

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000850-MR

DENNIS GENE PITTMAN

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NO. 05-CR-00098

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Dennis Gene Pittman brings this appeal from an April 19, 2006, order dismissing without prejudice the indictment for first-degree unlawful possession of methamphetamine precursor and theft by unlawful taking less than \$300.00 in Action No. 05-CR-00098. We affirm.

Appellant was indicted for stealing sudafed from a Kroger store in Taylor County. He was specifically indicted upon the offenses of unlawful possession 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 Kentucky Revised Statutes 21.580.

methamphetamine precursor in the first degree (Kentucky Revised Statutes (KRS) 218A.1437) and theft by unlawful taking less than \$300.00 (KRS 514.030).

In January 2006, the Commonwealth offered appellant a plea bargain. In exchange for a plea of guilty, the Commonwealth agreed to recommend a sentence of five years, “diverted for five (5) years.” The record indicates that appellant did not accept the offer but instead announced ready to proceed to trial. As such, a trial date was set for February 28, 2006. In preparing its case, the Commonwealth learned of the existence of a surveillance video at Kroger. The video showed appellant and his girlfriend walking out of Kroger, and Kroger employees approaching them. Upon obtaining the video, the Commonwealth apparently called appellant's trial counsel, informed his office about the video, and mailed it to defense counsel on the same day.

After reviewing the video on the day of the trial, appellant attempted to accept the Commonwealth's earlier plea offer. However, the Commonwealth argued that the plea offer was rejected by appellant and was no longer viable. Thereupon, appellant filed a motion to enforce the plea bargain. The Commonwealth then filed a motion to dismiss the indictment as appellant had been re-indicted upon the same offenses. After a hearing on the matter, the circuit court concluded that the plea bargain had indeed been rejected by appellant and granted the Commonwealth's motion to dismiss the indictment.

Appellant contends the circuit court committed error by granting the Commonwealth's motion to dismiss the indictment and by denying his motion to enforce the plea bargain. In support thereof, appellant cites this Court to the case of *Workman v.*

*Commonwealth*, 580 S.W.2d 206 (Ky. 1979).<sup>2</sup> In *Workman*, the Commonwealth promised to dismiss the indictment if defendant voluntarily submitted to a polygraph examination by the Kentucky State Police and if the examination indicated defendant's innocence. In compliance therewith, defendant voluntarily submitted to a polygraph examination by the Kentucky State Police and the examination revealed that defendant had no involvement in the crimes charged. Nevertheless, in contravention of the agreement, the Commonwealth proceeded to try defendant upon the charges and ultimately obtained a conviction. On appeal, defendant argued that the case against him should have been dismissed as per his agreement with the Commonwealth. The Supreme Court agreed and held:

When as here, our historical ideals of fair play and substantial justice do not permit attorneys for the Commonwealth to disregard promises and fail to perform bargains, it does not permit the judge to allow such iniquities to succeed.

*Workman*, 580 S.W.2d at 207.

Appellant believes that *Workman* is controlling because:

*Workman* involved the Commonwealth promising to do something, which induced Workman to accept the plea offer, and then not doing what was promised. Mr. Pittman's case involves the Commonwealth making an offer based on partial discovery, which induced Mr. Pittman to reject the plea offer, and then providing the rest of discovery.

Appellant's Brief at 9. Appellant argues that the Commonwealth knew or should have known about the surveillance video and that appellant's original decision to reject the

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<sup>2</sup> *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979) was overruled on other grounds by *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991).

offer was based upon discovery the Commonwealth had produced at that time. We disagree and view *Workman* as inapposite. In *Workman*, defendant accepted the Commonwealth's plea bargain and took steps to comply therewith. In our case, appellant rejected the Commonwealth's plea offer and took no steps to comply with the offer. Simply put, we do not view *Workman* as broad enough to provide appellant with a remedy. Additionally, we do not believe that appellant is entitled to resurrect a previously rejected plea bargain simply because of newly discovered evidence. Accordingly, we conclude that the circuit court properly denied appellant's motion to enforce plea bargain and dismiss the indictment in Action No. 05-CR-00098.

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

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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