting evidence at his trial.

Smallwood also filed a notice of appeal from the trial court's order denying his motion to withdraw his guilty plea. Kentucky Rule of Criminal Procedure 8.10

allows a court to permit a guilty plea to be withdrawn prior to the entry of judgment. “[P]ermission to withdraw a guilty plea and substitute a plea of not guilty is a matter within the sound discretion of the trial court.” *Anderson v. Commonwealth*, 507 S.W.2d 187, 188 (Ky. 1974). CR 76.12(4)(c)(vii) requires an appellant's brief to contain a copy of the trial court's judgment within its appendix. Smallwood failed to attach a copy of the order denying his motion to withdraw his guilty plea. Thus, we decline to review the trial court's denial of this motion. *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky.App. 1985).

For the foregoing reasons, the judgments of the Pike Circuit Court are affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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