

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000015-MR

TIMOTHY WAYNE HARMON

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 96-CR-00104

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING

*** *** *** *** ***

BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

PER CURIAM. Appellant, Timothy Wayne Harmon (Harmon), appeals his conviction of first-degree wanton endangerment, Kentucky Revised Statute (KRS) 508.060, as a matter of right. Harmon's sole issue on appeal is that the trial court erred in denying his motion to withdraw his plea agreement after the trial court rejected the agreement. The Commonwealth conceded in a motion to reverse and remand that Harmon should have been permitted to withdraw his guilty plea. Having considered the record and applicable case law, we reverse and remand.

Harmon was indicted for two counts of first-degree wanton endangerment, pled guilty, and entered into a plea agreement with the Commonwealth for five (5) years on each count to be concurrently served, with credit for time already served, and the balance of the five (5) years to be probated.

The trial court rejected the plea agreement at the sentencing hearing, refusing to probate the balance of the time. Harmon immediately moved the trial court to withdraw the plea, but the trial court denied the motion. RCr 8.10 provides:

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

A court must permit a defendant to withdraw his guilty plea if the court has not elected to follow it. Haight v. Commonwealth, Ky., 938 S.W.2d 243, 251 (1996); Kennedy v. Commonwealth, Ky. App., 962 S.W.2d 880, 882 (1997).

The record reflects that the trial court did not permit Harmon the opportunity to withdraw his guilty plea after rejecting the plea agreement entered into by Harmon and the Commonwealth. This was error.

For the foregoing reasons, we reverse the judgment of the Casey Circuit Court and remand this case with directions that Harmon be permitted to withdraw his guilty plea and proceed to trial on the original charges if he so chooses.

Having considered the Commonwealth's motion to reverse and remand, this Court ORDERS that the motion be DENIED AS MOOT. The appellant also filed a motion to dismiss because he was granted shock probation pursuant to KRS 439.265. In view of the foregoing opinion, appellant's motion is ORDERED DENIED.

ALL CONCUR.

ENTERED: June 11, 1999

/s/ John D. Miller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

No brief for appellee.

Tim Berry Falls
Campbellsville, Kentucky