

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2004-CA-002505-MR

MICHAEL HOWARD ADDIS

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT  
HONORABLE WILLIAM L. SHADOAN, JUDGE  
ACTION NO. 04-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Michael Howard Addis appeals the entry of judgment and sentence upon a plea of guilty to counts involving possession of a controlled substance and possession of drug paraphernalia. Addis contends that the guilty plea was not knowingly, voluntarily, and intelligently entered. Because upon entering his plea of guilty Addis waived his right to appeal his judgment and sentence, we affirm.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

On April 3, 2004, Addis was arrested for driving under the influence and operating on a suspended license. In a search of Addis's vehicle incident to the arrest, police discovered two crack cocaine pipes, one containing crack cocaine residue; numerous marijuana "blunts"; hemostats; and a clear plastic bag tied at the corners. Addis told police that he was a marijuana smoker, but that the items found in the vehicle were not his. Addis claimed that his vehicle had broken down in a bad section of Kalamazoo, Michigan, had been broken into and used by crack cocaine users, and that that the crack pipes had been left in the vehicle by them.

On May 25, 2004, the Ballard County Grand Jury returned an indictment charging Addis with first-degree possession of a controlled substance, KRS<sup>2</sup> 218A.1415, and possession of drug paraphernalia, first offense, KRS 218A.500.

On May 21, 2004, Addis was arraigned, entered a plea of not guilty, and was released on bond. On July 2, 2004, Addis failed to appear for a scheduled court appearance and a bench warrant was issued. Addis was subsequently arrested for first-degree bail jumping, KRS 520.070, arraigned on the charge, and entered a plea of not guilty.

On September 3, 2004, Addis and the Commonwealth entered into a plea agreement under which in return for Addis's

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<sup>2</sup> Kentucky Revised Statutes.

guilty plea the Commonwealth would drop the bail jumping charge and recommend a two-year sentence on the cocaine possession charge and a 12-month sentence on the paraphernalia charge. The agreement contained no recommendation by the Commonwealth regarding probation. In conjunction with the agreement, Addis filed a motion to enter a guilty plea. The plea, however, was to be to be pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 12 L.Ed.2d 162 (1970), on the basis that while Addis maintained his innocence to the charges, he conceded that the Commonwealth had enough evidence to convict him.

On September 3, 2004, the circuit court, after engaging in a colloquy with Addis pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), to inquire into whether Addis was knowingly, intelligently, and voluntarily entering into his plea, accepted the plea agreement.

On November 5, 2004, Addis appeared for sentencing, and was sentenced in accordance with the plea agreement. Addis aggressively requested probation. However, ultimately, the circuit court did not grant Addis probation. Final Judgment and Sentence in accordance with the plea agreement was entered on November 12, 2004. This appeal followed.

On appeal, Addis requests that this Court vacate the final judgment and remand the case for an evidentiary hearing on whether his plea was entered knowingly, voluntarily, and

intelligently. Addis does not specifically state the grounds upon which he believes his plea defective; however, it appears that Addis contends that he was under the impression that he would receive probation (his conviction and sentence was otherwise consistent with his plea agreement), and since he did not, his plea was not knowingly, voluntarily, and intelligently entered.

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. See United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990). 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. See, e.g., Rodriguez v. Commonwealth, 87 S.W.3d 8 (Ky. 2002); Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001)(direct appeal from denial of a motion to withdraw guilty plea); Hughes v. Commonwealth, 875 S.W.2d 99, 100 (Ky. 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.

In order to be constitutionally valid, a guilty plea must be entered voluntarily, knowingly, and intelligently. Boykin v. Alabama, supra.; Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001). 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." See also Bronk, 58 S.W.3d at 486; and Haight v. Commonwealth, Ky., 760 S.W.2d 84, 88 (Ky. 1988). The validity of a guilty plea is determined from the totality of the circumstances surrounding it. See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); and Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

Of course, 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. Boykin, supra. 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. See Hughes, 875 S.W.2d at 100, and Gaither v. Commonwealth, 963 S.W.2d 621 (Ky. 1998). Similarly, a defendant does not impliedly waive his Sixth Amendment right to effective assistance of counsel as to claims of ineffective assistance affecting the validity of the plea. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

We first address whether Addis, by pleading guilty, waived his right to a direct appeal of his guilty plea. "Any right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily." Johnson v. Commonwealth, 120 S.W.3d 704 (Ky. 2003); see also Town of Newton v. Rumery, 480 U.S. 386, 393, 107 S.Ct. 1187, 1192, 94 L.Ed.2d 405, 416 (1987) (holding that plea bargaining does not violate the U.S. Constitution even if important constitutional rights are waived). It is likewise well established that a plea agreement, and any waivers contained therein, are binding upon a defendant. Johnson, supra. This includes waiver of the right to appeal. Id.

In paragraph 5 of his Motion to Enter Guilty Plea Addis stated that he understood that by entering a guilty plea that he was waiving his right to appeal his case to a higher court. Moreover, at the September 3, 2004, plea agreement hearing Addis was informed by the circuit court that by pleading

guilty he was waiving his right to appeal his case to a higher court and Addis stated that he understood this. In addition, Addis's trial counsel advised the circuit court that she had discussed with Addis the rights he would be waiving by pleading guilty to the charges. As such, we believe that Addis knowingly and voluntarily waived his right to appeal the final judgment and sentence entered upon his plea.

A guilty plea is valid if it represents a voluntary and intelligent choice by a competent and counseled defendant to waive all trial-related constitutional rights. Boykin v. Alabama, supra. However, "[t]he trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

Addis has not raised the issue to the circuit court that his guilty plea was not knowingly, voluntarily, and intelligently entered into, and the circuit court has accordingly not had the opportunity to pass upon the issue. Should Addis desire to challenge the validity of his plea based upon his understanding at the time of the plea, the proper procedure for doing so would be pursuant to an RCr 11.42 motion, thereby presenting the circuit court with the opportunity to first consider the issue. However, until the circuit court has

considered and rejected Addis's argument, there is no error to review.

Finally, we note that at the conclusion of the sentencing hearing, the trial judge did tell Addis 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. See United States v. Elliott, 264 F.3d 1171, 1173 (10<sup>th</sup> Cir. 2001); 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). In United States v. Fleming, 239 F.3d 761 (6th Cir. 2001), 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 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.

Id. at 765.

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

For the foregoing reasons the judgment of the Ballard Circuit Court is affirmed.

ALL CONCUR.

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