

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000868-MR

FRANK E. MASBY, III

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00987-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: During the pre-dawn hours of April 14, 2001, Frank Masby, III, and four cohorts disabled the alarm at a shop, the Gun Site, on Nicholasville Road in Lexington, broke the shop's front window with a large rock, and stole from the premises eight handguns and six rifles. At the time of the offense Masby was fourteen years old.

He was arraigned in the juvenile branch of the Fayette District Court on July 10, 2001. At a pre-trial conference on

July 25, 2001, Masby, against the advice of counsel, declined the Assistant County Attorney's offer to plea bargain, and so was ordered pursuant to KRS 640.010 to appear at a hearing on August 6, 2001, to determine if he was to be transferred to circuit court as a youthful offender. The attorneys agreed, it seems, that Masby would have another chance to plead guilty as a public offender at that hearing. By the day of the hearing Masby had decided to plead guilty, but when he attempted to initiate the plea process, the County Attorney refused. She withdrew the Assistant County Attorney's prior plea offer, whatever it may have been, and advocated Masby's transfer to circuit court.

The district court ordered the transfer, and in September 2001, Masby was duly indicted as a youthful offender. In March 2002, he pled guilty in Fayette Circuit Court to first-degree burglary, a class-B felony.¹ By judgment entered March 29, 2002, the court sentenced him to ten years' imprisonment. In pleading guilty, Masby reserved the right to appeal from the order transferring him to circuit court and from an order of the circuit court denying his motion to enforce the Assistant County Attorney's alleged offer to plea bargain. Masby's first claim is meritless. The second, however, raises a question of fact that cannot be resolved on the present record. We are obliged,

¹ KRS 511.020.

therefore, to vacate the circuit court's judgment and to remand for additional proceedings.

KRS 640.010 provides in part that where, as in this case, there is probable cause to believe that a juvenile at least fourteen years old has committed a class-B felony, the district court may order him to face the charge as a youthful offender in circuit court. In exercising its discretion to order such a transfer, the district court must consider the statutory factors listed in KRS 640.010(2)(b) and should not order transfer unless at least two of the factors favor it.² The Fayette District Court found that the seriousness of Masby's offense, his prior record, and the need to ensure public safety all favored transfer. Masby contends that these findings were not supported by substantial evidence, as he correctly notes they must be.³ Masby has not, however, provided us with a transcript of the transfer hearing. Absent a record, we must assume that the evidence supported the district court's decision.⁴ We may also observe that, on its face, Masby's participation in the theft of several high-powered weapons is a serious offense against the public safety. Masby is not

² KRS 640.010(2)(c).

³ Stout v. Commonwealth, Ky. App., 44 S.W.3d 781 (2000).

⁴ Pentecostal Church of Christ v. Webb, Ky., 412 S.W.2d 264 (1967).

entitled to relief from the order transferring him to circuit court.

Masby's principal contention is that the prosecution should have permitted him to plead guilty as a public offender. The Assistant County Attorney promised to accept such a plea, he claims, and the prosecution should be held to that promise. Masby is correct, of course, that "[i]f a plea offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable."⁵ Prior to acceptance in one of these ways, however, the general rule is that either party to a plea bargain is free to change his or its mind. An offer may be withdrawn; even an agreement may be revoked.⁶

Obviously, Masby did not accept the prosecution's purported plea offer by entering a plea, and we agree with the circuit court that he did not rely on it to his detriment. In fact, he did not rely on it at all. He took no action in performance of the agreement.

Nevertheless, Masby contends that the general rule permitting the prosecution to withdraw its offer should not

⁵ Matheny v. Commonwealth, Ky., 37 S.W.3d 756, 758 (2001) (Citations and internal quotation marks omitted.).

⁶ Cope v. Commonwealth, Ky., 645 S.W.2d 703 (1983); Adkins v. Commonwealth, Ky. App., 647 S.W.2d 502 (1982).

apply in this case. He asserts that he was reluctant to plead guilty at the pre-trial conference because he feared retaliation by his co-defendants and that the Assistant County Attorney, acknowledging his fears, promised not to withdraw the offer until Masby could consider it apart from his cohorts. Masby further asserts that he declined to plead guilty at the pre-trial conference because of this assurance that he could plead guilty later. If both of these assertions are true, if the Assistant County Attorney promised not to withdraw the plea offer and if Masby relied on that promise in deciding to postpone acceptance, then we would agree with Masby that the prosecution was estopped from withdrawing the offer as it did. Even a promise unrelated to a plea bargain can become binding on a prosecutor if it reasonably induces a defendant to rely upon it to his detriment.⁷

Unfortunately, following its hearing on this issues, the circuit court made findings on neither of Masby's assertions. The court deemed them irrelevant in light of the general rule noted above. This, we believe, was an error. On remand, the court must make these findings. It is free, of course, to hear additional evidence. If it finds that Masby's assertions are substantiated--that he would have pled guilty at the pre-trial hearing were it not for the prosecutor's promise

⁷ Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979).

that he could do so later--then the matter shall be returned to the district court and Masby permitted to enter his guilty plea as a public offender. If it finds to the contrary, then its original judgment shall be reinstated.

Accordingly, we vacate the March 29, 2002, judgment of the Fayette Circuit Court and remand to that court for additional proceedings consistent herewith.

ALL CONCUR.

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