

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000197-MR

ANTRIGUIS WEST

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 15-CR-00567

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: Antriguus West brings this appeal from an order of the Campbell Circuit Court denying his motion to withdraw his guilty plea. Because we find that West failed to provide any sufficient basis for the trial court to withdraw his plea, and because the trial court was not required to appoint different counsel, we affirm.

West was indicted in Campbell County and charged with one count of trafficking in at least two grams of heroin and being a persistent felony offender in the first degree. At West's arraignment, his counsel stated that there were some discrepancies in weights of the heroin listed in West's laboratory report.

After the Commonwealth moved to amend West's persistent felony offender in the first degree charge to persistent felony offender in the second degree, West pled guilty. During West's plea colloquy, after the judge asked West if he had any mental difficulty, West responded that he had seizures, but he received medication for them at the jail. He said he understood the charges against him and his attorney said that she believed that West was competent to enter a guilty plea. The trial court found him competent.

At sentencing, West's attorney stated that he wanted to withdraw his guilty plea. His attorney indicated that it was against her legal advice and that she did not "know if there's a legal reason" for the motion to withdraw. West indicated that he wished to file a motion to withdraw because he was "on isolation" at the jail; therefore, he could not receive mail (including legal mail), did not have access to hygiene products, and could not make phone calls. West also said that his motion was based upon his seizure disorder. The trial court instructed West to further discuss his motion with his attorney, who again indicated she believed the motion would be frivolous.

When the circuit court recalled the case approximately one and one-half hours later, West's attorney asked that West himself inform the trial court of the merits of his motion to withdraw his guilty plea, in order to allow the trial court to instruct her as to whether the motion would be frivolous. West said that there were some items in his paperwork that he did not understand, but did not specify the items. He also said that there were some "things that weren't sent to the laboratory," and he did not want to withdraw his plea "to set it up for trial," but he just wanted to get the matter with the laboratory weights clarified.

West's trial attorney explained that he was alleged to have trafficked in heroin on five different occasions. On three of those occasions, two packages were sent to the lab, but only one package was tested. Counsel did not know of a reason why the packages would contain anything other than heroin. The Commonwealth noted that it is the policy of the Kentucky State Police to test only one of the baggies per trafficking charge unless the case goes to trial.

West's attorney noted there was some discrepancy involving one of the items sent for testing: the lab reported a different weight for one item than what the drug strike force reported. The Commonwealth pointed out that the numbering utilized by the drug strike force did not necessarily correspond with the numbering utilized by the laboratory. Recognizing that this is the standard procedure for testing controlled substances, the court denied West's motion to withdraw his

guilty plea. It then entered its judgment finding West guilty and sentenced him to ten years' imprisonment. This appeal followed.

West's first argument is that the trial court erroneously denied his motion to withdraw his guilty plea.¹ West identifies four different reasons why the trial court should have granted his motion: 1) one of the quantities of heroin recovered by the drug strike force was less than its corresponding quantity as recorded in the crime lab; 2) he did not have access to legal mail or to the phone; 3) he did not understand some things in his paperwork; and 4) he had a seizure disorder. Second, West argues that his attorney had a conflict of interest when she failed to withdraw from the case following West's request to withdraw his guilty plea.

"[A] criminal defendant is only entitled to an evidentiary hearing on a motion to withdraw a guilty plea when 'it is alleged that the plea was entered involuntarily.'" *Russell v. Commonwealth*, 495 S.W.3d 680, 684 (Ky. 2016) (quoting *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006)). West has not at any point alleged that his plea was involuntary; therefore, "[w]hether the motion should be granted is left to the discretion of the trial court." *Carrigan v. Commonwealth*, 414 S.W.3d 16, 21 (Ky. App. 2013) (citing *Rodriguez v.*

¹ West's attorney never made a formal motion to withdraw his guilty plea, because of her stated belief that that motion would be frivolous. His attorney did, however, request that West explain the basis for his proposed motion to withdraw in the presence of the judge. The judge, after considering the merits of West's motion, then declined to allow West to withdraw his plea.

Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002)). “The facts and circumstances surrounding a motion to withdraw a guilty plea should be given individualized consideration. The trial court is in the best position to discern the totality of the circumstances surrounding a guilty plea.” *Williams v. Commonwealth*, 229 S.W.3d 49, 53 (Ky. 2007) (citing *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287-88 (Ky. App. 2004)).

First, West argues that the circuit court should have granted his motion to withdraw because one of the quantities of heroin recovered by the drug strike force was less than its corresponding quantity as recorded in the crime lab. This amounts to little more than speculation. Even assuming the two weights did not correspond, West has not included his lab results in the record for this Court to determine whether the difference in the amount of heroin would be enough to prohibit him from being charged with trafficking in a controlled substance in the first degree. “It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (citing *Commonwealth, Dep’t of Highways v. Richardson*, 424 S.W.2d 601 (Ky. 1968)).

West also argues the lack of access to legal mail and a phone while incarcerated deprived him of legal services.² West's attorney on appeal apparently alleges that this deprived West of some legal services. We note that West never affirmatively alleged that he was denied access to his attorney, only that some methods of communication were limited. To be sure, this Court understands the gravity of a criminal defendant's need to contact his attorney, *see, e.g., Ferguson v. Commonwealth*, 362 S.W.3d 341, 345 (Ky. App. 2011) (reversing for the police's refusal to allow a criminal defendant to contact her attorney prior to taking a breathalyzer test under KRS³ 189A.105(3)), but West has simply not provided this Court with enough factual details surrounding this argument. For example, it is not clear if West was denied access to his attorney entirely or if West was merely not allowed to talk to his attorney whenever he wished. West was apparently able to communicate with his attorney to inform her that he wanted to withdraw his guilty plea; we know from the record that West consulted with his attorney regarding his motion to withdraw because the trial court announced that it would recall the case after West and his attorney discussed the matter. In the absence of some more

² West also complains that the prison in which he was incarcerated did not have other services; we see this as irrelevant to West's conviction.

³ Kentucky Revised Statutes.

specific argument concerning West's alleged denial of access to an attorney, he is not entitled to relief on this issue.

Third, West alleges that there were some things in his paperwork that he did not understand. During his plea colloquy, West stated that he understood the charges against him and that he had no questions. Because this Court cannot determine what West did not understand, West is also not entitled to relief on this issue.

Next, West notes that he has a seizure disorder. We disagree that West's seizure disorder could constitute the basis for West's motion to withdraw. West has not alleged that he is not lucid when he is not having a seizure, and West appeared to be lucid on the day that he pled guilty. We also note that West's counsel stated that she believed West was competent to plead guilty. Furthermore, the trial court made a finding that West was competent to plead guilty.

More importantly, however, West has not alleged that his plea was not knowing and voluntary. This is particularly relevant in West's case because West stated during his plea colloquy that he committed the offenses with which he was charged:

Trial Court: The indictment says, uh, that, count one, well, both counts. That on or about a period between April 15 and May 12, 2015, in Campbell County you sold or transferred two grams or more of heroin. Did you do that?

West: Yes, sir.

Trial Court: And where did that happen?

West: In [unintelligible].

Trial Court: That's fine. And when you did that, I take it you were at least 21 and you had previously been convicted of a felony. And at the time you committed that prior felony you were 18 or older.

West: Yes, sir.

“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 (quoting *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). This Court, considering the speculative nature of West’s arguments and West’s own admission, can find no abuse of discretion in the trial court’s refusal to grant West’s motion to withdraw his guilty plea. *See Porter v. Commonwealth*, 394 S.W.3d 382, 386 (Ky. 2011).

West requests palpable error review for his allegation that his attorney had a conflict of interest but she failed to withdraw. RCr⁴ 10.26 provides that “[a]

⁴ Kentucky Rule of Criminal Procedure.

palpable error which affects the substantial rights of a party may be considered by ... an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

In *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015), our Supreme Court held that counsel had a conflict of interest when he failed to withdraw after his client alleged that his counsel coerced his guilty plea. *Id.* at 387. The Kentucky Supreme Court held that “[w]hen a ‘defendant ma[kes] a claim of coercion during his plea withdrawal hearing ... his accusation place[s] his attorney in the position of having to defend himself, and potentially to contradict [the defendant], in open court.’” *Id.* (quoting *United States v. Davis*, 239 F.3d 283, 287 (2d Cir. 2001)). This case, however, is clearly distinguishable. West never argued that his counsel coerced him into pleading guilty.

Furthermore, West was able to provide the grounds for his motion to the court. Even though West’s counsel did not formally present his motion to the court, she did not do so upon her stated belief that West’s motion was frivolous. She offered to file his motion if the court deemed it nonfrivolous. In other words, her refusal to file West’s motion was based upon her attempt to comply with her

responsibility to not file frivolous motions. *See* CR⁵ 11. Finally, we note that we have examined West's motion and have found it to be without legal merit.

Because West did not allege that his attorney coerced him to plead guilty and his motion was without merit, no conflict of interest existed and no evidentiary hearing was required.

In sum, we hold that the trial court did not err when it denied West's motion to withdraw his guilty plea. Furthermore, because West failed to allege a legally sufficient basis for his motion to withdraw, the trial court was not required to appoint different counsel.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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⁵ Kentucky Rule of Civil Procedure.