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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000082-MR

CHARLES R. BLACKWELL — APPELLANT

v. — APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CR-00319

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Charles R. Blackwell appeals the decision of the Bullitt Circuit Court that denied his motions to withdraw a plea of guilty to criminal charges. He argues the trial court denied his due process rights when it

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

failed to establish a factual basis for his guilty plea, and abused its discretion by refusing to grant his request to withdraw that plea. After our review, we affirm.

Blackwell entered a plea of guilty to one count of fleeing or evading police, first degree; one count of third-degree burglary; one count of wanton endangerment in the first degree and one count of being a persistent felony offender in the second degree. The charges stemmed from an incident on August 20, 2008, where Blackwell went to the home of a former girlfriend, assaulted her and then fled the scene as police arrived in response to a 911 call from the residence. He crashed into two police cruisers while attempting to flee the scene.

Blackwell submitted to a court ordered mental evaluation and, after a hearing, was found competent to stand trial. Blackwell's attorney informed the trial court that during previous discussions with the Commonwealth and his client, he thought a plea agreement had been reached. But when he met with Blackwell on the morning the plea was to be entered "[i]t was as though we had not spoken before."

Blackwell indicated he believed the plea agreement permitted concurrent sentences for a total of five years instead of consecutive sentences for a total of fifteen years, his actual sentence as reflected by the record. Later on that afternoon, Blackwell returned to the trial court and entered a guilty plea to the amended charges pursuant to *North Carolina v. Alford,* 400 U.S.25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The plea agreement, which counsel acknowledged "took

all day" provided for consecutive sentences for a total of fifteen years. Sentencing was set for November 9, 2009.

On November 2, 2009, counsel orally indicated to the trial court that Blackwell wished to withdraw his plea. At the hearing on the request to withdraw his plea, counsel indicated that Blackwell believed he had been coerced. Blackwell himself indicated that he suffers from dyslexia and has been diagnosed as bipolar, and that he sometimes understands things as he would like them to be rather than as he is told. Blackwell is unable to read but it was clear from questioning by counsel and the Commonwealth that his attorney had read the plea agreement to him. He returned however to his position that he thought the plea involved five-year sentences that would run concurrent for a total of five years.

Counsel indicated to the trial court that during the plea negotiations, Blackwell had requested a reduction in the total sentence to twelve years but that was refused by the Commonwealth although Blackwell denied such a conversation ever took place. The trial court then terminated the hearing and indicated it would review the video tape of the plea prior to issuing a ruling.

On December 7, a newly appointed attorney appeared for Blackwell. Although the Commonwealth and the trial court were prepared for sentencing, Blackwell had filed a new motion to set aside his plea based on "11.42 reasons." The trial court continued the hearing for one week allowing Blackwell's new attorney time to review the reports and record.

On December 14, 2009, counsel appeared with Blackwell and indicated that he had reviewed the record and although he could not find anything specific, asked the court to allow Blackwell to withdraw the plea based on Blackwell's repeated statements that he did not understand the plea agreement. Blackwell again indicated he believed the plea agreement would result in concurrent sentences for a total of five years and not consecutive sentences resulting in a total sentence of fifteen years. The trial court then overruled Blackwell's motion and sentenced him to serve consecutive sentences for a total of fifteen years. This appeal followed.

Blackwell first argues he was denied his due process rights when the trial court failed to establish a factual basis for the plea. This issue was never presented to the trial court and would not generally be reviewed. Blackwell then asks us to determine whether, pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26 there has been a palpable error that affects his substantial rights. We will review the matter under that standard.

The decision of whether to allow a withdrawal of a guilty plea is within the sound discretion of the trial court. RCr 8.10. That discretion is however limited to situations where the plea was made voluntarily. *Rodriguez v. Commonwealth,* 87 S.W.3d 8, 10 (Ky. 2002). Here, Blackwell's motion alleges he was coerced which, if true, would make the plea involuntary. We therefore review this matter to determine if "manifest injustice has resulted from" any error. RCr 10.26.

Central to any typical plea of guilty is an admission by the defendant that he committed the illegal acts. *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Blackwell however availed himself of an exception to that rule and submitted a guilty plea pursuant to *Alford.* In place of a defendant's acknowledgement of guilt, *Alford* cautions "that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." *Alford,* 400 U.S. at 38 n.10, 81 S.Ct. at 168 n.10. We dismiss the Commonwealth's attempt to argue that because no Kentucky law specifically requires the trial court to establish a factual basis for a plea, none is required. The United States Supreme Court answered that question in the *Alford* opinion. Blackwell now argues the trial court never established a factual basis for the guilty plea. We disagree.

During the plea colloquy, the trial court read the indictment to Blackwell. It contained the facts and Blackwell's involvement in the incident of August 20, 2008. The trial court asked Blackwell if he was the person named in that indictment. The trial court then asked if Blackwell understood the facts with which he was charged in the indictment. Blackwell responded "Yes" to both questions. Counsel then indicated to the court that because Blackwell was unable to read, the attorney had read the Commonwealth's written offer to Blackwell from the guilty plea form, and Blackwell had then signed that form. The form contains a short recitation of the factual basis for the plea. It reads:

> On or about August 20, 2008, in Bullitt County, Kentucky, [Appellant] unlawfully entered a building with intent to commit a crime. [He] wantonly operated his motor vehicle in a manner which caused a grave risk of death or serious physical injury to officers responding to the location and intentionally caused or attempted to cause injury to Officer Travis Schoenlaub and Officer Dennis Creason.

Additionally before he entered the plea of guilty, Blackwell acknowledged there was sufficient evidence against him to result in a conviction. "[A] trial court can satisfy itself that there is a factual basis for a guilty plea in any number of ways, many of which do not involve a defendant personally reciting his involvement in the underlying facts which gave rise to the criminal charges." *Chapman v. Commonwealth,* 265 S.W.3d 156, 183 (Ky. 2007) (footnote omitted). A sufficient factual basis was presented to the trial court to authorize the court to accept Blackwell's guilty plea. We find nothing in the record to indicate that Blackwell was coerced into making an entry of a plea of guilty. There was no error.

Finally, Blackwell brings forth an argument that the trial court abused its discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or not supported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). His brief details Blackwell's repeated statements of his desire that the plea agreement should result in a sentence of five years and emphasizes Blackwell's mental conditions. Yet it fails to recognize two key elements of the plea.

First, although Blackwell now contends he may not have understood the difference between the words "consecutive" and "concurrent," the plea form which Blackwell acknowledged was read to him by counsel before he signed it states the sentences are to "be served consecutively for a total of fifteen (15) years." Second is his attempt to have counsel negotiate a reduced sentence of twelve years.

Clearly, Blackwell was aware of the imposition of a fifteen-year sentence regardless of his desire that the sentences result in only five years of incarceration. We find nothing arbitrary, unreasonable, unfair or anything not supported by sound legal principles in the decision to deny Blackwell's requests. The trial court did not abuse its discretion. There was no error.

We therefore affirm the Bullitt Circuit Court's denial of Blackwell's motions to withdraw his plea of guilty.

ALL CONCUR.

BRIEF FOR APPELLANT:

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