

RENDERED: JANUARY 26, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002018-MR

GERARD EDWARD SEALEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 05-CR-00308

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Gerard Edward Sealey appeals the Fayette Circuit Court's refusal to accept his open guilty plea to theft by unlawful taking over \$300.00 on March 4, 2005. For the following reasons, we affirm the trial court's findings.

Sealey's case was one of the first proposed for the Rapid Disposition Program (RDP) operated by the Fayette Commonwealth Attorney's Office. When Sealey was accepted for the program, the prosecution offered four years on a plea of

---

<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

guilty to theft by unlawful taking over \$300.00, in exchange for Sealey proceeding by information and pleading guilty at his arraignment. Sealey had ten previous shoplifting misdemeanors and at least one prior felony conviction. The Commonwealth noted that Sealey was eligible for persistent felony offender (PFO) status, at least in the second degree.

Pursuant to the agreement, Sealey signed a waiver of indictment and was scheduled for arraignment on February 18, 2005. When he appeared for his arraignment, Sealey refused to accept the original bargain, seeking more favorable terms. The prosecutor advised if he did not accept the plea deal by the end of the day, the offer would be withdrawn and the Commonwealth would indict Sealey as a PFO.

Sealey signed a waiver of indictment; however, because Sealey's attorney had been preoccupied in a death penalty case, he failed to deliver the discovery papers to Sealey prior to the arraignment. Sealey then asked for a week to review the discovery. Again, the Commonwealth stated that the offer had to be accepted that day or it would be off the table, reiterating the purpose of rapid dispositions. The trial court passed the matter to the end of the docket to allow Sealey additional time to review the two or three pages of reports and pictures provided in discovery.

Upon the return of Sealey and his attorney to the courtroom, counsel informed the court that there was a breakdown in the attorney-client relationship. Defense counsel advised the trial court Sealey became angry and cursed at him when presented with the discovery. Defense counsel indicated that he could not take it anymore. Sealey claimed defense counsel did nothing but insult him. The trial court allowed defense counsel to withdraw and the matter was continued for two weeks for assignment of another counsel.

Subsequently, on March 4, 2005, Sealey's new counsel informed the trial court at a status hearing that Sealey was prepared to enter an open plea as no new indictment had been returned. Sealey sought to plead guilty to theft by unlawful taking over \$300.00, without a recommendation from the Commonwealth, allowing the trial court to impose a penalty between one and five years. Sealey asked the trial court to waive any formal pre-sentence investigation report and sentence him that day. Sealey argued to the trial court that the Commonwealth had two weeks to indict him for being a PFO but had failed to do so.

The Commonwealth objected, advising they had scheduled for the following Tuesday a grand jury hearing to charge Sealey

with either second-degree PFO or possibly first-degree PFO.<sup>2</sup> The prosecutor argued that allowing Sealey to plead would further his attempt to take advantage of the system. The Commonwealth further asserted that Sealey's stalling tactics and disruptive behavior at his arraignment would encourage others who were offered a rapid disposition in the future to similarly manipulate the system.

The trial court noted that Sealey had an opportunity to review the discovery against him. Sealey also had an opportunity on February 18, 2005, to plead guilty and accept the prosecutor's offer of four years without the enhanced PFO in the second-degree charge but Sealey refused to do so. The trial court decided not to accept Sealey's guilty plea.

Consequently, Sealey was arraigned for a second time on March 11, 2005, on the superseding indictment of theft by unlawful taking over \$300.00 and for being a second-degree PFO. On April 22, 2005, Sealey entered a conditional guilty plea to the Commonwealth's recommendation of four years on theft by unlawful taking over \$300.00 enhanced to six years as a PFO in the second degree. On September 8, 2005, the trial court sentenced Sealey to a total of six years and granted probation.

---

<sup>2</sup> The Commonwealth originally planned to indict Sealey for being a first-degree PFO when it was thought that he had been convicted of a felony in New York. The Commonwealth later discovered that the Sealey in the case *sub judice* was not the Gerard Sealey convicted of a felony in New York. Thus, Sealey was indicted as a second-degree PFO.

Sealey argues that the trial court abused its discretion when it refused to accept his open guilty plea on March 4. Specifically, Sealey asserts that the trial court favored the Commonwealth by allowing the prosecution several additional weeks to obtain the PFO indictment, but refused to grant Sealey only one week to review the discovery during arraignment. Sealey argues these unfair actions by the trial court amount to abuse of discretion.

We disagree. Sealey was given the opportunity to avoid the PFO charge and review the discovery but instead chose to use the time arguing with and verbally abusing his attorney. Thus, Sealey knowingly wasted his time, fully aware that the Commonwealth's offer would expire and he would lose the opportunity to avoid the PFO charge.

By the time of the hearing on March 4, Sealey had backed out of the RDP offer and slowed the process considerably. In addition, the Commonwealth was in the process of ensuring that the appropriate charges were filed against Sealey and presented to the grand jury as there was some confusion with a Gerard Sealey with a felony conviction in New York. Consequently, the trial court concluded that Sealey had waived his participation in the RDP.

It is well within the trial court's discretion to refuse to accept a guilty plea. *Cobb v. Commonwealth*, 821

S.W.2d 817, 818 (Ky.App. 1992). While a defendant has an absolute right under RCr 8.08 to unconditionally plead guilty to charges against him in an indictment, RCr 8.08 also states that, "the court may refuse to accept a guilty plea." See also *Commonwealth v. Corey*, 826 S.W.2d 319 (Ky. 1992).

Sealey contends that the trial court had no legitimate reason to reject his guilty plea, but the record clearly shows that Sealey failed to take advantage of an opportunity to avoid any enhancement under the PFO statute. Under these circumstances, the trial court was well within its discretion to allow the Commonwealth a reasonable amount of time to present the PFO charge for a subsequent grand jury hearing.

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert T. West  
Fayette County Legal Aid  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
Susan Roncarti Lenz  
Assistant Attorney General  
Frankfort, Kentucky