

RENDERED: October 23, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-003324-MR

THOMAS CARLTON HALE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NO. 95-CR-000259

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: HUDDLESTON, JOHNSON, AND MILLER, JUDGES.

JOHNSON, JUDGE: Thomas Carlton Hale (Hale) has appealed from the judgment of the Christian Circuit Court entered on December 3, 1996, which sentenced him to serve a total of fifteen years in prison after denying his oral motion to withdraw his plea of guilty. We affirm.

On July 9, 1995, Hale was arrested in the shooting death of Michael Gilliam (Gilliam). On August 30, 1995, the Christian County Grand Jury returned an indictment charging Hale

with the offense of murder, Kentucky Revised Statutes (KRS) 507.020. Hale initially pleaded not guilty to this charge, but on October 21, 1996, he entered a guilty plea after negotiating an agreement with the Commonwealth's Attorney. Pursuant to that agreement, Hale pled guilty to a reduced charge of manslaughter in the second degree, KRS 507.040, in exchange for a sentence of ten years which would run consecutive to a five-year sentence for a separate crime of knowingly receiving stolen property over \$300.<sup>1</sup> The trial court conducted an extensive plea colloquy with Hale and Hale's attorney, and found that the plea was made freely, voluntarily, intelligently and "understandingly." The matter was continued for sentencing pending the receipt of the pre-sentence investigation report.

At the sentencing hearing on November 27, 1996, Hale made an oral motion to withdraw his guilty plea based on alleged newly discovered evidence. His attorney informed the trial court that he was unaware of any new evidence, but believed that Hale was putting a different "emphasis" on the evidence. Hale himself told the trial court that he had recently obtained "verification" that a man would testify that Hale was with him in Hopkins County at 9:00 p.m. on the night Gilliam was shot. Hale argued that this alibi witness was significant because Gilliam was known to be alive at 9:31.

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<sup>1</sup>Hale's plea of guilty in that case and the five-year sentence imposed are not at issue in this appeal.

The trial court explained to Hale that the "problem" with his argument was that he had previously told the Court that he had shot Gilliam. Hale further explained that he did not know Gilliam and had not seen his picture until the day before the sentencing hearing. He insisted that Gilliam was not the same man that he had "shot at."

In denying the motion, the trial court reasoned that Hale's new evidence was "meaningless," for the reason that evidence that Gilliam was still alive when Hale was out of the county only proved that Gilliam did not die immediately after the shooting. He also opined that it did not matter who Hale "shot at," as it was Gilliam who actually received the fatal shot. Finally, the judge found that Hale's original plea was freely and voluntarily made and that in his eyes, Hale was guilty. The trial court then sentenced Hale according to the terms of the plea agreement.

In this appeal, Hale argues that the trial court erred in refusing to allow him to withdraw his plea of guilty. In this jurisdiction, the trial court is not required to grant a request to withdraw a guilty plea unless it does not accept the negotiated agreement. Kentucky Rules of Criminal Procedure (RCr) 8.10 provides in relevant part that "[a]t 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" (emphasis added). Whether to grant such a motion is a matter which our highest Court observed, is "within the sound

discretion of the trial court." Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974). Thus, our review of a trial court's denial of a request to withdraw a guilty plea is limited to determining whether the trial court abused its discretion. Id.

We believe that the discovery of new evidence would rarely justify the withdrawal of a knowing and voluntary plea because: "'a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.'" Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 225 (1986), quoting Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975) (emphasis in original). Rarely would new evidence affecting the Commonwealth's ability to convict the defendant have any bearing on the voluntary or knowing nature of the guilty plea. Nevertheless, Hale contends that his plea was "not intelligent because he did not know at the time he pleaded who he was accused of killing."

We have difficulty understanding this argument as the indictment contained the identity of the victim. Hale admitted that he "shot at" someone on the evening Gilliam was shot and killed. In his brief, Hale suggests the possibility that he actually shot someone else, although he did not provide the trial court with the identity of the man he shot. He simply asserted in the trial court that the person he "shot at" was not the same person as the victim who was depicted in a photograph. Further, Hale did not state how he came to see a picture of Gilliam the

day before sentencing, and he did not explain why he had not previously attempted to learn whether the man he was alleged to have murdered was the same man he "shot at." Under these circumstances, we find no abuse in the trial court's refusal to allow Hale to withdraw his guilty plea.

Hale further argues that the trial court should have treated his motion as one for a new trial based on newly discovered evidence. Again, such a motion is left to the sound discretion of the trial court. Collins v. Commonwealth, Ky., 951 S.W.2d 569, 576 (1997). Further, Hale did not provide any affidavits or otherwise demonstrate that he "exercised sufficient diligence" to obtain the evidence prior to his guilty plea. Id. More importantly, his own attorney conceded that there was nothing "new" about Hale's evidence. See McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 417 (1997). Hale knew who he was with on the night of the shooting, yet he waited seventeen months before disclosing the existence of a potential alibi witness. Even then, he did not reveal the witness' identity nor explain why the witness' verification of what Hale himself already knew would exonerate him. In any event, the trial court, in labeling the "new evidence" as "meaningless" addressed the essential consideration, i.e., whether the new evidence would alter the outcome. "Newly discovered evidence 'must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" Collins, supra. The new

evidence Hale alleged to have obtained would not "with reasonable certainty" result in a different conviction or sentence.

Finally, Hale argues that "fundamental fairness" requires a reversal and remand for a trial. However, there is no manifest injustice in allowing Hale's conviction to stand. By his own admission, Hale engaged in wanton conduct in shooting at someone and this admission provided a sufficient factual basis for the plea which was entered into voluntarily and knowingly.

Accordingly, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Elizabeth Shaw  
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BRIEF FOR APPELLEE:

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