

RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2683-MR

MARC A. KELLY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 93-CR-0107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: ABRAMSON, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying relief under Kentucky Rule of Criminal Procedure (RCr) 11.42. Finding that the record supports the decision of the circuit court, we affirm.

On January 11, 1993, a grand jury of Jefferson County returned an indictment against Marc A. Kelly, charging him with attempted murder, first-degree robbery, receiving stolen property over \$100, complicity to commit the aforementioned offenses, resisting arrest, fourth-degree assault and carrying a concealed deadly weapon. Kelly's co-defendant, John Carlton Martin, was charged with the same offenses, with the exception of the

concealed deadly weapon charge. A public defender, Christina Brown, was appointed to represent Kelly and trial was set for November 18, 1993.

On the date set for trial, both Martin and Kelly withdrew their pleas of not guilty and entered pleas of guilty to the amended charges of first-degree wanton endangerment, first-degree robbery, resisting arrest and carrying a concealed deadly weapon, and the Commonwealth moved to dismiss the remaining charges. Because Kelly and the Commonwealth had not reached an agreement as to a recommended sentence, the Commonwealth's offer on a plea of guilty did not include one. The judgment on the guilty plea recited that it was an "open plea" of guilty. On December 16, 1993, after a presentence investigation, the court sentenced Kelly to thirteen years' imprisonment.

On January 6, 1994, Kelly's counsel filed a motion to withdraw the plea of guilty. The motion alleged that, in an off-the-record discussion on the day set for trial, Jefferson Circuit Court Judge, William Knopf, promised to "do the right thing" in sentencing Kelly. The motion recited that since Kelly had rejected the Commonwealth's offer of thirteen years, and was holding out for a ten-year sentence, the court had effectively promised Kelly a ten-year sentence by encouraging him to make an open guilty plea. The court filed its own response to this motion on January 14, 1994. In its response, the court acknowledged that there was an off-the-record discussion of the case. The court, however, denied promising the minimum sentence

of ten years. Judge Knopf explained that when he said he would "do the right thing" by way of punishment, he meant that he would hear arguments from the Commonwealth and Kelly and consider all the appropriate sentencing factors. Finally, the court noted that on the day that he entered his guilty plea, Kelly denied being promised anything. The same day, the court also ordered Kelly's counsel to clarify the grounds for relief in the January 6, 1994 motion. The court noted that the pleading was not verified, as required under RCr 11.42.

Kelly's motion to withdraw the plea of guilt was set for hearing on February 14, 1994. Before that date, however, his public defender was removed from the case because of a possible conflict of interest, and the court appointed the Department of Public Advocacy. Kelly's new counsel, Anthea Boarman, was unable to appear at the February 14 hearing, and the court reset it for February 28, 1994. The next pleading which appears on the record is a motion for a voluntary dismissal without prejudice, filed by Kelly, pro se, on October 27, 1995. Kelly asked the court to dismiss his motion without prejudice and to file his own verified motion under RCr 11.42. Kelly's pro se RCr 11.42 motion alleges that the circumstances of his guilty plea rendered it involuntary, since the judge had in effect promised him a ten-year sentence. Kelly also alleged that his counsel was ineffective for permitting the guilty plea and sentence to be entered.

A third attorney, Mark Wettle, filed a notice of entry of appearance of counsel for Kelly on December 12, 1995. After some confusion over Kelly's representation, Kelly filed another pro se motion on April 14, 1996, asking for a default judgment. On April 29, 1996, Jefferson Circuit Court Judge Mershon noted that although Mr. Wettle had filed a notice of entry of appearance, he had not filed anything with the court triggering the Commonwealth's need to respond. The court ordered that Mr. Wettle would have forty-five days to amend or supplement Kelly's pleadings and file a memorandum, the Commonwealth would have twenty days to respond, and the court would rule thereafter. On August 6, 1996, Mark Wettle filed a supplemental pleading on Kelly's behalf. The Commonwealth filed its response on September 3, 1996. In an order entered September 5, 1996, the court denied Kelly's request for relief under RCr 11.42, without a hearing. This appeal followed.

On appeal, Kelly again argues that his guilty plea was not knowingly and intelligently entered because it was based on the trial court's promises concerning sentencing. He next alleges that his first counsel, Christina M. Brown, was ineffective because she did not timely file Kelly's motion to withdraw his plea of guilty and failed to have Kelly verify the motion. Finally, Kelly claims that his later attorneys were ineffective because they failed to request an evidentiary hearing on Kelly's RCr 11.42 motion.

Kelly's second argument is without merit. Kelly argues that he was denied effective assistance of counsel because his first attorney did not file a motion to withdraw his guilty plea within ten days as required by Kentucky Rules of Civil Procedure (CR) 59.05, and failed to have Kelly verify the motion as required under RCr 11.42. Any error here was harmless since Kelly filed his own verified RCr 11.42 motion, and the court entertained it. CR 61.01. In his pro se motion, Kelly did not fault his counsel for any failing with respect to filing a motion to withdraw his guilty plea, but rather for permitting him to plead guilty under the circumstances.

Likewise, Kelly's third argument is readily disposed of. Kelly's second and third attorneys, obviously, did not allege that they themselves were ineffective, nor did Kelly in his original RCr 11.42 motion. These claims, therefore, are not properly before this Court. Kelly's complaint that the later attorneys failed to request an evidentiary hearing would be harmless error in any event. Kelly himself requested an evidentiary hearing in his pro se RCr 11.42 motion. Despite any lapses by his successive counsel, Kelly's RCr 11.42 motion and request for an evidentiary hearing, supplemented by Mark Wettle, his third attorney, were considered by the circuit court on their merits.

The issue in this case is whether or not the circuit court judge's involvement in the plea negotiations should render the guilty plea invalid. The government should not be permitted

to welsh on its bargain, Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), overruled on other grounds by Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991), and the court should not inject itself into the plea bargaining process because of the danger of misleading the parties. Haight v. Commonwealth, Ky., 760 S.W.2d 84 (1988). In Haight, the Supreme Court of Kentucky ruled that the circuit court had erred in refusing to allow the defendant to withdraw his guilty plea, after the court declined to sentence the defendant in accordance with the plea agreement between the prosecutor and defense counsel. The Court held that, because of the circuit court's extensive involvement in the plea negotiations, its ambiguous statements regarding whether or not it would accept the Commonwealth's sentence recommendation, and the fact that it permitted the guilty plea form to be substantially altered, the guilty plea was defective and Haight should have been permitted to withdraw his plea. Id. at 88.

In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). Both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Since pleading guilty involves the waiver of several constitutional rights, a waiver of

these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Sparks, supra.

The validity of a guilty plea is not determined from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902 (1980); Sparks, supra. These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made. Sparks, supra. The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty. Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872, 874 (1977). Solemn declarations in open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). Upon motion under RCr 11.42, if the movant's allegations are refuted by the record as a whole, the trial court is not required to grant an evidentiary hearing. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985).

We begin with a review of the plea negotiations and the court's involvement therein. In contrast to both Workman and

Haight, there was no plea agreement in the case sub judice. A review of the record indicates that the court inquired about plea negotiations at pretrial hearings. In fact, at a hearing on July 20, 1993, Kelly's counsel informed the court that they had reached an agreement, based upon Commonwealth's offer of thirteen years to serve. Upon hearing counsel's announcement, Kelly made his disagreement known, and the case was set for trial on November 18, 1993.

On that date, the court held an off-the-record discussion with Kelly, his counsel, his co-defendant and his counsel as to the progress of plea negotiations. Determining that no agreement could be reached, the court suggested that both defendants enter open pleas of guilty. It is not disputed that the circuit court made the comment that it would "do the right thing" with regard to punishment, if the defendants entered an open plea. There is no suggestion, however, that the court mentioned a particular term of imprisonment or expressly promised to be more lenient than the prosecution's offer. On the record, the court accepted both defendants' guilty pleas to reduced charges. The Commonwealth noted that it would have amended the charges, even if the case had gone to trial, because the proof did not fit the charges as set out in the indictment. Since the Commonwealth made no sentence recommendation, the court could not have misled Kelly into thinking it would accept it, thus distinguishing this case from Haight.

The circuit court took the necessary precautions to insure that Kelly's guilty plea was knowingly, voluntarily and intelligently given. The court made it very clear that the plea was an open plea, explaining that Kelly's counsel and the Commonwealth had not been able to agree on a recommended sentence. The court specifically asked both Kelly and his co-defendant whether they understood that sentencing would be left up to the court. Each said "yes." The court explained that Kelly was facing punishment in the range of a minimum of ten years to a maximum of twenty years, and that in an open plea, during sentencing, the attorneys for the prosecution and defense would present arguments, but that the court would make the sentencing decision. The court also asked whether Kelly was entering his guilty plea as a result of any promises or threats. Kelly responded "no." The court asked Kelly's counsel if she had discussed his constitutional rights with him and was confident he understood. She stated that she had and that she was.

At sentencing, the court again made reference to the fact that the pleas were open guilty pleas, because no agreement had been reached on the term of years. After reviewing the presentence investigation and the victim impact statement, and listening to Kelly's counsel's argument for a minimum sentence of ten years, Kelly's personal apology, the testimony of the police officer who encountered the robbery in progress and the victim's, the court sentenced Kelly to a term of thirteen years.

Under the circumstances of this case, we find that the circuit court did not become so deeply involved in the plea negotiations that he misled the parties, and Kelly's guilty plea was knowingly, voluntarily and intelligently entered. Kelly apparently gambled that he would receive a more favorable sentence from the judge than from a jury after a trial, or as recommended by the Commonwealth. He was not entitled to believe that he had a guaranteed sentence of fewer than thirteen years based upon an isolated comment by the court. By entering a guilty plea, Kelly was depending on the trial court to impose an appropriate sentence, and the court was required to observe a number of procedural and substantive safeguards and impose a sentence within the limits prescribed by law. Commonwealth v. Corey, Ky., 826 S.W.2d 319, 321 (1992). The court fulfilled its obligations.

Finally, the court correctly dismissed Kelly's RCr 11.42 motion without an evidentiary hearing. The court's recollection of the off-the-record discussion was placed in the record, and the record as a whole refutes Kelly's allegations. Hopewell, supra. In his brief, Kelly suggests that his attorney may have made comments interpreting the court's remarks for Kelly, and that a hearing is required to determine what effect these may have had. This was not raised at the circuit court, either in Kelly's pro se motion or as supplemented by his attorney, and will not be considered on appeal.

For the foregoing reasons, the decision of the
Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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