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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000506-MR

JAMES WILLIAMS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 2006-CR-00500

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: James Williams (a.k.a. James Thomas) appeals the Campbell Circuit Court's order overruling his motion to withdraw his guilty plea to the charge of third-degree assault. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Williams was indicted on charges of third-degree assault and of being a second-degree Persistent Felony Offender (PFO). He initially entered a plea of not guilty to both charges. Thereafter, the Commonwealth made a plea offer whereby, if Williams

entered a guilty plea to the charge of third-degree assault, the Commonwealth would seek dismissal of the second-degree PFO charge and recommend a sentence of four years of imprisonment, to run consecutively to the sentence Williams was serving at that time under an unrelated conviction.

Williams moved to enter a guilty plea to the charge of third-degree assault. In his motion, Williams acknowledged that by pleading guilty, he was waiving various constitutional rights, including his right to produce witnesses in his favor. His motion also provided that his guilty plea was “freely, knowingly, intelligently and voluntarily made,” and that he had been represented by counsel, who had “fully explained [his] constitutional rights to [him], as well as the charges against [him] and any defenses to them. . . .”

At the plea colloquy, Williams testified that he was able to read and write. The circuit court noted that Williams's attorney, Aaron Currin, informed the court that Williams wanted to be sentenced that day because he was not getting his heart medication while he was in the Campbell County Detention Center.¹ Williams testified that his ability to make decisions, however, was not affected by the fact that he was not receiving that medication. Williams attested that he had spoken with Mr. Currin about his case, he was satisfied with the advice Mr. Currin had given him, and he believed that Mr. Currin had done everything that he could do to represent Williams in this matter.

¹ Williams asserted that he had been given his medication while at the state penitentiary, but alleged he had not received it in ten days, since moving to the Campbell County Detention Center for hearings in this case.

The court discussed the plea offer with Williams. Specifically, the court stated that if Williams entered a guilty plea to the third-degree assault charge, the Commonwealth would move to dismiss the second-degree PFO charge and would recommend a four-year sentence to be served consecutively to the sentence Williams was already serving. The court asked Williams if that was his understanding of the plea offer, and Williams responded in the affirmative. The court also asked Williams if, other than the plea offer, anyone had made any other promises to him or tried to force him to plead guilty. Williams answered “no” to both of these questions.

The court inquired if Williams had read the motion to enter a guilty plea and signed it, and Williams responded in the affirmative. Williams was asked if he was pleading guilty because he was in fact guilty, and he responded affirmatively. The court then stated: “You're not entering a plea of guilty because you feel like you need your medication [and] you want to get that medication quicker, is that correct, sir?” Williams informed the court that was correct. The court continued, stating: “Cause [sic] I wanted to let you know . . . if that would be the case, well you know, we could send you back immediately . . . to the state prison so we could make sure you get that medication [and] give you time to think about this case. You understand that, sir?” Williams again responded in the affirmative.

The circuit court inquired if Williams was admitting that he was guilty to the charge of third-degree assault. He replied affirmatively. The court then asked if he

was entering his guilty plea freely, voluntarily, and knowingly. Williams responded “yes.”²

The court and Williams discussed various options concerning when Williams would be sentenced. The court decided that Williams would be sent back to the state penitentiary that afternoon and remain there until his sentencing hearing, so that he could get his medication. The court also ordered that a new presentence report be prepared.³

The circuit court entered its judgment on Williams's guilty plea, noting first that the Commonwealth had moved to amend the indictment by dismissing the second-degree PFO charge. The court sustained the Commonwealth's motion to amend. The court then accepted Williams's guilty plea to the charge of third-degree assault and

² We take this opportunity to note that, upon review of the video tape of Williams's plea hearing, the court asked Williams various other questions that are typically asked during such a hearing, including whether Williams understood that he had certain constitutional rights, such as the right to confront witnesses against him, and whether he understood that, by pleading guilty, he was waiving those rights. Unfortunately, Williams's responses to some questions are inaudible on the tape. Thus, we have only recited in this opinion the questions and answers that are audible and capable of review. We would like to remind the lower courts to ensure that defendants speak loudly and clearly during court hearings, particularly plea hearings, so that the questions, answers, and concerns expressed during these hearings are properly recorded for appellate review. However, in the present case, simply because some of Williams's answers were inaudible, we will not presume that he did not waive his constitutional rights or that there was any irregularity during his plea hearing. *See Parke v. Raley*, 506 U.S.20, 30, 113 S. Ct. 517, 523-24, 121 L. Ed. 2d 391 (1992). Williams does not contend that he did not waive his constitutional rights at that time. Furthermore, despite the fact that some of Williams's responses were inaudible, we are nonetheless able to conduct a full review of his appellate claims based on the audible portions of the plea hearing and on his motion to enter a guilty plea. The audible portions of the tape were sufficient to show that Williams's plea was facially valid. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 565-66 (Ky. 2006).

³ The court had the presentence report at the time of the plea colloquy, but there were allegedly errors in it. The court thereafter ordered the Division of Probation and Parole to prepare a new presentence report.

directed the Division of Probation and Parole to prepare a presentence investigation report.

Later, at the sentencing hearing, Williams appeared with a different attorney, Derek Durbin, and moved to withdraw his guilty plea. Williams was sworn in for testimony on his motion. The basis for his motion was that he did not get a chance to talk to his prior attorney before pleading guilty and that his prior attorney had failed to subpoena exculpatory witnesses. He also contended that he needed a heart transplant. He claimed he could not have the surgery while incarcerated, and his doctor told him he only had about a year to live. He said that he was trying to figure out a way to get the surgery. The court stated:

Sir, all I hear from you is that, um, perhaps you think you could win your case at trial, um, but I don't hear anything from you that makes me feel that you were coerced into entering a plea of guilty, that you were, um, not aware of what you were doing at the time that you entered the plea. . . . I don't hear anything that would make me believe that you didn't give this plea freely, voluntarily, and knowingly, so I don't need to go back over the plea colloquy.

Therefore, the court held that Williams was not permitted to withdraw his guilty plea.

The court then sentenced Williams to serve four years of imprisonment, with the sentence running consecutively to the sentence that he was already serving.

Williams now appeals, claiming that the circuit court erred when it did not permit him to withdraw his guilty plea because his attorney failed to communicate with him, did not subpoena exculpatory witnesses and also due to Williams's deteriorating

health condition. Williams further contends that the court should have ordered his prior attorney, Mr. Currin, to appear and testify concerning his representation of Williams.

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

A. CLAIM CONCERNING THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

Williams asserts that he should have been permitted to withdraw his guilty plea because he received ineffective assistance of trial counsel and that counsel, Mr.

Currin, should have been required to appear and testify concerning his representation of Williams.

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) (internal quotation marks omitted).

Williams contends that his attorney, Mr. Currin, failed to communicate with him and failed to subpoena exculpatory witnesses. However, in his motion to enter a guilty plea, which Williams testified he read and signed, Williams professed that his guilty plea was “freely, knowingly, intelligently and voluntarily made,” and that he had been represented by counsel, who had “fully explained [his] constitutional rights to [him], as well as the charges against [him] and any defenses to them. . . .” Additionally, during his plea colloquy, Williams testified that he had had enough time to speak with Mr. Currin about his case, he was satisfied with the advice Mr. Currin had given him, and he believed that Mr. Currin had done everything that he could do to represent Williams in this matter. Therefore, Williams's allegation that he received the ineffective assistance of counsel, thus warranting a withdrawal of his guilty plea, because his counsel failed to communicate with him and to subpoena exculpatory witnesses, directly contradicts

Williams's motion to enter a guilty plea and the sworn statements that he made during his plea hearing. The Kentucky Supreme Court has "recognize[d] that a defendant who expressly represents in open court that his guilty plea is voluntary may not ordinarily repudiate his statements to the sentencing judge." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 568 (Ky. 2006) (internal quotation marks omitted). In the present case, there was substantial evidence supporting the circuit court's finding that Williams's plea was voluntary, knowing, and intelligent. *See id.*

Other than making this vague allegation that he received ineffective assistance of counsel, Williams did not support his motion in the circuit court with any factual or legal arguments. The circuit court found that Williams failed to show that his guilty plea was not entered freely, knowingly, and voluntarily, and that he was simply arguing that he thought he could win the case if it proceeded to trial. Because Williams did not support his ineffective assistance of counsel allegation with any factual or legal argument, he failed to show "that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance." *Bronk*, 58 S.W.3d at 486 (internal quotation marks omitted). Therefore, Williams's ineffective assistance of counsel claim fails.

Furthermore, due to the fact that Williams's claim of ineffective assistance of counsel was merely conclusory, we see no reason for the circuit court to have ordered Mr. Currin to appear and testify concerning his representation of Williams in this matter.

Thus, the circuit court did not err in failing to require Mr. Currin to testify regarding Williams's assertion of ineffective assistance of counsel.

B. CLAIM CONCERNING WILLIAMS'S DETERIORATING HEALTH CONDITION

Williams next alleges that he should have been permitted to withdraw his guilty plea because of his deteriorating health condition and his need for a heart transplant, which he claims he is unable to get while in prison. However, he did not contend in the circuit court that his guilty plea was involuntarily, unknowingly, or unintelligently entered due to his health condition. Williams also failed to provide the circuit court with medical records to support his assertion that he needed a heart transplant.

Furthermore, during the plea colloquy, the circuit court was very careful to ensure that Williams's health condition had no effect on his decision to enter a guilty plea. Williams testified during his plea hearing that his ability to make decisions was not affected by the fact that he was allegedly not receiving his medication while at the Campbell County Detention Center. Moreover, as noted previously, the circuit court asked Williams during his plea hearing: “You're not entering a plea of guilty because you feel like you need your medication [and] you want to get that medication quicker, is that correct, sir?” Williams responded that the court was correct. The court continued, stating: “Cause I wanted to let you know . . . if that would be the case, well you know, we could send you back immediately . . . to the state prison so we could make sure you

get that medication [and] give you time to think about this case. You understand that, sir?" Williams again responded in the affirmative.

"Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Edmonds*, 189 S.W.3d at 569.

Williams's allegation that he should have been permitted to withdraw his guilty plea due to his deteriorating health was unsupported by any factual or legal arguments. In fact, his testimony at the plea hearing weighed against any finding that his health condition affected his decision to enter a guilty plea.

Consequently, there is substantial evidence supporting the circuit court's determination that Williams's guilty plea was voluntarily entered, and we find that the circuit court did not abuse its discretion when it overruled Williams's oral motion to withdraw his guilty plea. *See Rigdon*, 144 S.W.3d at 288.

Accordingly, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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