RENDERED: September 18, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001253-MR

CHAUNCEY JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 96-CR-002264 and 96-CR-002962

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant, pursuant to a guilty plea, of possession of a controlled substance and theft by unlawful taking over $300. Appellant argues that the trial court erred in not allowing the appellant to withdraw his guilty plea. Upon reviewing the record and the applicable law, we adjudge appellant's argument to be without merit and, thus, affirm.

Appellant was indicted on separate charges of theft by unlawful taking over $300 and possession of a controlled substance. Separate plea agreements were thereafter entered into as to each charge. As to the possession of a controlled substance charge, the Commonwealth recommended two (2) years to

serve or five (5) years if probated. The agreement specifically stated that the Commonwealth did not object to releasing appellant on his own recognizance pending sentencing, but if appellant failed to appear at sentencing, its recommendation would be five (5) years to serve. The plea agreement on the theft by unlawful taking charge recommended one (1) year to serve or three (3) years if probated and contained the same language as the aforementioned agreement regarding a recommendation of five (5) years to serve if appellant failed to appear at sentencing.

On December 23, 1996, appellant entered a plea of guilty on both charges. During the plea, appellant was made aware of the Commonwealth's recommendation on both charges--three (3) years to serve or eight (8) years probated, reserving to the court's discretion whether to grant probation. The Commonwealth specifically qualified this recommendation by verbally stating that if appellant failed to appear at sentencing, the recommendation would be five (5) years on each count, for a total of ten (10) years to serve.

Appellant failed to appear at his sentencing proceeding on February 14, 1997. Appellant was subsequently arrested and brought before the court for sentencing on May 6, 1997. On May 5,1997, appellant's counsel filed a motion to withdraw his guilty plea, maintaining that he was coerced into pleading guilty. At the sentencing hearing, appellant argued that he should be allowed to withdraw his guilty plea because he did not feel adequately represented by his newly appointed counsel as his former counsel had withdrawn from the case. The court denied the motion to withdraw appellant's plea and imposed the ten (10) year

sentence recommended by the Commonwealth in the event appellant did not appear at his sentencing. This appeal followed.

On appeal, appellant argues that the trial court erred in refusing to let him withdraw his plea when the court did not sentence appellant in accordance with the recommendation of the Commonwealth in the plea agreement. Appellant cites Kennedy v. Commonwealth, Ky. App., 962 S.W.2d 880 (1997) in support of his position. In Kennedy, supra, the Court held that under RCr 8.10, the trial court must allow a defendant to withdraw his plea if the court does not sentence the defendant according to the recommendation of the Commonwealth in the plea agreement.

The instant case can be factually distinguished from Kennedy, supra, by the fact that the court in the present case did follow the recommendation of the Commonwealth in the plea agreement. In the plea agreements on both offenses, it states that if the defendant does not appear at sentencing, the sentencing recommendation is five (5) years to serve. During the plea proceeding, the Commonwealth made that fact very clear. Appellant knew the exact consequences of his failure to appear at sentencing and agreed to them when he pled guilty. Accordingly, the court did not err in refusing to allow appellant to withdraw his plea.

Appellant next argues that his plea was not voluntarily entered. A guilty plea is valid if it represents a voluntary and intelligent choice to waive the several trial-related constitutional rights, and the record affirmatively establishes this knowing waiver. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Centers v. Commonwealth, Ky. App.,

799 S.W.2d 51 (1990). Whether a plea is voluntary is determined from the surrounding circumstances as well as from the transcript of the plea proceeding. Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978).

In reviewing appellant's plea, there is nothing in the record to suggest that appellant's plea was anything but voluntary. During the plea proceeding, the trial court explained all of the constitutional rights appellant was waiving by pleading guilty, and appellant acknowledged that he understood. Appellant stated that he had read the guilty plea, understood it, and was entering his plea voluntarily. The court informed appellant three times as to the consequences of not appearing for sentencing, and appellant explicitly stated that he understood these consequences.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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