

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002649-MR

RUSSELL McCAULEY

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
ACTION NOS. 05-CR-00019 AND 05-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Russell McCauley appeals from an order of the Marion Circuit Court denying his motion to withdraw the guilty plea he entered in the above captioned indictments. We affirm.

In Indictment No. 05-CR-00019 McCauley was indicted on various drug and firearm charges. In Indictment No. 05-CR-00020 he was indicted for receiving

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

stolen property over \$300.00. McCauley was also indicted for first degree persistent felony offender in both cases. In Indictment No. 05-CR-00021 McCauley's step-daughter and co-defendant, Robin Crystal Tungate, was indicted for various drug charges in connection with allegations overlapping with the charges in the appellant's Indictment No. 05-CR-00019.

McCauley eventually entered into a plea agreement with the Commonwealth resolving both Indictments 05-CR-00019 and 05-CR-00020. Pursuant to the plea agreement various counts were dropped, the persistent felony offender charge was reduced to second-degree, an unrelated indictment was dismissed, McCauley pled guilty to various of the counts, and the Commonwealth agreed to recommend a sentence of a total of 18 years to serve. On June 9, 2006, a plea agreement hearing was held at which time the trial court accepted the plea agreement. McCauley's trial counsel at the time of the plea agreement was Dawn Spalding.

Prior to sentencing, the appellant moved to withdraw his guilty plea upon the basis that a term of his plea agreement with the Commonwealth was that his step-daughter's charges in Indictment No. 05-CR-00021 be dropped, and the Commonwealth had failed to comply with this aspect of the agreement.

On December 4, 2006, an evidentiary hearing was held on McCauley's motion to withdraw his guilty plea. Prior to the hearing new trial counsel was substituted in place of Spalding. At the hearing Spalding's former secretary, McCauley's brother, and McCauley all testified to the effect that Spalding had informed McCauley that the

Commonwealth would agree to drop the charges against his step-daughter if he would agree to plead guilty under the terms as described above. Spalding, however, firmly testified that she had stated no such thing. She testified that she had only indicated that the step-daughter may get pre-trial diversion, which could ultimately lead to dismissal of the charges.

In its December 15, 2006, order denying McCauley's motion to withdraw his guilty plea, the trial court made findings rejecting McCauley's claim that there had been an agreement that charges against his step-daughter would be dismissed if he pled guilty. McCauley appeals from the denial of his motion to withdraw his plea.

Before us, McCauley contends that the trial court erred in denying his motion to withdraw his guilty plea. We disagree.

We first note that in its December 15, 2006, order the trial court made findings rejecting McCauley's claim that the Commonwealth had agreed to dismiss the charges against his step-daughter in return for his guilty plea. “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR² 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* As stated in *R.C.R. v.*

² Kentucky Rules of Civil Procedure.

Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998), “when the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *Id.* at 39.

The trial court's finding that there was no agreement that the charges against McCauley's step-daughter would be dismissed in return for his guilty plea is supported by substantial evidence. Spalding's testimony alone supports the trial court's finding. In addition, the issue was not included in the written plea agreement documents, nor was it raised at the plea agreement hearing. As such, we undertake the remainder of our review based upon the premise that there was no agreement that the Commonwealth would dismiss the charges against McCauley's step-daughter in return for his guilty plea.

RCr³ 8.10 provides that “[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.” The decision to permit the withdrawal of a guilty plea is firmly committed to the sound discretion of the trial court. *Anderson v. Commonwealth*, 507 S.W.2d 187, 188 (Ky. 1974). A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 570 (Ky. 2006).

As previously noted, the trial court determined that the Commonwealth had, in fact, not offered to dismiss the charges against McCauley's step-daughter in return for his guilty plea. Moreover, the premise that the Commonwealth had made such an offer

³ Kentucky Rules of Criminal Procedure.

was the underpinning of McCauley's motion to withdraw. As the underpinning for McCauley's motion has been subverted, we conclude that the trial court did not abuse its discretion in denying his motion to withdraw his guilty plea. McCauley cites us to no other basis why his otherwise knowing and voluntary guilty plea should be withdrawn, and we will accordingly not disturb the trial court's denial of the motion.

In the alternative McCauley argues that his guilty plea should be set aside based upon ineffective assistance of counsel during the plea negotiation process. However, McCauley does not cite us to his preservation of this issue as required by CR 76.12(4)(c)(iv).

In any event, a claim of ineffective assistance of counsel generally will not be reviewed on direct appeal because there usually is no record or trial court ruling specifically on the issue and there is a potential problem of conflict of interest for trial counsel filing notices of direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky.1998) (indicating the better approach involving claims not preserved by trial counsel is to first file a RCr 10.26 substantial or palpable error motion in the appellate court, and then if unsuccessful, to raise an ineffective assistance of counsel claim in a post-judgment collateral attack); *Hibbs v. Commonwealth*, 570 S.W.2d 642, 643 (Ky.App.1978). However, where the ineffective assistance claim is specifically raised in a new trial motion and ruled on by the trial court, it may be reviewed on direct appeal. *Humphrey, supra*. As the trial court did not rule upon McCauley's claim of ineffective

assistance of counsel, the issue is not properly before us. His remedy is to pursue this claim through a post-conviction motion pursuant to RCr 11.42

For the foregoing reasons the judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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