

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001121-MR

JEFF NASH

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 98-CR-00456

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF AND TACKETT, JUDGES.

JOHNSON, JUDGE: Jeff Nash appeals from the judgment of the Campbell Circuit Court entered on May 5, 1999, that sentenced him to prison for ten years on his convictions for burglary in the third degree<sup>1</sup> and being a persistent felony offender in the first degree (PFO I).<sup>2</sup> Having concluded that the trial court did not abuse its discretion in denying Nash's motion to withdraw guilty plea, we affirm.

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<sup>1</sup>Kentucky Revised Statutes (KRS) 511.040.

<sup>2</sup>KRS 532.080(3).

In October 1998, a criminal complaint was filed accusing Nash of unlawfully entering a building and damaging two metal boxes in an attempt to remove tools belonging to the owner. In December 1998, the Campbell County Grand Jury indicted Nash on one felony count of burglary in the third degree and PFO I. On December 22, 1998, Nash appeared with counsel for arraignment on the charges. After several pretrial conferences, a trial was scheduled for March 4, 1999.

On the morning of trial, Nash entered a guilty plea to both counts of the indictment pursuant to a plea agreement with the Commonwealth, which recommended the minimum sentence of ten years in prison. The trial court conducted a hearing and found that Nash understood the nature of the charges against him; that his plea was voluntary; that there was a factual basis for the plea; and that he knowingly and voluntarily waived his right to trial by jury, his privilege against self-incrimination, and his right to confront any witnesses. The circuit court postponed sentencing until April pending preparation of a presentence investigation report.

On the day of sentencing, April 21, 1999, Nash's attorney filed a motion seeking leave to withdraw as counsel and also seeking leave to allow Nash to withdraw his guilty plea. In his affidavit, counsel stated that Nash maintained his innocence and did not fully understand the nature of the plea agreement because he was ill at the time of the plea. The trial court granted counsel's motion to withdraw as attorney of record,

appointed a public defender to represent Nash, and delayed ruling on the motion to withdraw the guilty plea.

On May 3, 1999, the trial court conducted a hearing on the motion. After hearing from the appellant and considering the arguments of counsel, the court denied the motion and sentenced Nash consistent with the Commonwealth's recommendation to five years for burglary in the third degree enhanced to ten years on the PFO I conviction. This appeal followed.

Nash argues that the trial court erred by failing to allow him to withdraw his guilty plea. He contends that the plea was not knowingly, intelligently, and voluntarily entered. Nash asserts that since he is illiterate and was on medication at the time of the plea, he did not fully understand the nature and ramifications of the plea agreement.

RCr<sup>3</sup> 8.10 provides 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." As the language of RCr 8.10 indicates and case law clearly establishes, the decision of whether 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>4</sup> Factors relevant to the trial court's exercise of its discretion include: (1) the amount of time that elapsed between the plea and the motion to withdraw; (2) the presence or absence of a valid reason

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<sup>3</sup>Kentucky Rules of Criminal Procedure.

<sup>4</sup>See Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975); Anderson v. Commonwealth, Ky., 507 S.W.2d 187 (1974).

for the defendant's failure to present the grounds for withdrawal at an earlier point in the proceedings; (3) whether the defendant has asserted his legal innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) a defendant's lack of experience with the criminal justice system; and (7) the potential prejudice to the state should the plea be withdrawn.<sup>5</sup> Several courts have noted that the purpose of the rule on withdrawal of guilty pleas "is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant 'to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice in pleading guilty.'"<sup>6</sup>

During the sentencing hearing, Nash asserted that prior to entering the guilty plea he had met only once with his attorney and that they did not discuss the facts of the case or potential defenses to the charges. He claimed that since he is illiterate he was unable to read the guilty plea documents, including the motion to enter a guilty plea and the Commonwealth's offer on a plea of guilty. He said that his

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<sup>5</sup>United States v. Pluta, 144 F.3d 968, 973 (6th Cir. 1998) (citing United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994)), cert. denied, 525 U.S. 916, 119 S.Ct. 266, 142 L.Ed.2d 218 (1998); United States v. Riascos-Suarez, 73 F.3d 616, 621 (6th Cir. 1996) (involving Fed. R. Crim. P. 32(d) the federal counterpart to RCr 8.10), cert. denied, 519 U.S. 848, 117 S.Ct. 136, 136 L.Ed.2d 84, (1996).

<sup>6</sup>United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991) (quoting United States v. Carr, 740 F.2d 339, 345 (5th Cir. 1984)), cert. denied, 502 U.S. 1117, 112 S.Ct. 1231, 117 L.Ed.2d 465 (1992).

attorney did not fully explain these documents or the legal aspects of the plea to him. Nash also alleged that his attorney told him that if he changed his mind he always had the option of withdrawing the guilty plea. Nash claimed that he was on medication at the time of the plea that impaired his ability to understand the proceedings. Finally, he asserted his innocence and complained about the quality of his attorney's assistance in representing him. Based on its review of the record, the trial court denied the motion to withdraw the guilty plea.

Our review indicates that during the guilty plea hearing the trial court engaged Nash in a lengthy colloquy concerning his willingness to enter the guilty plea. When asked if he was under the influence of any drugs or alcohol to the extent that it would hinder his ability to understand the proceedings, Nash responded, "No." He responded affirmatively when asked if he had read or had had read to him the motion to enter a guilty plea and the Commonwealth's offer on a plea of guilty. He acknowledged having voluntarily signed the motion to enter a guilty plea, which set out his various constitutional rights. Nash indicated that he understood the allegations supporting the burglary and PFO charges and that he had committed those offenses. Nash indicated that he had not been threatened or promised anything to get him to plead guilty other than the recommendation by the Commonwealth of a ten-year sentence. Defense counsel stated that he had explained to Nash his various constitutional rights and that he believed Nash understood those

rights. Nash stated that he had had a sufficient amount of time to discuss his decision to enter a guilty plea.

After reviewing the record, we cannot say that the trial court abused its discretion in failing to allow Nash to withdraw his guilty plea. The record refutes Nash's allegations that he did not understand the nature of the proceedings. He specifically told the trial court that he had fully discussed the case with his attorney, that he had had the guilty plea documents read to him, that he was not impaired by any drugs, that he understood the facts supporting the charges, and that he had committed the offenses. Statements by a defendant made during a guilty plea hearing "in open court carry a strong presumption of verity."<sup>7</sup> Absent extraordinary circumstances, declarations in open court under oath should not be lightly cast aside.<sup>8</sup>

Several factors militate in favor of the denial of Nash's motion to withdraw guilty plea. First, he waited until the day of the sentencing hearing, approximately seven weeks after entering his guilty plea, to make his motion to withdraw. Second, he has offered no explanation or reason for waiting so long to request withdrawal of his plea. Third, he has had extensive experience with the criminal justice system as evidenced by several prior felony and misdemeanor convictions. Fourth, most of his factual allegations are contradicted by explicit statements made during the guilty plea hearing. Nash

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<sup>7</sup>Blackledge v. Allison, 431 U.S. 63, 73, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977).

<sup>8</sup>Zilich v. Reid, 36 F.3d 317, 320 (3rd Cir. 1994).

has offered no plausible explanation for these contradictions. Although he alleges that he was taking medication at the time of the guilty plea, he has not identified the exact drug or how it affected his ability to understand the proceedings. Similarly, his claim that his alleged illiteracy impacted the validity of the guilty plea is rebutted by the fact that he said he had discussed his constitutional rights with his attorney, that he acknowledged signing the guilty plea documents, and that the documents had been read to him. While Nash now proclaims his innocence, he has not provided any explanation for why he admitted having committed the offenses at the guilty plea hearing. Nash exhibited no indication of confusion or hesitancy during the guilty plea hearing. Based on our review of the record, we cannot conclude that the trial court abused its discretion in denying Nash's motion to withdraw his guilty plea.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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