

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001630-MR

LANNIE PHIPPS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE WILLIAM L. SHADOAN, JUDGE  
ACTION NO. 02-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Lannie Phipps has directly appealed from a judgment entered by the Fulton Circuit Court on July 11, 2002, which sentenced him to six years' imprisonment on a guilty plea to complicity to commit theft by unlawful taking of property over \$300<sup>1</sup> and bail jumping in the first degree.<sup>2</sup> Having

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<sup>1</sup> Kentucky Revised Statutes (KRS) 502.020 (complicity) and KRS 514.030 (theft).

<sup>2</sup> KRS 520.070.

concluded that Phipps waived direct appeal of his guilty plea and his appeal lacks substantive merit, we affirm.

On January 24, 2002, a Fulton County grand jury indicted Phipps on one felony count of complicity to commit theft by unlawful taking of property valued at over \$300 in connection with a robbery of a Pizza Hut restaurant, and one count of being a persistent felony offender in the second degree (PFO II).<sup>3</sup> On the same day, Phipps was arraigned on the charges, the trial court released him on a \$5,000 (10% cash) bail bond, and the case was continued to February 28 for a pretrial conference. On February 28, 2002, Phipps failed to appear for the pretrial conference so the trial court issued a bench warrant for his arrest. A short time later, Phipps was arrested in Tennessee, and on March 4, 2002, he waived extradition to Kentucky and was returned to Fulton County.

On March 14, 2002, Phipps appeared with counsel before the circuit court. At that time, the Commonwealth filed a bill of information charging him with the felony offense of bail jumping in the first degree. At the same time, Phipps entered a plea of guilty to complicity to commit theft by unlawful taking over \$300 and bail jumping in the first degree pursuant to a plea agreement with the Commonwealth. Under the plea agreement, the Commonwealth recommended sentences of five years on theft by

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

unlawful taking and one year on bail jumping, and moved to dismiss the PFO II count. The trial court accepted the guilty plea and withheld final sentencing for four months. On July 11, 2002, the trial court entered a final judgment and sentence on a plea of guilty sentencing Phipps to five years for complicity to commit theft by unlawful taking over \$300 and one year for bail jumping in the first degree, to run consecutively for a total sentence of six years. On July 19, 2002, Phipps filed his notice of appeal.

As an initial matter, we note the somewhat unusual procedural posture of this appeal, i.e., a direct appeal from a guilty plea. A guilty plea constitutes an admission of guilt to a substantive crime and the waiver of various statutory and constitutional rights.<sup>4</sup> In general, a valid guilty plea waives all non-jurisdictional defects in the conviction unless they are preserved for appellate review either by entering a conditional guilty plea or by moving to withdraw the guilty plea.<sup>5</sup> However, in order to be constitutionally valid, a guilty plea must be

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<sup>4</sup> See United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); Centers v. Commonwealth, Ky.App., 799 S.W.2d 51 (1990); and Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223 (1986).

<sup>5</sup> See, e.g., Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002); Bronk v. Commonwealth, Ky., 58 S.W.3d 482 (2001)(direct appeal from denial of a motion to withdraw guilty plea); Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994)("The general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense."); and Kentucky Rules of Criminal Procedure (RCr) 8.09 and 8.10.

entered voluntarily, knowingly, and intelligently.<sup>6</sup> In addition, RCr 8.08 requires a trial court to determine at the time of the guilty plea "that the plea is made voluntarily with understanding of the nature of the charge."<sup>7</sup> The validity of a guilty plea is determined from the totality of the circumstances surrounding it.<sup>8</sup>

A guilty plea is invalid if the defendant does not understand the nature of the constitutional protections that he is waiving or if he has such an incomplete understanding of the charges against him that the plea cannot stand as an admission of guilt.<sup>9</sup> In addition to the general validity of the guilty plea, the courts have recognized a few issues that are not waived by even a voluntary, knowing and intelligent plea. For example, a defendant may challenge the legality of the sentence imposed on a guilty plea by way of a direct appeal because that issue is considered "jurisdictional," and cannot be waived.<sup>10</sup> Similarly, a defendant does not impliedly waive his Sixth

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<sup>6</sup> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Woodall v. Commonwealth, Ky., 63 S.W.3d 104 (2001).

<sup>7</sup> See also Bronk, 58 S.W.3d at 486; and Haight v. Commonwealth, Ky., 760 S.W.2d 84, 88 (1988).

<sup>8</sup> See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); and Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

<sup>9</sup> James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995).

<sup>10</sup> See Hughes, 875 S.W. 2d at 100; Gaither v. Commonwealth, Ky., 963 S.W.2d 621 (1998); Ware v. Commonwealth, Ky.App., 34 S.W.3d 383 (2000); and Sanders v. Commonwealth, Ky.App., 663 S.W.2d 216 (1983).

Amendment right to effective assistance of counsel as to claims of ineffective assistance affecting the validity of the plea.<sup>11</sup>

In the current case, appellate counsel filed a brief pursuant to Anders v. California,<sup>12</sup> indicating that there are no colorable issues on appeal. Phipps was notified of the brief and given an opportunity to file a supplemental brief, which he failed to do. As required by Anders, this Court has conducted an independent review of the record for possible errors.<sup>13</sup>

First, we will address the fact that this appeal was brought as a direct appeal. As part of his guilty plea, Phipps signed a motion to enter a guilty plea form that included a waiver of his right to appeal. A waiver is defined as the intentional relinquishment or abandonment of a known right.<sup>14</sup> An effective waiver generally precludes appellate review.<sup>15</sup> It is well established that a defendant may waive his right to appeal and such a waiver is enforceable if it is agreed to knowingly

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<sup>11</sup> See, e.g., Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001); and DeRoo v. United States, 223 F.3d 919 (8th Cir. 2000).

<sup>12</sup> 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

<sup>13</sup> Id.; Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

<sup>14</sup> United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)(quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938)); United States v. Branham, 97 F.3d 835 (6th Cir. 1996).

<sup>15</sup> See Branham, 97 F.3d at 842; and United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000).

and voluntarily.<sup>16</sup> Waiver of a right to appeal does not absolutely foreclose review because a defendant does not lose his right to challenge the waiver if it was based on an impermissible factor (i.e., race), if it was made because of ineffective assistance of counsel, if the sentence exceeded the statutory range, or if it would result in a miscarriage of justice because then it would not have been knowingly and voluntarily made.<sup>17</sup> Although waivers should be strictly construed, the defendant bears the burden of showing why a waiver in a plea agreement should not be enforced.<sup>18</sup> Courts have acknowledged the public policy benefits supporting plea agreements that include an appeal waiver.<sup>19</sup> A waiver of appellate rights is of value to a defendant in obtaining concessions from the prosecution and benefits the government by saving it time and money responding to appeals. "[The] proper enforcement of appeal waivers serves an important function in the judicial administrative process by 'preserving the finality

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<sup>16</sup> See United States v. Khattak, 273 F.3d 557, 561 (3rd Cir. 2001); United States v. Jemison, 237 F.3d 911 (7th Cir. 2001); and United States v. Nunez, 223 F.3d 956 (9th Cir. 2000).

<sup>17</sup> See, e.g., United States v. Rhodes, 330 F.3d 949, 952 (7th Cir. 2003)(citing Jones v. United States, 167 F.3d 1142, 1144-45 (7th Cir. 1999)); United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001); and Khattak, 273 F.3d at 562.

<sup>18</sup> See United States v. Rubio, 231 F.3d 709, 711 (10th Cir. 2000).

<sup>19</sup> See, e.g., United States v. Littlefield, 105 F.3d 527, 530 (9th Cir. 1997); United States v. Michelsen, 141 F.3d 867 (8th Cir. 1998); United States v. Rutan, 956 F.2d 827 (8th Cir. 1992); and United States v. Teeter, 257 F.3d 14 (1st Cir. 2001).

of judgments and sentences imposed pursuant to valid plea agreements.'"<sup>20</sup> Whether a defendant validly waived his right to appeal is a legal question reviewed de novo.<sup>21</sup>

In reviewing a waiver of appeal, the court looks to the circumstances surrounding the entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily, and to the language of the waiver to determine its scope.<sup>22</sup> The motion to enter guilty plea form signed by Phipps states: "I understand that if I plead 'Guilty', I waive these rights." The list of rights included: "The right to appeal my case to a higher court." Phipps does not allege that he did not knowingly and voluntarily accept the appellate waiver, that counsel was ineffective in connection with negotiation of the waiver, that the waiver is otherwise unlawful, or that any other recognized exception to enforcing the waiver exists. In addition, the six-year sentence imposed by the trial court was within the applicable statutory sentencing range, so Phipps cannot claim the court was without authority to impose the sentence.

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<sup>20</sup> United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996)(quoting Rutan, 956 F.2d at 829).

<sup>21</sup> See United States v. Brown, 232 F.3d 399, 402 (4th Cir. 2000); and United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998).

<sup>22</sup> United States v. Rhodes, 330 F.3d 949, 952 (7th Cir. 2003); United States v. Anglin, 215 F.3d 1064, 1066 (9th Cir. 2000); and United States v. Woolley, 123 F.3d 627, 632 (7th Cir. 1997).

We note that during the sentencing hearing, the trial judge did tell Phipps that he could appeal the conviction within 30 days. While this statement may appear inconsistent with enforcement of a waiver of the right to appeal, an overwhelming majority of courts have held that such a statement does not negate the effect of a written waiver of appeal.<sup>23</sup> In United States v. Fleming,<sup>24</sup> the Sixth Circuit Court of Appeals held that a trial court's notification of a general right to appeal at the sentencing hearing did not resurrect a defendant's right to appeal that was knowingly and voluntarily waived at the guilty plea hearing. The court recognized that a trial court has no authority to unilaterally amend a plea agreement and that enforcing the waiver was not unjust or would not offend a defendant's "reasonable expectations" as to his ability to appeal. It stated:

We think, however, that a defendant who is mistakenly notified of a right to appeal and suffers confusion as to the status of his appellate rights suffers a significantly lesser injury than one who should be notified of his right to appeal but is not and consequently forfeits his appellate rights. A defendant who receives an extraneous notification suffers, at most, the dashing of a momentary sense of false

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<sup>23</sup> See Elliott, 264 F.3d at 1173; United States v. Fisher, 232 F.3d 301 (2d Cir. 2000); United States v. Michelsen, 141 F.3d 867 (8th Cir. 1998); United States v. Ogden, 102 F.3d 887 (7th Cir. 1996); and United States v. Melancon, 972 F.2d 566 (5th Cir. 1992). Contra United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995).

<sup>24</sup> 239 F.3d 761 (6th Cir. 2001).



hope. In assessing the gravity of this injury, we consider the fact that the same defendant, typically with the assistance of counsel, has evaluated the potential penalties under a plea agreement as compared to his prospects at trial, and knowingly and voluntarily pled guilty to a criminal offense. Any confusion in regard to appellate rights after sentencing is easily clarified by defense counsel.<sup>25</sup>

This approach is further supported by the fact that Phipps does not contend that he was misled by the trial court's statement concerning an appeal at sentencing. As a result, we believe that Phipps waived his right to direct appeal as part of the plea agreement and his waiver should be enforced to preclude review in this appeal.

Even if the waiver of appeal was not enforceable, Phipps's challenge to his guilty plea is without merit. The record reflects that his plea was entered voluntarily, knowingly, and intelligently. During the guilty plea hearing, the trial court explicitly reviewed with Phipps the factual basis for the plea, the Commonwealth's burden to prove him guilty beyond a reasonable doubt, the potential penalties, and the waiver of his rights to a jury trial, not to testify, and to confront and cross-examine witnesses. Phipps verbally acknowledged that he understood the charges and consequences of his plea, and that he was entering his plea freely and

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<sup>25</sup> Id. at 765.

voluntarily without coercion and duress. In addition, as indicated earlier, Phipps signed the written motion to enter a guilty plea that included his constitutional rights and stated that his guilty plea was knowingly, intelligently, and voluntarily entered.<sup>26</sup> The trial court also questioned Phipps's attorney, who indicated that he had advised Phipps of his constitutional rights and possible defenses.

Finally, Phipps has not identified any specific complaints suggesting that he received ineffective assistance of counsel. As stated earlier, ineffective assistance of counsel affecting the validity of the guilty plea may be raised in a direct appeal of the plea.<sup>27</sup> However, given the fact intensive nature of an ineffective assistance of counsel claim, unless the record has been developed sufficiently to allow appellate review, courts generally defer review of such claims for collateral attacks brought initially in the trial court, which can conduct additional hearings and develop a more complete record.<sup>28</sup> Failure to raise an ineffective assistance of counsel claim on direct appeal or failure of an appellate court to

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<sup>26</sup> See Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990).

<sup>27</sup> See supra note 12; Rodriguez, 875 S.W.3d at 8; and United States v. Timbana, 222 F.3d 688 (9th Cir. 2000).

<sup>28</sup> See, e.g., United States v. Shabazz, 263 F.3d 603, 612 (6th Cir. 2001); United States v. Sevick, 234 F.3d 248, 251 (5th Cir. 2000); United States v. Goodlett, 3 F.3d 976, 980 (6th Cir. 1993); and Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998).

review such a claim on direct appeal will not preclude a defendant from raising that issue in a collateral attack under the general rule requiring exhaustion of all issues that could have been raised on direct appeal.<sup>29</sup> As a result, our resolution of this direct appeal would not preclude Phipps from asserting an ineffective assistance counsel claim in a collateral post-judgment motion such as RCr 11.42. However, this statement of the law is not intended in anyway to infer that this Court believes or does not believe that there is a basis for such a claim.

For the foregoing reasons, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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<sup>29</sup> See, e.g., Massaro v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); United States v. Reyes-Platero, 224 F.3d 1112, 1116-117 (9th Cir. 2000); and United States v. Cothran, 302 F.3d 279, 285 (5th Cir. 2002).