

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002007-MR

BRIAN KEITH WHITE

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 95-CR-00325

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE: The appellant, Brian Keith White (White), appeals from the judgment of the Pike Circuit Court, following his conviction of Receiving Stolen Property Over \$300.00, for which he was placed on two-years' probation. White contends on appeal that the court erred in denying his motion to withdraw his guilty plea. Finding no error, we affirm.

In December 1995, White was indicted by the Pike County Grand Jury on the charge of Receiving Stolen Property Over \$300.00 (KRS 514.110). Subsequently, on May 12, 1998, White appeared before the court and pled guilty to the charge. The Commonwealth recommended that the court sentence White to a term

of one- year imprisonment probated for two years. After ascertaining that his plea was voluntarily given, the court accepted White's plea and scheduled a sentencing hearing. However, White filed a motion on June 11, 1998, to withdraw his guilty plea, alleging that he was dissatisfied with his attorney and that he was in fact innocent.

On July 19, 1998, the court conducted a hearing on White's motion to withdraw his plea. It appears that the court denied his motion by order entered on July 27, 1998. There is some confusion in the record as to this particular order; it appears to be an unsigned order. The record contains only the portions of the order setting out what is captioned as the court's "Findings of Fact and Conclusion of Law, and Order; it does not bear the trial judge's signature. The appellant appended to his brief a signed copy of the order at issue. This copy has the additional page not appearing in the record which has the trial judge's signature, denying the motion to withdraw. Significantly, at White's sentencing on July 29, 1998, his counsel, the Commonwealth, and the trial judge all acknowledged that the court had entered an order denying White's motion to withdraw his plea. It appears the last page of the order was somehow inadvertently omitted from the record.

On July 31, 1998, the court entered final judgment, sentencing White to a one-year term of imprisonment, which the court suspended, and placed him on probation for two years. This appeal followed.

White argues on appeal that the court erred in failing to allow him to withdraw his guilty plea. His motion was based upon his general dissatisfaction with his attorney at the time he pleaded guilty. White contended that his attorney did not prepare nor did he spend an adequate amount of time conferring with him.

RCr 8.10 provides:

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 or 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. (Emphasis added).

This rule mandates that a defendant be afforded the opportunity to withdraw his or her guilty plea if the court elects to deviate from the plea agreement. However, if the court acts in accordance with the plea agreement and the defendant wishes to withdraw his plea for other reasons, then "permission to withdraw a guilty plea and substitute a plea of not guilty is a matter within the sound discretion of the trial court." Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974).

In this case, before accepting White's guilty plea, the court questioned him extensively as to his understanding of his

rights and the consequences of entering a guilty plea. The court reviewed with White the specific constitutional rights that he was waiving by entering a guilty plea. White informed the court that he understood his rights and that his plea was freely and voluntarily given. The court further questioned White as to whether he was satisfied with his attorney, specifically asking him whether he had been given sufficient time to confer with his attorney and whether he needed more time to do so. He assured the court twice that he was fully satisfied with his attorney's performance. White acknowledged that his attorney had discussed with him the charge against him, the merits of his case, and the plea agreement with the Commonwealth. There is nothing in the record to indicate that White was coerced into pleading guilty or that his plea was not entered voluntarily, knowingly, and intelligently. While we may have proceeded differently and allowed White to withdraw his plea and proceed to trial, we cannot substitute our judgment for that of the trial court and interfere with its legitimate exercise of its discretion in refusing to permit the plea to be withdrawn. We cannot say that the court abused its discretion in denying White's motion to withdraw his guilty plea.

We find no merit in the Commonwealth's contention that the record on appeal is incomplete for purposes of appellate review. The video of the sentencing hearing shows that all the parties to the case, including the trial judge, acknowledged that White's motion to withdraw his plea had been denied by an order of the court. Although the last page of one order is missing

from the record, the record sufficiently establishes that the court did enter this order and that the record is complete enough for us to entertain the appeal.

For the foregoing reasons, we affirm the judgment of the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Sidney Trivette  
Pikeville, KY

BRIEF FOR APPELLEE:

A. B. Chandler III  
Attorney General of Kentucky

Joseph R. Johnson  
Assistant Attorney General  
Frankfort, KY