

RENDERED: September 11, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002227-MR

GUYLAND B. WILLIAMS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CR-1065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: HUDDLESTON, JOHNSON and MILLER, Judges.

JOHNSON, JUDGE: Guyland Williams (Williams) appeals from an order of the Fayette Circuit Court entered on August 26, 1997, denying his motion to withdraw guilty plea brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10. After review of the record and the applicable law, we affirm.

In December 1995, the Fayette County Grand Jury indicted Williams on one felony count of burglary in the second degree (Kentucky Revised Statutes (KRS) 511.030), one felony count of stalking in the first degree (KRS 508.140), one misdemeanor count of assault in the fourth degree, (KRS 508.030), and one misdemeanor count of unlawful imprisonment in the second degree (KRS 509.030). All of these charges arose out of an incident involving Williams' girlfriend.

At a pretrial conference on December 14, 1995, the Commonwealth presented a plea offer pursuant to which the Commonwealth would move to dismiss the two misdemeanor charges, amend the burglary in the second degree charge to burglary in the third degree, and recommend a sentence of three years on the burglary offense and one year on the stalking offense. Williams rejected this plea offer and the parties continued to try to negotiate a plea. At a hearing on January 26, 1996, Williams entered a guilty plea pursuant to a plea agreement with the Commonwealth. The Commonwealth moved to dismiss the two misdemeanor charges and the stalking charge, and to amend the burglary charge to burglary in the third degree. The Commonwealth then recommended a sentence of two years on the burglary in the third degree offense and payment of restitution if Williams were probated. At that time, the trial court postponed sentencing until February pending review of a presentence investigation report (PSI).

On February 23, 1996, Williams appeared in court with his attorney for sentencing. At that time, the trial judge offered to probate Williams with a sentence of five years on the burglary in the third degree conviction probated for a period of three years. The trial judge stated that Williams could choose either a probated five-year sentence or two years in prison. Williams indicated that he preferred the probated five-year sentence to the two years in prison. Accordingly, the trial court sentenced Williams to five years on the burglary in the third degree conviction, suspended service of the sentence and placed him on probation for three years with various conditions.

In August 1996, Williams' probation officer filed an affidavit stating that Williams had violated the terms of his probation by committing a felony. Williams had been charged with and pled guilty to the felony offenses of trafficking in a controlled substance (cocaine) and being a persistent felony offender in the second degree. On October 4, 1996, the trial court conducted a probation violation hearing in which Williams stipulated that he had violated the terms of probation by committing a felony. The trial court revoked the probation and ordered Williams to serve the five-year sentence for burglary. In June 1997, Williams filed a motion to withdraw guilty plea pursuant to RCr 8.10 alleging the trial court was obligated to impose only a two-year sentence based on the recommendation of the Commonwealth or to allow him to withdraw his plea. The trial court denied the motion. This appeal followed.

Williams argues that the trial court abused its discretion and violated his right to due process by failing to allow him to withdraw his guilty plea. Williams also contends that under RCr 8.10, the trial court was obligated to give him an opportunity to withdraw his guilty plea at the sentencing hearing because the trial court rejected the plea agreement. Williams maintains that his belated motion to withdraw the guilty plea should have been granted because the plea was not voluntary in that the trial court did not sentence him in accordance with the Commonwealth's recommendation under the plea agreement.

RCr 8.10 provides as follows:

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.

The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report [emphases added].

The plain language of RCr 8.10 requires that before judgment if the trial court rejects the plea agreement, the court shall afford the defendant the opportunity to then withdraw his plea.

As the trial court in its order denying relief stated, it "did not reject the plea agreement but merely gave [Williams] an opportunity to reject it."

Williams argues that we should follow the rulings in Kennedy v. Commonwealth, Ky.App., 962 S.W.2d 880 (1997), Haight v. Commonwealth, Ky., 760 S.W.2d 84 (1988), and Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975). However, in each of these cases the defendant moved to withdraw his guilty plea after the trial court rejected the Commonwealth's recommended sentence.

In the case sub judice, the trial court did not reject the Commonwealth's recommended sentence. Rather, it gave Williams a choice: (1) two years in prison pursuant to the Commonwealth's recommendation; or (2) probation for three years with a five-year sentence to be imposed if probation were violated. Williams rejected the Commonwealth's recommended sentence and opted for the probated five-year sentence. Thus, since the sentence that was imposed was chosen by Williams and the trial court did not reject the Commonwealth's recommended sentence, Williams was not entitled to withdraw his plea under RCr 8.10.

The Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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