

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000168-MR

TRAVIS CARTER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT JACKSON, JUDGE
ACTION NO. 96-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, HUDDLESTON, and KNOPF, Judges.

BUCKINGHAM, JUDGE. Travis Carter (Carter) appeals from an order of the Jessamine Circuit Court setting aside a prior order allowing him to withdraw his guilty plea. We affirm.

In December 1996, Carter was indicted by a Jessamine County grand jury for the charge of first-degree rape. The trial court ordered that Carter be evaluated to determine his competency to stand trial, and it found him to be competent after conducting a competency hearing. On August 11, 1997, Carter entered into a plea agreement with the Commonwealth whereby he would plead guilty to an amended charge of criminal attempt to

commit first-degree rape and would receive a sentence of fifteen years in prison.

Carter, who was represented by counsel, signed a document entitled "Waiver of Further Proceedings with Petition to Enter Plea of Guilty" and pled guilty pursuant to the plea agreement. Prior to accepting the guilty plea, the trial judge engaged in a colloquy with Carter and determined that Carter understood the proceedings, had discussed the facts of the case with his attorney, had not been threatened or promised anything relative to the plea, and was certain that he desired to plead guilty to the amended offense. Carter also related the facts of the case as he understood them and admitted that his actions constituted the offense of criminal attempt to commit first-degree rape.

At his sentencing hearing on September 19, 1997, Carter made a pro se motion to withdraw his guilty plea on the grounds that he had differences of opinion with his attorney and that his guilty plea was not knowingly and willingly made. The trial court denied the motion and entered an order to that effect. Carter's counsel was allowed to withdraw from the case, and new counsel was eventually appointed to represent him.

On November 17, 1997, Carter filed a pro se motion for the trial court to reconsider his motion to withdraw his guilty plea and for the trial judge to withdraw from the case. The court denied the motion as it related to the trial judge but granted the motion to reconsider and set aside Carter's guilty plea. The

court's order entered on November 27, 1997, included the following statements:

The Court did enter into discussion on the video record and confirm that Defendant understood his rights and that the plea was supported by the evidence.

. . . .

[N]o audio record is available to help establish that the Court did, in fact, make findings that Defendant had committed the crime he was pleading guilty to.

. . . .

The Defendant's pro se motion to withdraw his guilty plea is proper in light of the unavailability of the video record to help establish that the Court correctly found evidence of the crime and that Defendant knowingly, intelligently and voluntarily waived all his rights and this motion, having reconsidered same, should be granted.

. . . .

[W]hile the Court is of the opinion that there was, in fact, discussion regarding his rights and the crime he was pleading guilty to, there is no supporting video [footnote omitted] record of the Court's action and it is the Court's conclusion that the Defendant's motion to withdraw his guilty plea should be granted.

On December 5, 1997, the Commonwealth filed a motion to reconsider the trial court's order setting aside Carter's guilty plea. As ground for its motion, the Commonwealth stated that the audio record of the guilty plea had now become available for review by the court. After reviewing the audio record of the guilty plea, the court entered an order setting aside its order of November 26, 1997, allowing withdrawal of Carter's guilty plea

and ordered that the plea be reinstated. The court stated in its order that

A subsequent review of the record supports the Commonwealth's contention that the plea of guilty was knowingly, intelligently and voluntarily given by a competent Defendant; that he did, with advice of counsel, execute the two required forms and the Court did enter into discussion and make findings on the video record which are supportive of his decision to plead guilty.

Carter was subsequently sentenced to fifteen years in prison, and this appeal followed.

Kentucky Rule of Criminal Procedure (RCr) 8.10 provides in relevant part that "[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." However, "the permission to withdraw a guilty plea and substitute a plea of not guilty is a matter within the sound discretion of the trial court." Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974). In this case, Carter was found to be competent to stand trial, was represented by counsel, and entered a guilty plea on the record after engaging in a colloquy with the trial judge concerning his understanding of his legal rights and the nature of the charge and proceedings against him. Furthermore, Carter and his attorney signed documents indicating Carter's desire to plead guilty to the amended charge and indicating his full understanding and consent to the plea agreement and guilty plea.

While Carter argues that a court should not reinstate a plea over a defendant's objection once the plea has been set aside, he cites no authority to support his argument. In fact,

he concedes that there is a general rule that an interlocutory order is subject to change at any time prior to adjudication. See Bank of Danville v. Farmers Nat'l Bank of Danville, Ky., 602 S.W.2d 160, 164 (1980). Kentucky Rule of Civil Procedure (CR) 60.02(a), which is also applicable to criminal cases, gave the trial court the authority to grant the Commonwealth's motion due to the trial court's "mistake" in believing that the record of Carter's guilty plea was unavailable.¹ We conclude that the trial court acted within its discretion in entering the order setting aside its previous order allowing Carter to withdraw his guilty plea.

The judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Albert B. Chandler III
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¹ We are aware of this court's recent opinion in Turner v. Commonwealth, 1997-CA-003213-MR, which reversed a trial court's order granting a motion by the Commonwealth to reconsider an order granting a defendant's motion to withdraw his guilty plea. The facts in that case are distinguishable from the facts in the case sub judice in that no such mistake was involved in Turner. In fact, this court in Turner distinguished its facts from those in a case where the court reinstated a guilty plea after previously allowing it to be withdrawn due to a "mistaken" belief. See People v. Wilkens, 139 Mich. App. 778, 362 N.W.2d 862 (1984).

