RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-000996-MR
NO. 2004-CA-000997-MR
NO. 2004-CA-000998-MR
NO. 2004-CA-000999-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
INDICTMENT NOS. 03-CR-00027, 03-CR-00028,
03-CR-00029 AND 03-CR-00030

JEFFREY D. HARLOW APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: The Commonwealth appeals from a Barren Circuit Court order and two amended final judgments granting in part a motion by Jeffrey D. Harlow to withdraw his plea of guilty. Harlow had entered a plea of guilty to two charges of wanton endangerment and one charge of first-degree

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

stalking. After final judgment and sentencing, the circuit court allowed him to withdraw the plea of guilty to stalking on the ground that it was involuntary, and sentenced him to serve six years on the remaining charges. The Commonwealth contends that there was no evidence that Harlow's plea was involuntary, and that in allowing him to withdraw only part of his plea, the circuit court improperly interjected itself into the area of plea negotiations.

Harlow was charged with various crimes against a former girlfriend, Andrea "Andi" Amos, under the following four indictments:

**03-CR-00027**

Criminal Attempt Murder
Wanton Endangerment, first degree
Criminal Mischief, third degree

**03-CR-00028**

Burglary, second degree
Stalking, first degree
Harassment
Harassing Communications

**03-CR-00029**

Stalking, first degree
Attempted Sodomy, first degree
Sexual Abuse, first degree

**03-CR-00030**

Wanton Endangerment, first degree
Disorderly Conduct

A trial on indictment number 03-CR-00027 began on June 12, 2003. On the morning of the following day, the Commonwealth's attorney and Harlow's defense counsel advised the court that they had reached a plea agreement which encompassed all four cases. The record indicates that Harlow had arrived at court that day fully expecting the trial to continue. There was a colloquy at the bench about the plea agreement in which counsel informed the court that the following agreement had been reached:

Under indictment number 03-CR-00027, the attempted murder charge was initially amended to criminal assault in the second degree, and the other charges were dismissed; under 03-CR-00028, all charges except for stalking in the first degree were dismissed; under 03-CR-00029, all charges were dismissed in exchange for guilty pleas in the other indictments; and under 03-CR-00030, the disorderly conduct charge was dismissed. According to the proposed settlement agreement Harlow was to serve five years for the wanton endangerment charge under 03-CR-00027, five years for stalking under 03-CR-00028, and one year for wanton endangerment under 03-CR-00030. The two five-year sentences were to run consecutively and the one-year sentence concurrently for a total sentence of ten years.

As the agreement was being discussed, some confusion arose because both the Commonwealth's attorney and defense

counsel mistakenly thought that criminal assault in the second degree was a class D felony. After the trial court corrected them by pointing out that second-degree criminal assault is a class A misdemeanor, a fourteen-minute break followed, during which the attorneys revised the agreement. When they returned to the courtroom, the criminal assault charge under the first indictment had been amended to wanton endangerment in the first degree, a class D felony. Harlow entered a guilty plea under the terms of the amended plea agreement, and on July 7, 2003, he was sentenced to serve ten years in prison.

Some five months later, Harlow moved for shock probation. On February 11, 2004, he also filed a series of motions to withdraw his guilty plea, for a new trial, to alter, amend and vacate the judgment, and for relief pursuant to CR 60.02. As the basis for his motion to withdraw his plea, Harlow claimed that he had not understood the nature of the charges, and that he had been unaware of how the plea of guilty to stalking would affect where he was housed by the Department of Corrections.[2]

The circuit court held a hearing on Harlow's motions on February 19, 2004. On April 22, 2004, the court denied the motion for shock probation. The court did grant Harlow's motion

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[2] Although it is not entirely clear from the record, it appears that the stalking conviction meant that Harlow was not allowed "outside the fence" at the prison. It also appears that he has not been permitted to serve his time at a local jail because of the length of his sentence.

to withdraw his guilty plea, but only to the charge of stalking under indictment 03-CR-00028. He was not allowed to withdraw the guilty pleas to the two counts of wanton endangerment under 03-CR-00027 and 03-CR-00030. The court explained its reasoning as follows:

> The plea to stalking is more problematic [than the pleas to wanton endangerment]. That was not a charge for which the Defendant was then on trial [at the time of entry of the plea, he was on trial for the charges in indictment number 03-CR-00027 only]. There is no evidence in the record that the stalking plea had even been discussed until just a few minutes of negotiations that resulted in a guilty plea. The Court after considering all the evidence and arguments of counsel finds that the plea to stalking in the first degree was not entered intelligently, knowingly and voluntarily[.]

Thereafter, amended judgments resentencing Harlow to serve the five- and one-year sentences on the two remaining wanton endangerment charges consecutively for a total of six years were entered. The stalking charge was set for trial by jury.

On appeal, the Commonwealth argues that the circuit court abused its discretion in allowing a partial withdrawal of the guilty plea. The Commonwealth contends that Harlow's plea to all the charges was entered knowingly and voluntarily according to the standards established in Boykin v. Alabama,[3] and that his lack of knowledge of how the conviction for stalking

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[3] 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

would affect where and under what conditions he would serve his sentence was not sufficient to invalidate the plea.

The Commonwealth also disputes Harlow's claim, and the circuit court's finding, that he was given too little time in which to decide to plead guilty to stalking.

Finally, the Commonwealth contends that the court improperly interjected itself into the plea negotiations. It claims that the Commonwealth had sought to "package" all of Harlow's cases into one agreement. By allowing him to withdraw from only part of the agreement, the Commonwealth charges, the trial court gave Harlow the optimum benefit of the plea agreement while depriving the Commonwealth of the benefit for which it had bargained: a ten-year sentence and a final resolution of all charges.

We review the trial court's decision for abuse of discretion.

> [A] proper exercise of this discretion requires trial courts to consider the totality of circumstances surrounding the guilty plea[.]
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> . . . .
>
> Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of "the accused's demeanor, background and experience, and whether the record reveals the plea was voluntarily made."

. . . .

> Because of the factual determinations inherent in this evaluation, Kentucky appellate courts have recognized that "the trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty" at the time of the guilty plea and in a "superior position to judge [witnesses'] credibility and the weight to be given their testimony" at an evidentiary hearing. Accordingly, this Court reviews a trial court's ruling on a defendant's motion to withdraw his guilty plea only for abuse of discretion[.]
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> . . . .
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> [We must determine whether] substantial evidence . . . supports the trial court's finding [that the plea was involuntary].[4]

In this case, Harlow was permitted to withdraw his plea to one of the charges after final judgment and sentencing. The trial court acknowledged that it was "harder to withdraw [such a plea] after sentencing" and that a defendant needed to show fear, deceit or coercion in order to prevail on such a claim.[5]

The most persuasive testimony at the evidentiary hearing was provided by Grant Smith, an attorney who represents a party opposing Andi Amos in a civil suit. Smith testified that he was present at the events leading up to the entry of the

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[4] Bronk v. Commonwealth, 58 S.W.3d 482, 486-488 (Ky. 2001) (citations omitted).

[5] See e.g., Blair v. Commonwealth, 479 S.W.2d 643, 644 (Ky. 1972).

guilty plea. He stated that Joe Kirwan, Harlow's attorney, told Harlow that he had ten minutes to make up his mind whether to accept the plea agreement – that it was his choice, "twenty-five years or ten years." Smith further testified that when Harlow entered the plea, he "looked shell-shocked, couldn't put one foot in front of the other and appeared not to know where he was." Smith stated that Harlow appeared to be under duress, coercion or was not acting voluntarily because "he did not know what he was doing."

Another witness, Mark Underwood, testified that after the confusion over whether the criminal assault charge was a felony or a misdemeanor had been cleared up, "nothing was gone over again," that there was no discussion of pleading guilty to stalking and that at the time, he "couldn't believe" Harlow was pleading guilty.

Kirwan testified that the issue of pleading guilty to stalking did not come up until that morning, although the day before the judge had urged him and the Commonwealth's attorney to arrive at a settlement.

The court reviewed the videotape of the guilty plea proceedings during the course of the evidentiary hearing and commented that there was "considerably more confusion than average surrounding the plea." The record reveals substantial

evidence to support the trial court’s finding that Harlow’s plea of guilty to stalking was involuntary.

The Commonwealth also contends that, under our case law, Harlow did not have to be informed that a conviction for stalking could affect where he was housed by the Department of Corrections. Although Harlow did make the argument in his motion that this lack of information had rendered his plea involuntary, the circuit court did not base its decision on this factor. Rather, the court specifically found that the determining factor was that there had not been sufficient time for discussion of the plea.

The Commonwealth’s argument that the court erred in allowing Harlow to withdraw only part of the plea, thereby allowing him to reap only the benefits from the plea agreement, was never raised by the Commonwealth at any time during the course of hearing, nor did the Commonwealth file a subsequent motion for reconsideration or to alter, amend or vacate the court’s order. The propriety of allowing the withdrawal of only part of the plea was never presented for the trial court’s consideration and thus is not preserved for our review. We “will not consider a theory unless it has been raised before the

trial court and that court has been given an opportunity to consider the merits of the theory."[6]

For the foregoing reasons, the Barren Circuit Court order and amended final judgments from which this appeal is prosecuted are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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[6] Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998), citing Hopewell v. Commonwealth, 641 S.W.2d 744, 745 (Ky. 1982).