

RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000488-MR

KEVIN CHILDS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 03-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Appellant, Kevin Childs (Childs), brings this appeal from a February 12, 2004, order of the Kenton Circuit Court overruling his motion to set aside his guilty

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

plea. Before us, Childs argues that the trial court erred in not allowing withdrawal of the guilty plea. We affirm.

On September 15, 2003, Childs entered a guilty plea to one count of second-degree criminal abuse² for causing injury to his three-month old son by shaking him, as amended from one count of first-degree criminal abuse.³ In accepting the plea, the court conducted a guilty plea colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Childs admitted facts supporting the elements of the offense and acknowledged that he was subject to a penalty of up to five years. No mention was made in the motion to enter the plea, at the colloquy, or in the court's order of guilty plea, of any agreement with the Commonwealth regarding a diversion of the sentence.

On November 3, 2003, Childs appeared for sentencing. The Commonwealth, with the understanding that the victim in the case was not permanently injured, agreed to felony diversion by signing off on Childs's motion for felony pretrial diversion. Contrary to Childs's assertions in his brief, this is the first reference in the proceedings to the issue of diversion. All signatures on the motion for pretrial diversion are dated

² Kentucky Revised Statutes 508.110, a class D felony carrying a penalty of one to five years.

³ Kentucky Revised Statutes 508.100, a class C felony carrying a penalty of five to ten years.

November 3, 2003, the same date as sentencing. Questioning the propriety of diversion for an offense of this seriousness, and indicating a need for a more definite medical diagnosis of the permanency of the injuries, the court appointed a guardian ad litem (GAL) to provide "sufficient credible evidence of record" as to the extent and permanence of injuries before he imposed sentence.

Back in court for sentencing on February 2, 2004, the GAL's report was discussed. Childs argued that the report was incomplete and asked for a continuance to present additional information in mitigation. The court denied the motion to continue, indicating that the only germane facts were 1) wanton conduct (admitted by Childs) which caused 2) serious physical injury (admitted by Childs). Despite pleas of leniency on Childs's behalf by the child's mother and grandparents who presented arguments that the injuries were caused accidentally in an attempt to save the child's life, the court sentenced Childs to the maximum sentence of five years. In so doing, the court concluded that there was no plea agreement which left the court with Childs's admission during the taking of the plea that he shook the child, wantonly causing serious physical injury. Childs's motion to withdraw his guilty plea and proceed to trial was overruled. A later motion to set aside his guilty plea was overruled and this appeal follows.

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01. Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001); Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). The trial court's application of law is reviewed *de novo*. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). We conclude that the findings of the trial court are supported by substantial evidence and there was a correct application of law.

Kentucky Rules of Criminal Procedure (RCr) 8.10 provides the trial court with the discretion to allow the withdrawal of a guilty plea "at any time before judgment." Where the trial court rejects a plea agreement, however, RCr 8.10 directs the court to provide the defendant with the opportunity to withdraw the plea.

Relying on the provision of RCr 8.10 relating to rejection of a plea agreement, Childs argues that the trial court erred by not allowing him the opportunity to withdraw his plea upon the trial court's rejection of the plea agreement. We disagree. For this provision of RCr 8.10 to apply, there must be a plea agreement. As indicated above, from our review of the record, when Childs pleaded guilty, there was no plea agreement, with the apparent exception of the amended charge. The record is clear that Childs was informed by the court of the potential of a five-year sentence, and that he understood that

possibility. No mention was made of a diversion agreement. Instead, the record is clear that the agreed motion for pretrial diversion was made at sentencing, six weeks after the court's acceptance of the guilty plea. Any argument that Childs relied to his detriment on the offer of diversion is unsupported by the record. The court's denial of the motion to withdraw the guilty plea based on a finding that there was no plea agreement is supported by the record and is not clearly erroneous.

We also disagree with Childs's contention of reversible error based on his inability to challenge, beyond the argument he made before the court at sentencing, the report of the GAL which spoke to the permanency of the child's injuries. During the sentencing hearing, after receiving the requested report from the GAL, the court effectively discounted the need for the GAL report in stating that the only relevant facts he needed for sentencing purposes were admitted by Childs in the guilty plea. After being denied the chance to continue sentencing in order to secure witnesses in "mitigation," Childs objected to the "inadequate report" and proceeded to detail its insufficiency to the court. The court thereafter sentenced Childs based on the plea admissions.⁴

⁴ We feel it necessary to point out that, contrary to Childs' assertion, there is nothing in the record to support his statement that sentencing was continued at the request of the trial court and the GAL to allow the GAL adequate time to prepare the report, or that "it was simply stated that [the GAL] did not have the time to complete the interview of all relevant parties

While Childs has failed to cite to any authority requiring us to conclude error by the trial court on this issue, we note that "(t)he process due at sentencing is less, of course, than that due at the culpability trial," and that specific procedures such as cross-examination of adverse witnesses is not constitutionally required. Fields v. Commonwealth, 123 S.W.3d 914, 917 (Ky.App. 2003). Childs took the opportunity to controvert the GAL's report before the court at sentencing, and given the trial court's ultimate non-reliance on the report, the court's denial of his motion to present witnesses in mitigation of the report was not an abuse of discretion.

Likewise, we disagree with Childs's allegation that the trial court abused its discretion in sentencing him within the range of penalty allowed by law. Childs cites no controlling authority in support of this claimed error.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

. . ." On the contrary, the GAL stated that she felt the report was adequately based on interviews with the necessary parties.

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