

RENDERED: January 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2617-MR

ROY EVERETT WOLFE, JR.

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 96-CR-23

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING and REMANDING

* * * * *

BEFORE: BUCKINGHAM, COMBS and GARDNER, Judges.

GARDNER, JUDGE: Roy Everett Wolfe, Jr. (Wolfe) appeals from his conviction in Jefferson Circuit Court for second-degree burglary and receiving stolen property . Wolfe specifically contests the circuit court's refusal to allow him to withdraw his guilty plea following the circuit court's decision to run his sentence consecutively with a previous conviction rather than concurrently as the Commonwealth had recommended in the plea agreement. After reviewing the applicable law, this Court must reverse the circuit court's ruling and remand this case for further proceedings.

In January 1996, a grand jury indicted Wolfe on charges of second-degree burglary, receiving stolen property valued at \$300

or more and of persistent felony offender, first-degree. In May 1996, the Commonwealth offered Wolfe an agreement whereby Wolfe would plead guilty to second-degree burglary and receiving stolen property, and the Commonwealth would recommend eight years on the burglary charge and five years on the receiving stolen property charge. The Commonwealth would recommend that these sentences run concurrently, and that the sentence in this case run concurrently with Wolfe's sentence in another case for a total of eight years.

On June 14, 1996, Wolfe entered a guilty plea pursuant to the Commonwealth's recommendations. The circuit court told Wolfe that it was not bound by the Commonwealth's recommendations and that it had a right to review Wolfe's presentence investigative report before it decided to accept all of the Commonwealth's recommendations. The court also told Wolfe that if the court rejected the agreement, it must so inform him and allow him to insist on his guilty plea in which case, Wolfe could receive more severe punishment or under very limited circumstances, the court could allow Wolfe to withdraw his plea and proceed to trial.

In August 1996, Wolfe appeared before the circuit court for sentencing. The court told Wolfe that it would not follow the Commonwealth's recommendation to run the eight year sentence in this case concurrently with the sentence that Wolfe was serving from another indictment. Wolfe moved to withdraw his guilty plea, but the circuit court denied this motion. The court sentenced Wolfe to eight years, to be served consecutively with Wolfe's previous sentence. Wolfe has subsequently brought this appeal.

On appeal, Wolfe argues that Kentucky Rule of Criminal Procedure (RCr) 8.10 and fundamental fairness required the circuit court to allow him to withdraw his guilty plea once the court determined that it would not accept the sentencing terms of the plea agreement reached between Wolfe and the Commonwealth. After reviewing RCr 8.10 and this Court's recent decision in Kennedy v. Commonwealth, Ky. App., ___ S.W.2d ___ (rendered May 30, 1997), we must agree with Wolfe.¹

RCr 8.10 as amended in 1989 states in part,

At 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.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.[²]

¹The Kentucky Supreme Court denied discretionary review in Kennedy v. Commonwealth, *supra*, on November 12, 1997, thus making this Court's decision final on that date. Kennedy v. Commonwealth, *supra*, was submitted to this Court by Wolfe's counsel on November 21, 1997, in a notice of reliance on additional authority. The Commonwealth in an expedited motion to cancel oral argument filed with this Court on November 26, 1997, states that the instant case can be resolved pursuant to the Kennedy decision. It states that the principles of law announced in Kennedy govern the case at bar, and as a result, Wolfe must be permitted to withdraw his guilty plea.

²The Supreme Court in dicta in Edwardson v. Edwardson, Ky., 798 S.W.2d 941, 945 (1990), an opinion which considered the

In Haight v. Commonwealth, Ky., 938 S.W.2d 243, 251 (1996), the Supreme Court noted that, pursuant to the 1989 amendment to RCr 8.10, upon a determination by the trial court that it will not follow the plea agreement made between the Commonwealth and the defendant, the defendant has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point.

This Court in Kennedy v. Commonwealth, supra, was presented with a factual situation almost identical to that presented in the case at bar. The defendant in that case reached a plea agreement with the Commonwealth whereby the defendant would plead guilty to nine counts of theft of labor over \$300 and one count of theft of labor under \$300. The Commonwealth agreed to recommend a sentence of three years imprisonment on each of the nine counts of theft of labor over \$300 and twelve months on the one count of theft of labor under \$300, with all sentences to run concurrently. The defendant entered a guilty plea in keeping with this plea agreement. The court at sentencing ran some of the sentences consecutively for a total of nine years imprisonment. The defendant moved to withdraw his guilty plea but the circuit court denied his motion. This Court reversed the circuit court's decision. In reaching the decision, this Court found that the language of RCr 8.10 requires a court to permit a defendant to

viability of prenuptial agreements, stated that the court recently amended RCr 8.10 to permit a defendant in a criminal case an absolute right to withdraw a guilty plea in the event the trial court fails to sentence in accordance with the plea agreement.

withdraw a guilty plea if the court rejects the plea agreement. This Court held that the rule does not require the trial court to "rubber stamp" plea agreements, but it does require the court to afford the defendant the opportunity to withdraw his plea when and if the court decides to deviate from the plea agreement. This Court noted the Kentucky Supreme Court's clear language in Haight v. Commonwealth, supra. In Kennedy v. Commonwealth, supra, this Court found that because of the trial court's decision to run the sentences consecutively rather than concurrently, the court was required to permit the defendant to withdraw his plea.

This Court has been presented with the same factual scenario in the case at bar. Wolfe agreed to plead guilty based upon the Commonwealth's recommendation that Wolfe receive a total sentence of eight years to run concurrently with the sentence in Wolfe's previous conviction. The circuit court at sentencing concluded that the sentences should run consecutively. Thus, the circuit court rejected the terms of the plea agreement, and as a result, should have permitted Wolfe to withdraw his plea. Upon remand, the circuit court must permit Wolfe to withdraw his plea. The cases cited by the Commonwealth in its brief are either fundamentally distinguishable or are based on versions of RCr 8.10 prior to its 1989 amendment.

For the foregoing reasons, this Court reverses the judgment of the Jefferson Circuit Court and remands this case for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce P. Hackett
Daniel T. Goyette
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Karen Quinn
Assistant Attorney General
Frankfort, Kentucky