

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000157-MR

GARY COBURN

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 12-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Gary Coburn has appealed from the Floyd Circuit Court's denial of his motion to withdraw a guilty plea. He contends the trial court's decision was in error as it was made without first convening an evidentiary hearing or taking evidence concerning his request. Following a careful review, we affirm.

On June 19, 2012, an indictment was handed down by the Floyd County Grand Jury charging Coburn with three felony offenses. Counsel was

appointed to represent Coburn. On October 31, 2012, Coburn and the Commonwealth reached a plea agreement whereby one of the charges would be dismissed and he would receive concurrent twelve-year sentences on the remaining counts. He appeared before the Floyd Circuit Court the following day and formally entered a guilty plea in reliance on the Commonwealth's offer.

On November 19, 2012, new counsel entered an appearance for Coburn and filed a motion pursuant to RCr<sup>1</sup> 8.10 to withdraw the guilty plea along with a supporting memorandum. The memorandum alleged Coburn did not fully understand the plea agreement and was suffering from a medical condition (diabetes) which interfered with his ability to comprehend the terms of the agreement. It also contended prior counsel had failed to properly prepare Coburn for the plea, thereby rendering Coburn unable to make an informed decision on whether to plead or insist on proceeding to trial. The Commonwealth did not file a response. Although unclear from the record presented on appeal, apparently a hearing on the motion was convened on December 7, 2012.

In its December 14, 2012, order denying the motion, the trial court indicated it had reviewed the videotaped plea entered by Coburn as well as the entire colloquy between Coburn and the trial court. The trial court noted its review indicated Coburn's plea was done knowingly, freely, intelligently and voluntarily; Coburn acknowledged signing and understanding the matters contained in the motion to enter his guilty plea; he indicated to the trial court he needed no

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

additional time to discuss matters with counsel; and Coburn indicated he had told counsel everything he knew about the case and expressed satisfaction that counsel had done all that had been asked of her. Finding the plea had been voluntarily entered, the trial court denied his motion for relief. This appeal followed.

Coburn now contends the trial court should have convened an evidentiary hearing prior to ruling on his motion. He argues his motion raised several material issues which could not properly be determined absent such hearing and the failure of the trial court to order an evidentiary hearing rendered its decision infirm. We disagree.

Initially, we note the record on appeal contains a copy of only the sentencing hearing convened on December 28, 2012. It does not contain copies of any other videotaped hearings before the trial court nor transcripts of same. It is the duty of the appellant to ensure the record is complete and contains all of the evidence necessary to facilitate adequate appellate review. In the absence of a complete record we must assume the omitted portions support the trial court's ruling. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Further, contrary to the mandates of CR<sup>2</sup> 76.12(4)(c)(iv), Coburn's brief before this Court contains no citations to the record, but rather cites to documents appended to the brief which appear to be copied from the record, some of which are incomplete. Failing to comply with this rule is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is not optional; it is mandatory.

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<sup>2</sup> Kentucky Rules of Civil Procedure.

*See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although we would be well within our discretion to strike the brief or dismiss the appeal for Coburn's failure to comply with the rules, because the record is not voluminous and the issue presented is not complex, we will not impose such a harsh sanction. However, we will decide the issue presented based solely on the facts appearing on the face of the record.

In pertinent part, RCr 8.10 states: “[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.” If a motion to withdraw is filed alleging the plea was entered involuntarily, the trial court is required to evaluate the totality of the circumstances regarding the defendant's volition in entering the guilty plea.

*Edmonds v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006). If it be determined the plea was involuntarily entered, the defendant's motion to withdraw the plea should be granted. If the trial court determines the plea was entered voluntarily, the decision on whether to grant the defendant relief rests within its sound discretion and will not be disturbed absent an abuse of that discretion. *Rigdon v.*

*Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). Because such determinations are inherently fact-sensitive, we review them only for clear error, that is to say, whether the decision was supported by substantial evidence.

In the case *sub judice*, the trial court indicated it held a hearing on Coburn's motion, heard arguments of counsel, considered the memorandum filed in support of the motion, and reviewed the record including the plea colloquy.

After considering the totality of the circumstances, the trial court determined Coburn's plea was voluntarily entered and, in a proper exercise of its discretion, denied the motion to withdraw the voluntary guilty plea. *Id.* The record contains absolutely no evidence supportive of Coburn's bare allegations and we assume the omitted portions of the record support the trial court's determination. *Thompson*, 697 S.W.2d 143. Thus, we are unable to conclude the trial court clearly erred in denying Coburn's motion to withdraw his guilty plea.

For the foregoing reasons the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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