

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000624-MR

KENNETH EDWARD GOLACKEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 01-CR-00833

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion to withdraw his guilty plea on grounds that the Commonwealth promised that he would receive probation. Upon review of the record, we agree with the trial court that the record establishes that appellant's plea was made voluntarily with no promise of probation or leniency. Accordingly, we affirm.

On August 13, 2001, appellant, Kenneth Golackey, was indicted on three counts of first-degree trafficking in a controlled substance (cocaine). On November 30, 2001, pursuant to a plea agreement, Golackey pled guilty to two counts of first-

degree trafficking in a controlled substance and one count of first-degree possession of a controlled substance. In the final judgment entered on December 21, 2001, per the Commonwealth's recommendation, Golackey was sentenced to seven years' imprisonment on one of the trafficking charges, five years' imprisonment on the other trafficking charge, and one year in jail on the possession charge, all sentences to run concurrently for a total of seven years. In the judgment, the court expressly stated that probation was not an option because it would unduly depreciate the seriousness of the crime, because of Golackey's prior criminal record, and because of the deliberate nature of the crime.

Subsequently on December 29, 2001, Golackey wrote a letter to the trial judge seeking to withdraw his guilty plea on grounds that:

I was not promised, but assured I would receive probation, after I signed the agreement. Also in this plea agreement, there was a vehicle involved, I was told that it would be returned to me. . . .

The Commonwealth filed a response to the letter, considering it a motion pursuant to RCr 8.10. The court set the matter for an evidentiary hearing, but stated that it reserved the right to decide the motion without a hearing. Prior to the hearing date, the court canceled the evidentiary hearing and entered an order denying the motion. This appeal by Golackey followed.

Golackey maintains that the trial court abused its discretion in denying his motion without affording him an evidentiary hearing. RCr 8.10 provides that the court may permit

a defendant to withdraw his guilty plea "[a]t any time before judgment." In this case, however, Golackey sought to withdraw his plea after the final judgment. Consideration of a motion to withdraw a guilty plea filed after final sentencing is within the trial court's discretion. Blair v. Commonwealth, Ky., 479 S.W.2d 643 (1972); Reed v. Commonwealth, Ky., 261 S.W.2d 630 (1953). It has been held that the trial court should not exercise its discretion "by allowing the withdrawal of the plea after sentence, unless it appears that the accused's consent to plead guilty was unwillingly given and made under circumstances of fear, deceit, or coercion." Kidd v. Commonwealth, 255 Ky. 498, 74 S.W.2d 944, 946 (1934).

During the plea in the instant case, the court established that Golackey was aware of the various trial-related constitutional rights he was waiving pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The court also asked Golackey if he understood that the maximum sentence he faced under the charges was thirteen years, to which he responded in the affirmative. The court further inquired if he understood the Commonwealth's recommendation of seven years on count one, five years on count 2, and one year on count three, to which Golackey again responded in the affirmative. The trial court specifically asked if anyone had made any threats to force him to plead guilty or any special promises to the effect that if he pled guilty, the court would go easy on him or give him special treatment. Golackey responded in the negative. Golackey acknowledged reading and signing the waiver of further

proceedings/petition to enter a plea of guilty form which contained the specific declaration that "no officer or agent of any branch of government (federal, state or local) nor any other person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence, or probation, or any other form of leniency if I would plead 'Guilty'."

In both Blair, 479 S.W.2d 643, and Hurt v. Commonwealth, Ky., 333 S.W.2d 951 (1960), the Court affirmed the lower court's denial of the defendant's motion to withdraw his guilty plea which alleged that he pled guilty because he believed the trial court would grant him probation, which the lower court declined to do in both cases. As the Court stated in Hurt, 333 S.W.2d at 953:

No matter what inferences appellant may have drawn with respect to the prospects of probation, both he and his counsel were presumed to know that it was a matter wholly within the court's discretion, and they had no right to assume the result of that discretion.

Likewise, in the present case, the record completely refutes Golackey's claim that his plea was induced by a promise that he would receive probation. Everything in the record indicates that Golackey knew what the Commonwealth's sentence recommendation was and that the plea was thus entered voluntarily, knowingly, and intelligently. As to Golackey's contention that he pled guilty also with the belief that his car would be returned, we note that the pre-trial conference form states that the plea agreement included forfeiture of the vehicle. Accordingly, the lower court

did not abuse its discretion in refusing to allow Golackey to withdraw his plea without an evidentiary hearing. See Bowling v. Commonwealth, Ky., 981 S.W.2d 545 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999) (evidentiary hearings not required on RCr 11.42 motions where the record refutes movant's allegations).

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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