

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-002388-MR

REBECCA MERCER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH W. ROARK, JUDGE
ACTION NO. 96-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and COMBS, Judges.

COMBS, JUDGE. Rebecca Mercer (Mercer) appeals from the judgment of the Hardin Circuit Court entered on September 10, 1997, ordering her to serve eighteen (18) months in prison following her guilty plea to three counts of theft by deception over \$300.00. We affirm.

In March 1996, the Hardin County Grand Jury indicted Mercer on three felony counts of theft by deception over \$300.00 (KRS 514.040) involving the purchase of approximately \$3,256.00 worth of merchandise with bad checks. Over the next several months, the trial court conducted several pretrial conferences at

which the parties discussed settlement of the case. Finally, on June 24, 1997, Mercer entered a plea of guilty to all three counts of the indictment pursuant to a plea agreement with the Commonwealth according to which the Commonwealth recommended a sentence of eighteen (18) months on each of the three counts to run concurrently with each other; the Commonwealth also agreed to take no position on probation.

Mercer asked the trial judge to allow her to submit an alternative sentencing program pursuant to KRS 500.095, which the trial court agreed to consider. At the sentencing hearing on September 9, 1997, Mercer presented an extensive alternative sentencing proposal that included potential participation in numerous programs, including road work, community volunteer service, juvenile outreach, disabled assistance, counseling and self-help groups, legal aid services, school seminars with students, a parenting program and weekly meetings. After listening to Mercer's proposal, the trial court sentenced Mercer in accordance with the Commonwealth's recommendation to serve eighteen (18) months in prison on each of the three theft counts to run concurrently. This appeal followed.

Mercer argues that her guilty plea is invalid because it was not entered voluntarily, knowingly, and intelligently. More specifically, she contends that her plea was not voluntary because she believed that she would receive alternative sentencing rather than imprisonment. She also maintains that her plea was not intelligently entered because her attorney was not

very helpful and did not generate confidence. Mercer argues that her rights and interests were not protected because she did not receive the benefits of the alternative sentencing plan she submitted to the circuit court.

In general, a valid guilty plea waives all defenses except for jurisdictional issues -- such as that the indictment charged no offense. Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L. Ed. 2d 163 (1970); Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992). In order to be valid, a guilty plea must be voluntary, knowing and intelligent. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). However, the validity of a guilty plea is determined from the totality of the circumstances surrounding it rather than from reference to some specific key words recited at the time it was taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986).

During the guilty plea hearing, the trial court conducted a thorough colloquy with Mercer concerning the nature and consequences of the guilty plea. The trial court expressly informed Mercer of her right to call witnesses, her right to cross-examine witnesses, her right not to testify against

herself, the burden on the prosecution to prove guilt on each element of the offenses beyond a reasonable doubt, and the requirement of an unanimous jury guilty verdict. The trial court asked Mercer if she understood that by pleading guilty, she was giving up those rights and the right to bring a direct appeal of the conviction. Mercer responded that she understood the waiver of her rights and that she had signed the Motion to Enter Guilty Plea Form that described the consequences of the guilty plea and her rights. Mercer indicated that she had fully discussed the case including any defenses with her attorney and that she was very satisfied with her attorney's performance. Mercer responded negatively when the trial judge asked her if she had been threatened or coerced into pleading or if anyone had made any promise to her to cause her to plead guilty other than the plea agreement with the Commonwealth. Mercer also acknowledged that she had been through a guilty plea proceeding before and that she was familiar with the procedure.

Mercer first raised the issue of alternative sentencing at the hearing on her motion to dismiss the indictment on May 28, 1996. At that time, she argued that her repeated misconduct in passing bad checks was related to an emotional and mental problem that could be treated. She expressed a desire to plead guilty with an alternative sentencing plan. The trial court informed Mercer that she was free to attempt to negotiate a plea bargain with the Commonwealth.

On June 25, 1996, Mercer again raised the issue of alternative sentencing in connection with a guilty plea. At that time, the prosecutor stated that he was not agreeing to recommend alternative sentencing and that his plea offer on a guilty plea did not include alternative sentencing. He indicated that the plea offer from the Commonwealth was an eighteen-month sentence on each offense. Mercer's attorney explained to her that the Commonwealth's plea offer did not include a term related to alternative sentencing. The prosecutor unequivocally told Mercer that he objected to alternative sentencing in her case and he would not include it as a part of the plea agreement. They discussed whether she would have to serve the sentence consecutively or concurrently with the sentences on other prior convictions and the amount of time she would have to serve before being eligible for parole; Mercer then withdrew her guilty plea. However, she stated during the hearing that she was completely satisfied with her attorney.

On August 13, 1996, Mercer again appeared before the trial court on various *pro se* motions during which the parties and the trial judge discussed the actual time she would serve on an eighteen-month sentence and the role of parole. They also discussed the awarding of jail-time credit on a prison sentence and whether the sentence would run consecutively or concurrently under KRS 533.060(2). Mercer eventually entered her guilty plea in June 1997 pursuant to a plea agreement containing the original terms proposed by the Commonwealth in June 1996.

The record shows that Mercer's guilty plea was voluntary, knowing, and intelligent. She was fully aware of her constitutional rights and understood the consequences of the plea. See Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). Although she raised the issue of alternative sentencing several times, the Commonwealth unambiguously not only refused to recommend alternative sentencing -- but vigorously opposed it. During both the first guilty plea hearing in June 1996 and the final sentencing hearing in September 1997, the Commonwealth stated that the plea agreement involved an eighteen-month sentence of imprisonment. The record reveals that Mercer was aware of the Commonwealth's opposition to alternative sentencing and that she was concerned about the amount of time she would have to spend in prison on a conviction.

Under KRS 533.010(2), 500.095 and 533.030(6), the trial court may consider alternative sentencing even though a defendant commits a Class D Felony while on parole. Corman v. Commonwealth, Ky. App., 822 S.W.2d 421 (1991). However, a defendant has no right to alternative sentencing; the issue is wholly discretionary with the trial judge. See Turner v. Commonwealth, Ky., 914 S.W.2d 343 (1996); Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994). Mercer submitted her alternative sentencing plan prior to final sentencing, and the trial court considered her request for alternative sentencing at the sentencing hearing. In its final judgment, the trial court made

a specific finding that probation or probation with an alternative sentencing plan would unduly depreciate the seriousness of Mercer's crime. Mercer had an extensive history of passing bad checks. She was on parole for similar offenses at the time she committed the Hardin County offenses, and she had several pending misdemeanor bad check charges in other counties at the time she was indicted in Hardin County. The trial court did not abuse its discretion in failing to sentence Mercer under her alternative sentencing proposal.

Moreover, Mercer was familiar with the judicial system and the trial court's authority in sentencing. The record clearly refutes Mercer's allegation that she expected that she would receive probation under an alternative sentencing plan. Even if she had had such an impression, it would not have invalidated these proceedings since a defendant's subjective expectation on sentencing does not render the guilty plea involuntary or unintelligent. See, e.g., Spinelli v. Collins, 992 F.2d 559 (5th Cir. 1993) (defendant's mistaken belief not based on any promises by defense attorney, prosecutor or court does not invalidate guilty plea); Self v. Blackburn, 751 F.2d 789, 792-93 (5th Cir. 1985); Smith v. McCotter, 786 F.2d 697 (5th Cir. 1986). As the court stated in Tahamtani v. Lankford, 846 F.2d 712, 714 (11th Cir. 1988)

In short, Tahamtani pled guilty on the mere hopeful expectation, possibly rising to the level of an assumption, that he would receive a probated sentence. In light of the fact that he knew that there was a possibility that he could receive the [prison] sentence

that was imposed, his disappointment with the result is not grounds to set aside the guilty plea.

Finally, Mercer challenges the "intelligent" portion of the Boykin test by alleging that her attorney was not very helpful. However, Mercer does not contend that his actions or alleged omissions rose to the level of ineffective assistance of counsel. In order to establish ineffective assistance of counsel with respect to a guilty plea, a person must satisfy a two-part test showing both that counsel's performance was deficient in that he made serious errors outside the wide range of professionally competent assistance and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 80 L. Ed. 2d 203 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994); Skaggs v. Commonwealth, Ky. App., 885 S.W.2d 318, 320 (1994).

On the contrary, Mercer complimented her attorney on his performance and assistance on several occasions. She was personally very active and aggressively protected her interests by filing several motions *pro se* and seeking a continuance. Mercer has pointed to no specific facts illustrating erroneous or inadequate performance by her attorney; nor has she asserted that she would have gone to trial rather than plead guilty. Mercer has not demonstrated (and the record does not reveal) that she

received inadequate assistance of counsel. This argument must fail.

We affirm the order of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw
Richmond, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, KY