

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-003133-MR

TIMOTHY ALLEN MILLER

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE BENJAMIN L. DICKINSON, JUDGE  
ACTION NO. 98-CR-00250

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HUDDLESTON, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Timothy Allen Miller appeals from the final judgment entered by the Barren Circuit Court on December 16, 1998, that followed the denial of his motion to withdraw his guilty plea brought pursuant to RCr<sup>1</sup> 8.10. Having concluded that the trial court did not abuse its discretion, we affirm.

In October 1998, the Barren County grand jury indicted Miller on one felony count of operating a motor vehicle while

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<sup>1</sup>Kentucky Rules of Criminal Procedure.

license revoked or suspended for driving under the influence, third offense (KRS<sup>2</sup> 189A.090), one misdemeanor count of operating a motor vehicle while under the influence of alcohol or other substance which impairs one's driving ability, third offense (KRS 189A.010), and one count of being a persistent felony offender in the second degree (PFO II) (KRS 532.080(2)). On November 16, 1998, the trial court conducted a hearing at which Miller entered a guilty plea to the two traffic offenses pursuant to a plea agreement with the Commonwealth, which recommended a sentence of five years on count one for operating a motor vehicle while license revoked or suspended for DUI, third offense, and twelve months on count two for operating a motor vehicle while under the influence of alcohol or other substance that impairs one's driving ability, third offense, with the two sentences to run concurrently.<sup>3</sup> The Commonwealth also moved the trial court to dismiss count three involving the PFO II charge. During the hearing, the trial court engaged Miller in a colloquy. The trial court explained to Miller his constitutional rights, set forth the facts supporting the charges and asked Miller if he wanted to waive certain rights as part of the guilty plea. At the end of the hearing, the trial court made a finding that Miller understood the nature of the charges against him, that his plea was voluntary, and that he knowingly and voluntarily waived his

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<sup>2</sup>Kentucky Revised Statutes

<sup>3</sup>The Commonwealth also recommended that Miller pay a fine of \$1,000 and costs on count one and a \$750 fine, \$200 service fee, have his license suspended for 24 months and attend alcohol counseling for one year on count two.

right to confront any witnesses, his right to trial by jury, and his right against self-incrimination. The trial court also found that there was a factual bases for the plea and adjudged him guilty of the two traffic offenses. The trial court then postponed final sentencing until December 14, 1998, pending preparation of a pre-sentence investigation report.

On December 9, 1998, Miller filed a motion to withdraw his guilty plea. At the sentencing hearing on December 14, 1998, Miller's attorney raised the issue of the motion to withdraw the guilty plea. The trial court denied the motion and sentenced Miller consistent with the Commonwealth's recommendation to a total sentence of five years in prison on the two traffic offenses. This appeal followed.

Miller argues that the trial court erred by failing to allow him to withdraw his guilty plea. RCr 8.10 states in part: "At 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."<sup>4</sup> As the language of RCr 8.10 indicates and case law clearly establishes, the decision to allow a defendant to withdraw his guilty plea prior to entry of the final judgment is within the sound discretion of the trial court.<sup>5</sup>

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<sup>4</sup>RCr 8.10 further provides that a defendant must be given an opportunity to withdraw his guilty plea if the trial court rejects the plea agreement. See e.g., Kennedy v. Commonwealth, Ky.App., 962 S.W.2d 880 (1997). The trial court did not reject the plea agreement and sentenced Miller consistent with the Commonwealth's recommendation, so the trial court was not obligated to allow Miller to withdraw his guilty plea.

<sup>5</sup>See Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975); Anderson v. Commonwealth, Ky. 507 S.W.2d 187 (1974).

Factors relevant to the trial court's exercise of its discretion include the amount of time that elapsed between the plea and the motion to withdraw, the presence or absence of a valid reason for failure to present the grounds for withdrawal at an earlier point in the proceedings, whether the defendant has asserted his legal innocence, a defendant's lack of experience with the criminal justice system, and the potential prejudice to the state should the plea be withdrawn.<sup>6</sup>

During the guilty plea hearing, the trial court explicitly informed Miller of the importance and binding nature of his guilty plea. The trial judge told Miller at the start of the hearing that he was going to ask him a series of questions in order to determine his competency and voluntary willingness to enter the plea and that he would not be able to change his mind after entering his guilty plea. At the sentencing hearing, Miller's attorney stated that Miller wanted to withdraw his guilty plea in order to have time to sell some real estate so he could generate sufficient money to further pursue his desire to withdraw his guilty plea. The trial judge stated that he was denying the motion to withdraw because he had warned Miller at the guilty plea hearing that he would not be allowed to change his mind after entering the guilty plea.

Miller argues that the trial court abused its discretion because it denied the motion based on a "general rule

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<sup>6</sup>United States v. Riascos-Suarez, 73 F.3d 616, 621 (6<sup>th</sup> Cir. 1996) (involving Fed.R.Crim.P. 32(d) the federal counter part to RCr 8.10), cert. denied, 519 U.S. 848, 117 S.Ct. 136, 136 L.Ed.2d 84 (1996).

of not allowing pleas to be withdrawn." He contends that the trial court should have inquired further about the reasons for Miller's desire to withdraw his plea.

After reviewing the record, we cannot say the trial court abused its discretion. Abuse of discretion has been defined as a decision that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."<sup>7</sup> We disagree with Miller that the trial court was obligated to conduct an independent sua sponte inquiry into the reasons for his desire to withdraw his guilty plea. Given the trial court's prior warning to Miller at the guilty plea hearing that it generally did not allow a defendant to withdraw his guilty plea, we believe Miller was obligated to articulate his specific reasons for moving to withdraw his plea. Miller simply failed to provide any reason for his change of position. The trial court's partial reliance on its general policy of not allowing withdrawals is not arbitrary and unreasonable since Miller did not offer any legitimate reason for withdrawal of his guilty plea. Additionally, Miller has not asserted any claim of innocence, and he has had prior experience with the criminal justice system. Thus, we hold that Miller has failed to show that the trial court abused its discretion in denying his motion to withdraw his guilty plea.

The judgment of the Barren Circuit Court is affirmed.

ALL CONCUR.

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<sup>7</sup>Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

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