

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000504-MR

ANDRE LYDIAN

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE JOHN DAVID SEAY, JUDGE  
ACTION NO. 04-CR-00301

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION DISMISSING

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BEFORE: ACREE, CAPERTON AND KELLER, JUDGES.

ACREE, JUDGE: Andre Lydian appeals an order of the Nelson Circuit Court that determined Lydian knowingly and voluntarily waived his right to pursue this appeal. Finding the circuit court's determination to have been based on substantial evidence and therefore not clearly erroneous, we affirm the court's order and dismiss this appeal.

In 2004, a jury convicted Lydian of first-degree trafficking in a controlled substance and sentenced him to eight years in prison (“jury conviction”). He appealed that jury conviction to this Court. *Lydian v. Commonwealth*, No. 2005-CA-002096-MR, 2007 WL 2333037 (Ky.App., Aug. 3, 2007). While that appeal was pending, Lydian appeared again before the Nelson Circuit Court on five (5) other indictments (“subsequent criminal cases”). He entered into a plea agreement with the Commonwealth on each of the subsequent criminal cases.

The Commonwealth filed a motion to dismiss Lydian’s appeal of his jury conviction because, according to the Commonwealth, Lydian agreed to withdraw his appeal as part of his guilty plea agreement in the subsequent criminal cases. Presented with only portions of the record of the subsequent criminal cases in the Commonwealth’s motion to dismiss the appeal of the jury conviction, we determined

it necessary and appropriate to remand the matter to the Nelson Circuit Court for the limited purpose of determining whether Lydian knowingly and voluntarily waived his right to an appeal of the conviction at issue. As part of its determination, the court should enter specific and appropriate findings on the record as to whether any such waiver occurred. In so doing, the court will need to give particular consideration to “the record made at entry of the plea”; *i.e.*, any plea colloquy conducted by the court as to Lydian’s plea bargain agreement.

*Lydian v. Commonwealth*, 2007 WL 2333037 \*2, quoting *Johnson v. Commonwealth*, 120 S.W.3d 704, 705 (Ky. 2003).

On remand, the Nelson Circuit Court entered an order determining that Lydian's agreement to withdraw his appeal of his jury conviction was knowing and voluntary. In accordance with our specific direction in *Lydian*, the circuit court's order included specific findings that: (1) each of four plea agreements signed by Lydian included his express agreement to withdraw his appeal of his jury conviction; (2) during the colloquy, Lydian's withdrawal of his appeal of the jury conviction as part of his plea agreements was discussed in his presence no less than three times; (3) the circuit court's questioning of Lydian allowed him full and ample opportunity to raise any doubt that may have existed in Lydian's mind regarding the content of the plea agreements, including the provision requiring his withdrawal of his appeal; and (4) the final judgments in all five of the subsequent criminal cases recited that Lydian was waiving his right to continue pursuing the appeal of his jury conviction.<sup>1</sup>

Lydian now appeals that order and urges this Court to address the merits of the appeal originally presented in *Lydian*.

Presumably relying on case law addressing appeals from the denial of a Rules of Criminal Procedure (RCr) 11.42 motion, the Commonwealth asserts that we should review the circuit court's order *de novo*.<sup>2</sup> We disagree. Review of a trial court's decision regarding the knowingness and voluntariness of a guilty plea is under a clearly erroneous standard. *Rigdon v. Commonwealth*, 144 S.W.3d 283,

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<sup>1</sup> He did not take a direct appeal from any of those judgments.

<sup>2</sup> Lydian does not propose any standard of review.

288 (Ky. 2004). We believe this standard applies whether the entire plea is being challenged, or only a part of the underlying agreement, as is the case before us.<sup>3</sup> A ruling that is supported by substantial evidence is not clearly erroneous. *Id.* A thorough review of the record in this case clearly reveals that the trial court's decision that Lydian's agreement to the terms of his guilty plea was knowing and voluntary is supported by substantial evidence and is not clearly erroneous.

Lydian signed four separate plea agreements relating to four of the five subsequent charges, each of which included the following identical language: "Defendant agrees to withdraw appeal of current conviction." There is no dispute that the reference to the "current conviction" was meant to identify the jury conviction which is the subject of this appeal.

Furthermore, the colloquy during which the circuit court discussed these plea agreements in Lydian's presence and directly with Lydian includes the following illuminating passages.

FERGUSON: Mike Ferguson for the Commonwealth.

SIMON: Larry Simon with Mr. Lydian.

COURT: . . . . Mr. Ferguson would you please recite the terms of the agreement for the record sir.

FERGUSON: Yes your honor, on four separate Circuit Court Indictments, on 01-CR-00240 [the first of the four, the terms of the plea were recited, ending with Ferguson's misstatement that] the Defendant agrees to withdraw his plea on the current conviction that he is now serving.

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<sup>3</sup> Lydian does not seek to have his entire guilty plea set aside in the subsequent criminal cases, but only that portion of the agreement that ends his appeal of the prior jury conviction.

COURT: [correcting Ferguson] His appeal.

FERGUSON: His appeal. He agrees to withdraw his appeal.

COURT: Ok. Thank you Mike.

FERGUSON: 04-CR-299 [discussion of the second of the four indictments also ended with Ferguson's representation that] Defendant agrees to withdraw appeal on current conviction.

COURT: Ok.

FERGUSON: 04-CR-300 [discussion of the second of the four indictments also ended with the representation that] Defendant agrees to withdraw appeal on current conviction. . . .

COURT: Mr. Simon is that your understanding of the agreement sir?

SIMON: Yes. [Attorney Simon then acknowledged the presence and identity of his client, Andre Philip Lydian]

COURT: Have you explained Mr. Lydian's rights to him?

SIMON: I have.

[After swearing Lydian as a witness, the circuit court elicited the following testimony from Lydian directly]

COURT: Mr. Lydian, I am going to go over the rights that Mr. Simon has already explained to you and discussed with you, but if at any point throughout these proceedings you do not fully and completely understand every single thing I say or ask, sir if you will just let me know we will discuss it and I will try to answer your question, ok?

LYDIAN: Ok.

COURT: Sir your attorney has stated that you would like to plead guilty . . . in accordance with the recommendations just made by the Commonwealth. Is that in fact what you want to do?

LYDIAN: Yes.

[The circuit court then addressed Lydian's waiver of other rights not relevant to this appeal, followed by this series of questions specifically relating to Lydian's plea agreements]

COURT: Mr. Lydian, I have before me a series of plea documents. Can you tell me whether or not this is your signature on each and every one of those?

LYDIAN: Yes.

COURT: Sir, did you sign these documents freely and voluntarily?

LYDIAN: Yes.

COURT: Did you have an opportunity to read these documents over before you signed them?

LYDIAN: Yes.

COURT: Sir, can you read and write?

LYDIAN: Yes.

COURT: Did Mr. Simon also have a chance to explain the contents of these documents to you, discuss them with you and answer any question you might have regarding their content?

LYDIAN: Yes.

COURT: Based on your own review of the documents as well as the discussions you have had with your attorney, do you feel that you understand every single item contained within these documents that you have signed?

LYDIAN: Yes.

COURT: Do you have any questions about them at all?

LYDIAN: No sir.

In *Johnson, supra*, the defendant was convicted by a jury of one criminal offense, then agreed to waive his right to appeal that conviction as part of his guilty plea agreement to a reduced charge on another offense. When, in violation of his agreement, he appealed his jury conviction anyway, the Supreme Court said,

Any right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily. . . . It is likewise well established that a plea agreement and any waivers contained therein are binding upon a defendant.

*Johnson*, 120 S.W.3d at 706.

Attempting to distinguish his own case, Lydian argues that, unlike *Johnson*, “there was no direct questioning by the Circuit Court of Mr. Lydian about whether he waived his right to appeal from his [jury] conviction.” Therefore, he contends that on remand the trial court was required to conduct a hearing to determine if Lydian’s waiver of appeal of his jury conviction was knowing and voluntary (presumably to ask this specific question) or, alternatively, to determine that the waiver was not knowing and voluntary. Based on this record, however, there was no need for a direct question and failure to ask one is not contrary to *Johnson*.

First, the interpretation of *Lydian* that the circuit court had only two options is erroneous. Our mandate in *Lydian* clearly contemplated a third option – the possibility that the circuit court’s examination of the record alone would reveal that Lydian’s agreement to withdraw his appeal was knowing and voluntary. That is precisely what happened.

Second, the circuit court did not, *sua sponte*, order an evidentiary hearing, nor, as we just noted, did our mandate require one. Furthermore, the record reveals Lydian never filed a motion seeking an evidentiary hearing after the case was remanded. Nevertheless, Lydian now asks this Court to remand the case a second time and to order the circuit court to conduct an evidentiary hearing as an alternative to our determination that his agreement to end the appeal of his jury conviction was not knowing and voluntary. This we will not do because Lydian waived his right to a hearing when he failed to seek one before the circuit court. *Stumph v. Commonwealth*, 408 S.W.2d 618, 619 (Ky. 1966)(“preliminary to the right of appellate review, a party feeling aggrieved by an occurrence in court must give the trial court the first opportunity to alleviate his grievance by the appropriate objection or motion.”).

The real substance of Lydian’s argument is that, as a matter of law, his waiver cannot have been a knowing and voluntary waiver because the circuit court did not specifically ask him during the colloquy whether he knew he was agreeing to terminate his appeal. Our Supreme Court rejects the notion that guilty pleas must include special words before the waiver of associated rights is deemed



knowing and voluntary. Whether a defendant has entered into a plea agreement knowingly and voluntarily “is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.” *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

The totality of the circumstances surrounding Lydian’s agreement to withdraw the appeal of his jury conviction is set forth above. Whether that agreement was knowing and voluntary could “be conclusively resolved by an examination of the trial court record.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 469-470 (Ky. 2003). That is how the circuit court resolved the question in this case, and we believe properly so.

Furthermore, our assessment of the record on review convinces us that had the circuit court specifically asked Lydian if he was aware he was waiving his right to continue appealing his jury conviction he would have responded affirmatively. During the colloquy, Lydian was specifically asked whether he understood he was waiving his right to appeal the subsequent criminal cases and he answered that he understood those waivers. There is nothing in the record to indicate his answer regarding the appeal of his jury conviction would have been any different.

To be sure, when the right at issue is not one automatically waived by the very entry of a guilty plea (such as the right to a jury trial or the right to confront witnesses), it is prudent to ensure the defendant’s waiver is knowing and voluntary. A thorough colloquy such as that undertaken by the circuit court and set

forth above can provide that assurance. It did in this case. *See Centers v. Commonwealth*, 799 S.W.2d 51 (Ky.App. 1990)(plea was knowing and voluntary even though trial court did not specifically inquire of the defendant whether he understood his sentences would run consecutively).

This thorough colloquy, Lydian's testimony during the colloquy, and the other evidence of record constitutes substantial evidence that Lydian knowingly and voluntarily waived his right to continue pursuing this appeal of his jury conviction. Therefore, the order of the Nelson Circuit Court is affirmed and this appeal is dismissed.

ALL CONCUR.

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