

Pursuant to
Court order

FILED
JUL 10 2013
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NOS. 2011-SC-737 and 2012-SC-599

COMMONWEALTH OF KENTUCKY

APPELLANT/
CROSS APPELLEE

VS.

ON DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NOS. 2009-CA-080 and 2009-CA-1270

ON APPEAL FROM BELL CIRCUIT COURT
HON. JAMES L. BOWLING, JUDGE
INDICTMENT NO. 03-CR-00082

SHAWN TIGUE

APPELLEE/
CROSS APPELLANT

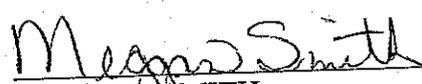
SUPPLEMENTAL BRIEF FOR APPELLEE/CROSS-APPELLANT

MEGGAN SMITH
ASSISTANT PUBLIC ADVOCATE
207 PARKER DRIVE, SUITE 1
LAGRANGE, KENTUCKY 40031
(502) 222-6682

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Supplemental Brief for Appellee/Cross-Appellant has been mailed via first-class postage prepaid to Hon. James L. Bowling, Jr., Farmer Helton Judicial Center, 101 Park Ave., P.O. Box 751, Pineville, Kentucky 40977; Hon. Karen Blondell, Bell County Commonwealth Attorney, P.O. Box W, Middlesboro, Kentucky 40965; Hon. W. Bryan Jones, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; all on this 24th day of June, 2013. I further certify that the record on appeal was not checked out from the Clerk of this Court.


MEGGAN SMITH

ARGUMENT

The Court of Appeals correctly determined that a motion to withdraw a guilty plea is a critical stage of a criminal proceeding at which the defendant is entitled to counsel. In determining what constitutes a critical stage,

The U.S. Supreme Court has defined a 'critical stage' in various terms: "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial," Wade, 388 U.S. at 226, 87 S.Ct. at 1932; a "moment when available defenses may be irretrievably lost, if not then and there asserted," Hamilton v. Alabama, 368 U.S. 52, 54, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961); a period when counsel's attendance is necessary to "mount a meaningful defense," Wade, 388 U.S. at 225, 87 S.Ct. at 1931; a stage when "potential substantial prejudice to defendant's rights inheres in the ... confrontation and the ability of counsel to help avoid that prejudice," Coleman v. Alabama, 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970). Thus, an analysis of a critical stage necessarily involves a retrospective inquiry as to the nature and consequences of each step in the proceedings. Particular attention must be given to how counsel would have benefited the defendant at these moments. In other words, was there the likelihood that representation by counsel would have benefited Appellant?

Stone v. Commonwealth, 217 S.W.3d 233, 238 (Ky. 2007). The Sixth Circuit has framed the inquiry as follows: "Whether it was a critical stage depends on whether there was a reasonable probability that [a defendant]'s case could suffer significant consequences from his total denial of counsel at the stage." Van v. Jones, 475 F.3d 292, 313 (6th Cir. 2007).

Recognizing the importance of counsel's assistance in properly framing issues, presenting those issues to the court, and developing any factual support, many states have specifically held that a motion to withdraw a guilty plea is a critical stage at which a

defendant is entitled to counsel. See, e.g., People v. Vaughn, 558 N.E.2d 479, 483 (Ill. 1990) (defendant is entitled to representation at every critical stage of any trial proceeding, and this right to counsel attaches when a defendant files a motion to withdraw his guilty plea.); Searcy v. State, 971 So.2d 1008 (Fla. 3d DCA 2008) (motion to withdraw a plea pursuant to rule 3.170(l) is a critical stage of a criminal proceeding.); State v. Jackson, 874 P.2d 1138 (Kan. 1994) (motion to withdraw a guilty plea that raised material issues of fact is a critical stage of a criminal proceeding and counsel must be appointed.); State v. Harell, 911 P.2d 1034 (Wash. 1996) (defendant is entitled to counsel at all critical stages of a criminal prosecution, which includes a motion under CrR 4.2(f) to withdraw a guilty plea.); Fortson v. State, 532 S.E.2d 102 (Ga. 2000) (plea-withdrawal proceeding is a critical stage entitling a defendant to counsel.). While this is an issue of first impression in Kentucky, Appellant has not cited to a single case where another jurisdiction has held that a motion to withdraw a guilty plea is not a critical stage.

In Mr. Tigue's case, the hearing on February 26, 2004 was a critical stage in the proceedings. At the hearing, the Court remarked that some of the things that Mr. Tigue and his family had brought to the Court's attention were concerning. During the August 6, 2008 evidentiary hearing on Mr. Tigue's RCr 11.42 motion this Court noted that it had a strong sense, while the charges were pending against Mr. Tigue, that he was not being well attended by his attorneys. However, back in 2004, the Court also indicated that Mr. Tigue had not given the Court sufficient legal grounds to withdraw his guilty plea. Mr. Tigue needed, and was constitutionally entitled to, the assistance of counsel to adequately present his grievances to the Court in his efforts to withdraw his guilty plea. Because Mr.

Tigue was unconstitutionally denied the assistance of counsel at a critical stage of the proceedings against him, his conviction and sentence must be vacated.

Respectfully submitted,


MEGGAN SMITH
COUNSEL FOR APPELLANT