Cite as 2009 Ark. App. 824

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-223

	Opinion Delivered DECEMBER 9, 2009
RICKY LEE McDANIELS APPELLANT	APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT, [NO. CR-2002-35]
V.	HONORABLE H.G. PARTLOW, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Ricky McDaniels appeals the denial of his motion to withdraw a guilty plea by the Poinsett County Circuit Court and the resulting forty-eight-month term in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred in denying his motion because he was not informed of the sentence he was facing at the time he signed the plea agreement. We affirm.

Facts

On December 16, 2002, appellant pled guilty to delivery of crack cocaine, a Class Y felony. He was placed on probation for one hundred and twenty months, half of which was to be supervised and the other half was to be unsupervised. On May 21, 2003, the State filed a petition to revoke appellant's probation based upon violations of failing to (1) report to

probation officer as directed; (2) keep probation officer informed as to his whereabouts; and (3) pay court costs, fines, and probation fees as ordered. An amended petition to revoke was filed on September 22, 2003, incorporating the previously filed revocation petition and adding the following violations:

> On August 7, 2003, the Defendant tested positive for use of controlled substance (Marijuana). He denied use. Confirmation test was positive. Defendant failed to report again until September 18, 2003. He was directed to report on August 21, but failed to do so. On September 18, he was directed to submit to drug testing, but said that he could not produce a sample at that time. He was directed to remain in attendance until he could do so, but left, and did not return.

On August 30, 2007, appellant appeared and entered a guilty plea to the violation of probation. Sentencing was deferred until September 28, 2007. A separate document captioned "Plea and Sentence Recommendation" was also entered on that date. Although there was a space for entry of a plea recommendation, no information was entered. Appellant failed to appear on September 28, 2007, but did eventually appear on July 14, 2008, with counsel, and the matter was continued until July 25, 2008, on appellant's motion. Appellant appeared on that date, but sentencing was again continued until October 27, 2008, at which time appellant appeared and moved to withdraw his guilty plea.

The circuit court, subsequent to hearing testimony on appellant's motion to withdraw the guilty plea, denied appellant's motion and sentenced appellant to forty-eight months in the Arkansas Department of Correction pursuant to a judgment and commitment order filed on October 27, 2008. Appellant filed a timely notice of appeal on November 26, 2008, and this appeal followed.

Standard of Review and Relevant Law

In *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005), our supreme court set out the standard of review in cases based on the denial of a motion under Arkansas Rule of Criminal Procedure 26.1 (2008). Rule 26.1 provides that once a plea of guilty has been accepted by the court, "the court in its discretion" may allow withdrawal of the plea. The plea, however, must be withdrawn prior to entry of judgment. The standard of review is therefore abuse of discretion. *Id.*

Discussion

Appellant contends that the circuit court abused its discretion in denying his motion to withdraw his guilty plea. He cites *Lewis v. State*, 101 Ark. App. 176, 272 S.W.3d 113 (2008), in which this court found error where the circuit court did not allow a defendant to withdraw his guilty plea after the defendant entered into a plea bargain, failed to appear, and the circuit court imposed a sentence in excess of the one agreed to by the parties. This court found error even though the defendant had been warned that the circuit court could sentence him to any term it could have without the plea agreement. This case is distinguishable in that the circuit court in *Lewis* failed to offer the defendant the opportunity to either affirm or withdraw his guilty plea after he failed to appear at the sentencing hearing, instead simply rejecting the sentence agreement to which it had previously concurred. Here, the circuit court did not deviate when it imposed the forty-eight-month sentence negotiated by appellant's former counsel and prosecutors.

In the instant case, appellant contends that he was to return to circuit court to be placed on additional probation. Appellant's former counsel, Ben Bristow, acknowledged that the plea and sentencing recommendation was left blank, but stated that he believed that appellant was to appear for sentencing. Mr. Bristow explained that the sentence recommendation could have been included on the form to advise appellant of what the agreement would be. Appellant argues that where there is a discrepancy between his and former counsel's view of the matter of sentencing, and where the record does not reflect that appellant was fully informed of the sentence he would receive in exchange for his guilty plea, the circuit court abused its discretion in not allowing him to withdraw his guilty plea. He urges that because the withdrawal of the plea would have corrected a manifest injustice, this court should reverse and remand.

It is appellant's burden to show to the satisfaction of the circuit court that a manifest injustice needed correcting. *See Folk v. State*, 96 Ark. App. 73, 238 S.W.3d 640 (2006). Further, appellate courts do not presume error simply because an appeal is made. *See Johnson v. State*, 342 Ark. 357, 28 S.W.3d 286 (2000). It is an appellant's burden to produce a record sufficient to demonstrate error. *Id.* When an abstract is so deficient that the appellate court cannot discern what happened below, it must affirm. *Id.* The State notes that there is no abstract of the transcript of the revocation hearing held on August 30, 2007, and the transcript was not requested in the notice of appeal. However, appellant does not appear to be contesting the court's acceptance of his guilty plea at that hearing, rather focusing on the

denial of his request to withdraw that guilty plea on October 27, 2008.

The August 30, 2007 docket entry from the circuit court reflects that appellant appeared on that date with his former counsel, Mr. Bristow, and that he pled guilty to violating his probation based on a petition to revoke filed on August 14, 2007. It also indicates that (1) his plea was knowingly, voluntarily, and intelligently entered; (2) he provided the circuit court with the factual basis for his plea; and (3) the circuit court deferred sentencing until September 28, 2007. It is undisputed that appellant failed to appear for the scheduled sentencing, but the sentencing hearing was eventually held on October 27, 2008. At that time, the circuit court considered appellant's motion to withdraw the previously entered guilty plea before denying it and sentencing him to forty-eight months' imprisonment.

In order to successfully support his motion based upon the argument presented on appeal, appellant bears the burden of proving to the satisfaction of the court that he did not receive the sentence contemplated by the plea agreement. *See* Ark. R. Crim. P. 26.1(b). The State urges that he failed to do so because the guilty-plea statement he signed showed the range of sentences that the circuit court might impose—specifically, that he faced "imprisonment for not less than 10 years nor more than 40 years, or a fine not to exceed $25,000, or by both imprisonment and fine." We agree.

Appellant relies on the fact that the sentence-recommendation page that was attached to the plea statement did not reflect a recommended sentence in order to claim that he was

not informed of the sentence. However, appellant's former attorney, Mr. Bristow, testified that he discussed the statements in the plea form in detail with appellant. Mr. Bristow stated that, following protracted negotiations with prosecutors, the agreed-upon sentence agreement was for forty-eight months. He also explained that sentencing was deferred from 2007 to 2008 so that appellant could get his affairs in order.

In his brief before this court, appellant's counsel indicates that appellant testified that "I understood Mr. Bristow said he was going to get me reinstated." Our review of the record indicates that appellant's appellate counsel misstated this comment in the Abstract, which actually reads instead indicating that the testimony was "I understood Mr. Bristow said he was going to *try* to get me reinstated[.]" (Emphasis added.) By omitting the word "try," counsel changes the meaning of the testimony. The State correctly argues that telling appellant that he was going to try to get the probation reinstated is not equivalent to saying that the "agreed-to sentence" was reinstated probation, as appellant would have this court believe, simply based upon the absence of such terms on the sentence recommendation sheet. We note that counsel's misstatement could be construed as a fraud upon the court, which would carry the potential consequences including, but not limited to, a finding of contempt and an appearance before the disciplinary committee. However, we are going to assume that counsel was simply not sufficiently diligent in her abstracting of this appeal and encourage her to be more careful in her future efforts.

Whether a manifest injustice occurred that required correction was a determination for

the circuit court to make, and that determination rested on a credibility determination. The only evidence offered in support of appellant's claim was his own testimony. The circuit court relied upon the original agreement of the parties in imposing the forty-eight-month sentence, rather than appellant's understanding that probation was to be reinstated. The fact that he hoped for, or even expected, reinstatement to probation is not grounds to allow his guilty plea to be withdrawn. *See Rawls v. State*, 264 Ark. 954, 581 S.W.2d 311 (1979). The circuit court was within its authority to believe the State's version of the events that occurred at the 2007 proceeding, which was corroborated by Mr. Bristow's testimony. Accordingly, we hold that the circuit court did not abuse its discretion, and we affirm.

Affirmed.

GLOVER, J., agrees

BROWN, J., concurs.