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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001243-MR

CANON HARPER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CR-002253-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: The Appellant, Canon Harper, appeals from an order of the Jefferson Circuit Court denying his motion to withdraw his guilty plea. After our review, we vacate and remand.

On August 24, 2015, a Jefferson County grand jury indicted Mr. Harper on two counts of complicity to criminal attempted murder, two counts of

complicity to assault in the first degree, one count of complicity to robbery in the first degree, and one count of complicity to wanton endangerment in the first degree. Mr. Harper was 19 years of age at that time (DOB: October 15, 1995) and had never been convicted of a felony or misdemeanor offense.

Initially, Mr. Harper was represented by Aaron Dyke in the Public Defender's Office for about three months. Mr. Harper then retained private counsel, Scott Drabenstadt and Steve Esselman.

Trial was originally set for May 10, 2016, which was converted to a pre-trial conference by agreement. Trial was rescheduled for October 4, 2016, which was also converted to address a suppression issue. On November 15, 2016, trial was scheduled for March 21, 2017 – the third trial date.

On January 26, 2017, Mr. Drabenstadt filed a motion to withdraw as counsel because he had accepted a position with the office of the Jefferson County Commonwealth's Attorney. The court granted the motion by an order entered on January 31, 2017. On February 17, 2017, Attorney Rob Eggert, who represented Mr. Harper's co-defendant, Brandon Washington, filed a motion to disqualify the Office of the Jefferson County Commonwealth's Attorney.

On March 13, 2017, the court granted Mr. Esselman's motion to withdraw because he had been co-counsel with Mr. Drabenstadt. Mr. Harper

indicated that his family would be hiring a private attorney to represent him. The trial date of March 21, 2017, was continued to August 15, 2017.

On March 23, 2017, Justin Brown filed a notice of entry of appearance as counsel for Mr. Harper. On April 27, 2017, Mr. Brown filed a motion on Mr. Harper's behalf to disqualify the Office of the Jefferson County Commonwealth's Attorney. The motion was heard on July 17, 2017, and was denied.

On August 15, 2017, Mr. Brown was present, announced ready for trial, and even had clothes brought in for Mr. Harper. However, Mr. Eggert did not appear. A Mr. Neumann appeared on behalf of his co-defendant, Brandon Washington, and requested a continuance. The trial was continued to February 27, 2018.

On December 21, 2017, Mr. Brown filed a motion to withdraw as counsel. The motion reflects that he had been ready to proceed to trial on the August 15, 2017, trial date (by which time Mr. Harper had been incarcerated for 23 months), that the trial had been continued, and that Mr. Brown had not been fully paid pursuant to his retainer agreement.

The court granted Mr. Brown's motion to withdraw and appointed the Public Defender's Office to represent Mr. Harper. The case was again assigned to Aaron Dyke, who filed an entry of appearance on January 8, 2018. On January 8,

2018, Mr. Dyke also filed a motion to convert the February 27, 2018, trial date to a pre-trial conference. The motion reflects that Mr. Dyke was appointed on January 3, 2018, and that as of the time of filing the motion, he had "not received or reviewed any of the discovery on this case . . . [n]or . . . had any opportunity whatsoever to conduct any investigation into the allegations in this case." Mr. Dyke explained that he had two trials scheduled in January 2018 and a vacation scheduled in February and that if the trial were to proceed as scheduled, Mr. Dyke believed that "he would be at risk of providing ineffective assistance to Mr. Harper."

On July 16, 2018, Mr. Harper entered a conditional guilty plea to two counts of complicity to criminal attempted murder, two counts of complicity to assault in the first degree, one count of complicity to robbery in the first degree, and one count of complicity to wanton endangerment in the first degree in exchange for a sentence of 10 years to serve, all sentences to run concurrently. Mr. Harper reserved his right to appeal the issue of his private attorney's withdrawing and being hired by the Commonwealth's Attorney during his representation pursuant to RCr[1] 8.09.

On July 18, 2018, the court entered judgment on a plea of guilty and found that:

[1] Kentucky Rules of Criminal Procedure.

> [T]he Defendant understands the nature of the charges against him; that the Defendant intelligently, knowingly and voluntarily waives his right to a trial by jury, the privilege against self-incrimination, the right to confront witnesses against him and any defenses available to him at trial; that the Defendant's plea is intelligent, knowing and voluntary, and that there is a factual basis for the Defendant's plea[.]

On August 14, 2018, the case of co-defendant, Brandon Washington, came on for trial in a different division of Jefferson Circuit Court before Hon. Charles L. Cunningham. The jury found Mr. Washington **not guilty on all counts**.

Three weeks later, on September 5, 2018, the date set for his sentencing, Mr. Harper made an oral motion to withdraw his guilty plea. The trial court set the matter for a hearing on December 10, 2018. By an order entered on September 11, 2018, the Public Defender's Office was stricken due to the potential conflict and Kevin Pride was substituted as counsel of record.

On November 16, 2018, Mr. Harper, by his new counsel, filed a written motion to withdraw guilty plea pursuant to RCr 8.10, which provides in relevant part:

> 14. At the plea hearing in July, [the] Court engaged in a discussion regarding Mr. Harper's understanding of the plea offer and whether his plea was freely, knowingly, intelligently and voluntarily made, to which Mr. Harper stated it was. However, Mr. Harper contends that the plea was made under undue influence by his counsel, Mr. Aaron Dyke. Mr. Harper contends that Mr. Dyke's presentation of the options available to Mr. Harper painted a dire picture should he proceed to trial and, as

> such, that accepting the plea was the best decision for him.
>
> …
>
> 16. Mr. Harper executes a limited waiver of attorney-client privilege with respect to his communications with Mr. Dyke regarding their conversations about his options and to determine whether any undue influence was placed upon him regarding his decision to plead guilty.

On December 10, 2018, the trial court conducted a hearing on the motion to withdraw. Mr. Harper first called Mr. Dyke. He testified that when he was re-assigned to the case in January 2018, both Mr. Brown, the previous attorney, and Mr. Cooke, the prosecutor, informed Mr. Dyke that there had been an offer of ten years at 85% with no other contingencies. Mr. Dyke visited Mr. Harper at the jail on January 6, 2018, and informed him about the offer. At that time, Mr. Dyke had not yet formed an opinion about the offer. Mr. Dyke visited Mr. Harper again on June 24 and July 12, 2018. Mr. Dyke testified that he told Mr. Harper that this was a case that could go either way, that his co-defendant would be taking his case to trial and might get a better outcome, but that Mr. Harper indicated he was not willing "to risk it."

Although he had no independent recollection, Mr. Dyke explained that he normally does not read the documents word for word but that he summarizes their contents. Mr. Dyke believed that he spent approximately ten minutes going over the plea sheets with Mr. Harper -- as was his general practice.

Asked about Mr. Harper's response, Mr. Dyke testified that he did not recall exactly what was said but that Harper did not raise any questions or objections to signing the plea documents that day.

Mr. Dyke did not recall discussing the possibility of an *Alford*[2] plea with Mr. Harper or Mr. Cooke, the prosecutor. According to Mr. Dyke, "it was off the table because there was potential that the Commonwealth would call Mr. Harper even though he had agreed that he would not be called." Mr. Dyke thought that pleading guilty was in Mr. Harper's best interest because he could receive a greater penalty. He was facing up to 70 years. Mr. Dyke's recollection was that if they did not accept the plea when they did, it was going to expire soon after. Mr. Dyke testified that he got to know Mr. Harper fairly well. Mr. Dyke thought that Mr. Harper trusted his judgment.

However, Mr. Harper testified that he felt he had "no choice" but to accept the plea deal. He had never been in this situation before. Mr. Harper testified that he felt:

> like to make it home the only thing I had to do was to plead guilty, that's basically what I was told. Either go to trial and lose, my chances are slim, or just take this, finish doing this time and make it home. And I really didn't do anything.

Mr. Harper consistently asserted his innocence.

[2] *North Carolina v. Alford*, 400 U.S. 25, 29, 91 S. Ct. 160, 163, 27 L. Ed. 2d 162 (1970).

Mr. Harper, who is African-American, testified that Mr. Dyke had also discussed race as a factor in the case. "He said that it's not going to look good to a jury with Caucasian males or Caucasian people coming to point out a black guy saying that he did something to them." According to Mr. Harper, Mr. Dyke said that he would take the deal and run with it if he were in Mr. Harper's shoes.

Asked if Mr. Dyke told him to plead guilty, Mr. Harper responded, "Yes, in so many words." Mr. Harper did not recall the exact words. He testified that Mr. Dyke "just persuaded me into it, because I put my trust in Mr. Dyke, I'm supposed to be able to put my trust in my counsel and I just went along with what he said." Mr. Harper testified that he was never offered an *Alford* plea in the case and that he would have considered taking it. "If I could have maintained my innocence, yes I would."

Mr. Harper did not feel that Mr. Dyke had adequate time to spend with him to discuss his options. Mr. Harper felt that Mr. Dyke had an overwhelming case load and could not really focus on his case the way Mr. Harper was sure that he wanted to. Mr. Harper testified that he felt as if he had been misled by Mr. Dyke's going through all the negatives: "I mean he brought up some pros, but it was always in discussions about deal this, deal that, deal that, **he never asked me my side of are you innocent**." (Emphasis added). Mr. Harper was never offered the time or opportunity to discuss the plea with his family. He

was told that the offer could be soon taken off the table. Because he felt pressured to take the deal quickly, he pled guilty despite claiming his actual innocence.

On cross-examination, Mr. Harper denied that he "lied to the judge" during the colloquy on July 16, 2018. Mr. Harper testified that his attorney told him to plead guilty, to say yes, and that is what he did. Mr. Harper testified that he is innocent and that he would like his chance to go to trial to prove his innocence.

On March 7, 2019, the trial court entered an order denying Mr. Harper's motion to withdraw his guilty plea, reciting as follows:

> Here, the Court asked the Defendant upon entering his plea if he understood an orally-provided list of his legal rights, including the right to a trial. The Court further advised Harper that at trial his lawyer would have the right to confront and cross-examine witnesses. The Court further inquired as to whether Harper felt threatened in any way to enter the plea. The Court also asked Harper whether he was satisfied with Dyke's advice as his lawyer. Harper responded yes.
>
> In addition, in this Court's experience, Attorney Dyke is very intelligent, thorough and professional with his clients. He testified to the Court that he spoke with Harper multiple times regarding the plea. He further testified that he was ready and had no reluctance whatsoever to take the Defendant's case to trial. Dyke further testified that he did not force his client or threaten him in any way to accept the plea. In fact, he specifically stated he advised Harper that it was a case he could see going either way, and that he would try it or plea, whichever the Defendant wanted. Dyke also testified that he informed Harper there was a possibility that his co-defendant would receive a more favorable outcome at trial.

> Balancing the totality of the circumstances of the plea, the Court finds that it was entered knowingly, voluntarily and intelligently. The only type of involuntary nature alleged by Harper was that he testified that he felt he had no option but to take the plea. This statement is clearly contradicted by Dyke's testimony regarding the process. There is no allegation in Harper's papers that any matter was misrepresented to Harper either by counsel or the Court. Further, even assuming Defendant felt pleading was his only option, the Court also advised Defendant Harper prior to his plea of his right to go to trial. The Court believes that Harper's motion is based upon his co-defendant's outcome at trial. A motion to set aside a plea is not for a circumstance in which a defendant merely wishes he could pursue another course.

On May 1, 2019, the trial court entered its judgment of conviction and sentence and on May 15, 2019, it entered an amended judgment of conviction and sentence, sentencing Mr. Harper to a total sentence of ten years to serve with a credit for time served pursuant to KRS[3] 532.120.

Mr. Harper appeals. RCr 8.10 provides in relevant part 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."

> Though an RCr 8.10 motion is generally within the sound discretion of the trial court, a defendant is entitled to a hearing on such a motion whenever it is alleged that the plea was entered involuntarily. If a guilty plea is found to have been entered involuntarily, considering the totality of the circumstances, a trial court must grant a

[3] Kentucky Revised Statutes.

> defendant's motion to withdraw the plea. This inquiry is inherently fact-sensitive, thus this Court reviews such a determination for clear error, *i.e.*, whether the determination was supported by substantial evidence.
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> . . .
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> After finding that Appellant's plea was voluntary (which is reviewed for clear error), a trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for abuse of discretion.

Edmonds v. Commonwealth, 189 S.W.3d 558, 566, 570 (Ky. 2006) (internal citations omitted).

> The validity of a guilty plea depends "upon the particular facts and circumstances . . . including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). In other words, the validity of a guilty plea is determined **not by reference to some magic incantation** recited at the time it is taken **but from the totality of the circumstances** surrounding it.

Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (emphases added).

We review the denial of a motion to withdraw a voluntary plea under an abuse-of-discretion standard. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). In the case before us, the trial court found that Mr. Harper's plea was entered knowingly, voluntarily, and intelligently and that the only

involuntariness alleged by Harper was that he testified that he felt he had "no option" but to take the plea.

We scrutinize this case in light of the *Kotas* criteria. And the *Kotas* test of the totality of the circumstances illustrates a disturbing sequence of events. Mr. Harper is a young man with no prior experience with the criminal justice system. He had never been in a situation like this one before. His three private attorneys withdrew through no fault of his own, and one of them went to work as a prosecutor in the same office that is prosecuting him. Although we find no error in the trial court's denial of the motion to disqualify the Office of the Commonwealth's Attorney, we must acknowledge the likelihood of the subjective misgivings of a possible conflict or even collusion as perceived by Harper that might have impacted his entry of a guilty plea.

His trial was continued again and again through no fault on Mr. Harper's part with long stretches between those continuances. He has now been incarcerated for nearly four years without ever going to trial. Believing that he had no options, Mr. Harper testified that he did what his counsel said and entered a guilty plea. However, he staunchly and consistently continued to maintain his innocence. During cross-examination at the hearing on Harper's motion to withdraw on December 10, 2018, the Commonwealth challenged his veracity by asking him if, by insisting on his innocence, he had lied when he entered his plea

of guilty. He emphasized that he felt that he had **no option** but to plead guilty. Significantly, we note that he was never offered an *Alford* plea despite his consistent assertion of his innocence.

One month after Harper entered his plea, his co-defendant went to trial and was found "not guilty" on all counts. Not surprisingly, Harper sought immediately to withdraw his guilty plea. To recapitulate, the sequence of events was as follows:

> 7-16-18 -- Harper entered his plea of guilty;
> 8-14-18 -- his co-defendant (Washington) was acquitted of all charges at trial;
> 9-5-18 -- Harper made an oral motion at his sentencing hearing to withdraw his guilty plea followed by a written motion on 11-16-18.

In its order denying Harper's motion to withdraw the plea, the court commented unfavorably upon the timing of the co-defendant's acquittal as likely having affected Harper's desire to withdraw his plea. The court again disregarded Harper's repeated assurances of his innocence -- even though the underlying crimes with which he was allegedly complicit had now evaporated for his co-defendant.

The facts and circumstances are indeed unique. And although the discretion of a trial court with respect to a plea withdrawal is broad, it is not absolute. Under the *Kotas* criteria, we are persuaded that the totality of the circumstances in this case compels us to conclude that the trial court's denial of

Mr. Harper's motion to withdraw his guilty plea constituted an abuse of discretion. Whatever burden on judicial economy may be entailed in this outcome is far outweighed by the dictates of justice under the compelling and disturbing prospect of no opportunity to contest ten years in prison because "some magic incantation" was not properly recited. *Kotas*, *supra*.

Therefore, we vacate the order of the Jefferson Circuit Court denying Mr. Harper's motion to withdraw his guilty plea, and we remand for entry of an order granting that motion and for whatever other proceedings may be consistent with this opinion.

ACREE, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I agree with the majority that the circumstances surrounding Harper's guilty plea are concerning and merit close scrutiny. However, I believe that the majority fails to give the trial court the deference to which it is entitled in the factual determination of whether Harper's guilty plea was knowing and voluntary. There are ample facts supporting the trial court's conclusion that Harper made a knowing and voluntary decision to plead guilty. Consequently, I must conclude that the trial court did not abuse its discretion by denying his motion to withdraw that plea.

As an initial matter, I note that Harper has asked this Court to address the voluntariness of his guilty plea applying the factors articulated in *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994). But as the Commonwealth points out, Harper did not make this argument to the trial court, and he is precluded from raising it for the first time on appeal. The majority correctly applies the "totality of the circumstances" test set out in *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978). However, I believe that the factors set out in *Bashara* are applicable to the inquiry under *Kotas*.

But in any event, the question in this case is whether Harper made a knowing and voluntary decision to enter a plea of guilty. We review the trial court's finding that a plea was voluntary under a clearly erroneous standard. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (citation omitted). Furthermore, evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001) (citation omitted). Because of the factual determinations inherent in this evaluation, the trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty. *Id.*

In this case, I agree with the majority that Harper was under some influence to accept the guilty plea. He was nineteen years old at the time of his arrest and facing his first felony charges. He had been incarcerated awaiting trial for nearly three years when he entered the plea. Harper's first retained counsel had withdrawn to accept a position with the Commonwealth Attorney's office. Harper's trial had been continued on numerous occasions and he could no longer afford to pay his second retained counsel. In addition, Harper's public defender, Mr. Dyke, while able and willing to serve as counsel, was under the same high case load as most other public defenders. I can understand how these factors, when viewed together, may have influenced Harper's decision to accept the guilty plea.

Nevertheless, we must also address whether Mr. Dyke's actions unduly influenced Harper to accept the guilty plea. Mr. Dyke testified that Harper was willing to accept a guilty plea if it meant he could return home sooner. Mr. Dyke informed Harper that he or Washington could obtain a better result by going to trial. But Mr. Dyke cautioned Harper that he could get a greater sentence than the plea offer. Harper admits that Mr. Dyke advised him of the benefits and risks of accepting the guilty plea, but he states that Mr. Dyke emphasized the risks of going to trial.

Harper alleges that Mr. Dyke suggested that the jury might consider his race and the race of the witnesses as a factor at trial. But at the evidentiary hearing, Harper testified that Mr. Dyke made this statement during his first stint as counsel in 2015. He does not allege that Mr. Dyke raised the subject again during the discussion of the guilty plea. While I am concerned by the interjection of such matters into the discussion, I find no indication that it was a factor at the time Harper accepted the guilty plea.

Harper also contends that Mr. Dyke failed to advise him of the possibility of entering an *Alford* plea without admitting guilty. But Mr. Dyke testified that the Commonwealth did not want to offer an *Alford* plea because it wanted to reserve its right to call Harper as a witness during Washington's trial. There is no evidence that an *Alford* plea would have been an option in this case or that the availability of an *Alford* plea affected Harper's decision to accept the guilty plea.

The most significant factor in determining the voluntariness of the plea is Harper's demeanor during the plea colloquy. Harper contends that he hesitated when the trial court asked him if he was admitting the facts supporting the charges. But in reviewing the colloquy, I do not see any such hesitation. The trial court fully advised Harper of his rights and the consequences of entering a

guilty plea. Harper repeatedly stated, under oath, that he understood his rights and that he was voluntarily pleading guilty.

In light of the record, I must disagree with the majority that the trial court clearly erred in finding that Harper's plea was not knowing and voluntary. Under such circumstances, the trial court was within its discretion to deny his motion to withdraw the guilty plea. Therefore, I would affirm the trial court's order denying the motion.

Lastly, I note that Harper reserved the right to appeal the denial of his motion to disqualify the Commonwealth Attorney's office after Mr. Drabenstadt accepted a position there. The majority summarily dismisses this argument. While I agree with this conclusion, I believe that the issue presented in this case deserves additional attention.

The mere appearance of impropriety is not sufficient to disqualify the entire staff of the Commonwealth Attorney's office from further prosecution of the case. *Summit v. Mudd*, 679 S.W.2d 225, 225-26 (Ky. 1984), *holding modified by Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995). Rather, the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. *Calhoun v. Commonwealth*, 492 S.W.3d 132, 137 (Ky. 2016). "Disqualification of the entire prosecuting office is not necessary absent

special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective." *Id.*

The Court in *Calhoun* set out guidelines for what appropriate screening procedures may look like in these circumstances. Those guidelines include written notice to every former client of the attorney, written notice to every judge in the affected jurisdiction, and written copies of the screening policy provided to every attorney involved in the prosecution. *Id.* The Commonwealth concedes that these guidelines were not strictly followed in this case. Nevertheless, the Commonwealth presented evidence that Mr. Drabenstadt was appropriately screened from any involvement in this prosecution. Those procedures were adequate to ensure overall fairness of the proceedings and the absence of any unfair prejudice to Harper.

Under these circumstances, I agree with the trial court that disqualification of the entire Commonwealth Attorney's office was not required. However, the Commonwealth's failure to follow the guidelines set out in *Calhoun* created this problem. Furthermore, the record reflects that Harper learned of Mr. Drabenstadt's withdrawal in open court without the assistance of counsel. I strongly believe that he was entitled to written notice in advance of the hearing on the motion to withdraw.

Moreover, the requirement for written notice and written guidelines does not only protect a defendant from potential conflicts of interest, it also ensures that the Office of the Commonwealth Attorney is protected from allegations of collusion or misconduct when it hires a criminal defense attorney. I would emphasize that the Jefferson County Commonwealth Attorney's Office would be well-served to adopt the guidelines set out in *Calhoun*. Adoption of those procedures would prevent the unfortunate situation that arose in this case.

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