

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-1477

MATTHEW COLE HAGEN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 14, 2010

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CR 2006-582 IV]

HONORABLE MARCIA R.
HEARNSBERGER, JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Matthew Cole Hagen appeals the order of the Garland County Circuit Court denying his motion to withdraw his guilty plea. For reversal, appellant contends that the trial court erred in ruling that his oral motion to withdraw was untimely and in finding that he received effective assistance of counsel. We affirm.

On October 23, 2006, the prosecuting attorney in Garland County charged appellant with second-degree battery for knowingly causing physical injury to a person he knew to be less than twelve years old. Appellant subsequently executed a plea and waiver statement and entered into a written plea agreement with the prosecuting attorney. On May 20, 2008, appellant appeared before the trial court and entered a guilty plea to a reduced charge of domestic battery in the third degree. The trial court asked appellant a series of questions, inquiring as to whether appellant was entering a knowing and voluntary plea, whether

appellant understood his rights, and whether appellant was satisfied with the services of his attorney. Appellant responded affirmatively to all questions. During the course of the hearing, appellant also acknowledged that he was guilty of striking the two-year-old child with sufficient force to leave bruises. The trial court accepted the plea and pronounced a sentence of one year's probation and a fine of \$500 in accordance with the plea-bargain agreement.

Later that same day, appellant appeared before the court without his attorney. Appellant alleged that his attorney had pressured him to plead guilty, and he requested permission to withdraw his guilty plea. The trial court instructed appellant to "file proper papers in order to do that." On May 23, 2008, the trial court entered a judgment and commitment order reflecting the sentence pronounced in open court. On May 27, 2008, the appellant filed a pro se motion to withdraw the guilty plea pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure, alleging that the plea should be set aside to correct a manifest injustice due to ineffective assistance of counsel. The trial court held a hearing on the motion on August 12, 2008.

Melinda Wood, appellant's former high school counselor, testified that she overheard a telephone conversation between appellant and his attorney the night before appellant entered the guilty plea. She recalled that the attorney became irate and told appellant that, if appellant did not plead guilty, he would resign and disclose to the judge appellant's confidential communications.

Appellant testified that his attorney's attitude toward him soured once appellant paid the attorney his fee in full. Appellant said that, during the telephone conversation overheard by Wood, his attorney threatened to reveal to the judge everything that appellant had told him in confidence. He testified that, when he entered the guilty plea, his attorney told him to "make it believable" and that the attorney nudged him during the plea hearing and told him what to say to the judge. Appellant stated that he changed his mind about the plea once he left the intimidating presence of his attorney.

The trial court took the motion to withdraw under advisement and later issued a letter opinion denying the motion. The court first ruled that appellant's oral motion to withdraw the plea was ineffective because it was made after the trial court pronounced judgment in open court. In the alternative, the trial court determined that appellant was not denied effective assistance of counsel. In reaching this conclusion, the court found that, upon inquiry at the plea hearing, appellant acknowledged that he understood his constitutional rights, stated that he was satisfied with his attorney, and asserted that the plea was not induced by threats or promises. Further, the court found that appellant responded fully and freely to the questions asked by the court at the plea hearing. The trial court also specifically found that the testimony given by appellant and Wood was not credible. Appellant brings this appeal from the order setting forth the trial court's decision.

In his first point, appellant contends that the trial court erred in ruling that the oral motion he made under Rule 26.1 was untimely. We certified this issue to the supreme court as a matter of first impression. In pertinent part, Rule 26.1(a) provides:

A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after the entry of judgment.

In its decision, the supreme court held that appellant's oral motion was effective and timely because it was made before the trial court entered the judgment and commitment order.

Hagen v. State, 2010 Ark. 54. The court thus ruled that the trial court erred in concluding that the motion was not timely because it was made after the oral pronouncement of sentence. In other words, the operative time for making a motion under Rule 26.1 is before the judgment is entered, not when the sentence is pronounced. The supreme court returned the case to us for a determination on the merits of whether the trial court abused its discretion in denying the motion to withdraw, which is appellant's second issue on appeal.

Rule 26.1(b)(i) provides that the withdrawal of a plea shall be deemed necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that he was denied effective assistance of counsel. This is a discretionary decision left to the trial court.

Folk v. State, 90 Ark. App. 73, 238 S.W.3d 640 (2006). A defendant whose conviction is

based on a guilty plea will normally have difficulty proving any prejudice since his plea rests upon his admission in open court that he did the act with which he was charged. *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984).

Here, the trial court found that appellant entered a voluntary and knowing plea of guilt to the reduced charge. The court also found that appellant stated at the plea hearing that he was satisfied with the services and the advice offered by his attorney and that he had not been threatened to enter the guilty plea. Indeed, appellant stated at the plea hearing that his attorney had “done a good job.” The trial court did not accept as credible the testimony of appellant and Wood that appellant’s attorney coerced him to enter the plea. Under these circumstances, we can find no abuse of discretion in the trial court’s denial of the motion.

Affirmed.

HART and ROBBINS, JJ., agree.