

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001905-MR

BENETTA PATRICK

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOANN SPINKS COLEMAN, JUDGE
ACTION NO. 04-CR-00147

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Benetta Patrick appeals from a judgment and sentence on plea of guilty entered by the Magoffin Circuit Court on August 25, 2006. Patrick claims she entered a conditional guilty plea on February 1, 2006, preserving two issues for appeal. The record on appeal does not support her contention that she entered a conditional plea. However, even if Patrick had

¹ Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

preserved the issues we have reviewed the record and find no error, therefore we affirm.

Patrick was indicted by a Magoffin County grand jury on November 1, 2004, for trafficking in a controlled substance, second-degree. It was alleged that she sold six Lortabs, a schedule III narcotic, for \$48.00 on May 17, 2004. There were numerous pre-trial conferences (at least eight) and Patrick filed several motions related to discovery, identity of the confidential informant, for bill of particulars, to preserve the substance for testing, etc. The Commonwealth complied with each discovery request and on June 10, 2005, in a response to discovery identified the confidential informant as Chris “Doody” Lemaster. And, on October 4, 2005, in response to Patrick’s motion to reveal the informant’s name and address the trial court entered an order on its docket sheet that “confidential informant info. to be filed under seal.” Thereafter, on December 19, 2005, the special prosecutor assigned to this case sent the following letter to Patrick’s attorney, Hon. Lowell E. Spencer.

During the course of your representation of Ms. Patrick you have made several allegations of prosecutorial vindictiveness. To again demonstrate my good faith attempts in resolving all of your client’s issues I again note my current offer. The Commonwealth will accept a plea of guilty in case 04-CR-00147 and recommend a sentence of five years, serve two years with the balance probated for five years. In addition, the Commonwealth will waive its right to pursue probation revocation in her previous drug trafficking case 98-CR-54 and will waive its right to use the 1998 conviction as an enhancer of the 04-CR-00147 case from a Class D felony to a Class C felony.

Your client, through you, has refused this offer before. After your initial refusal, I reviewed the case and your client's criminal history. I became aware of her 1998 conviction and realized she was not properly charged in the 04-CR-00147 case, nor was her pending probation revocation hearing in the 98-CR-54 case ever resolved. After communicating this to you, I reoffered the above plea deal which you have consistently refused.

As you may know, in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the court held it is **not** a violation of "due process" or prosecutorial vindictiveness when the state prosecutor carries out a threat made during plea negotiations to have the accused re-indicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged.

Further in *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 2489, 73 L.Ed.2d 74 (1982) the court stated that "In the course of preparing a case for trial, **the prosecutor may uncover additional information that suggests a basis for further prosecution** or he simply may come to realize that information possessed by the state has a broader significance." *Id.* at 381, 102 S.Ct. 2485. (Emphasis added).

Based on the above, I would ask you to again communicate my plea offer to your client. The offer will remain open until 12/27/05. Please fax your response to ensure it is received prior to our hearing on 12/29/05.

When Patrick did not accept the Commonwealth's plea offer the matter was set for a jury trial on February 1, 2006. On January 17, 2006, the Commonwealth filed a corrected chain of custody which indicated that the confidential informant received the drugs in question from Patrick and delivered them to Detective Leah Worley, a Big Sandy UNITE detective. The special

prosecutor also filed notice of intent pursuant to KRE 404(b) to introduce evidence of Patrick's prior drug trafficking charges and guilty plea in case 98-CR-54. Thereafter, on January 27, 2006, four days prior to the scheduled jury trial, the Commonwealth filed a motion to amend the indictment. Relying on *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003) the Commonwealth sought to amend Patrick's indictment "to accurately reflect the correct penalty range." Since Patrick had pled guilty in case 98-CR-54 to trafficking in a controlled substance, second-degree, the Commonwealth argued that case 04-CR-147 should be enhanced as a second offense. The amendment would enhance Patrick's potential penalty from a Class D felony (1-5 years) to a Class C felony (5-10 years). The motion was noticed for a hearing on February 1, 2006, prior to the scheduled trial. The next document in the file is the motion to enter guilty plea filed February 1, 2006. The guilty plea document does indicate by a hand written notation that the plea was "(conditional)." However, it does not state the basis for, nor the conditions under which it was entered. At the same hearing the trial court entered an order amending the original indictment as follows:

COUNT I:

On or about May 17, 2004 in MAGOFFIN COUNTY, KENTUCKY the above named Defendant committed the offense of Trafficking in a Controlled Substance in the Second Degree, second or subsequent offence, when she knowingly and unlawfully sold Lortab, a Schedule III Narcotic; and that the above named Defendant had a prior offence under KRS 218A, against the peace and dignity of the Commonwealth of Kentucky.

Based upon the guilty plea the matter was continued until March 2, 2006, for sentencing. After several continuances the final sentence was imposed on May 4, 2006. At that hearing Patrick made an oral motion to withdraw her guilty plea which was denied and a sentence of five (5) years was imposed. Patrick posted an appeal bond in this case and then timely filed this appeal.

On appeal Patrick raises two issues: She contends she entered a conditional guilty plea and preserved for appeal the issues of amending the indictment on the day of trial and the Commonwealth's refusal to provide the address and personal information of the confidential informant so that he could be located.

The Commonwealth responds by stating that the issue is not preserved because there is no record of any issue being raised before the open guilty plea was entered. The motion to enter guilty plea merely has a hand written notation of "(conditional)" written on it. The judgment and sentence on plea of guilty entered August 25, 2006, does not indicate a conditional plea or any issue being preserved. The record on appeal contends only one video tape. That tape is the May 4, 2006 sentencing hearing which does not mention a conditional plea or any issue being preserved for appeal purposes. The appellate file indicates that on October 30, 2006, Patrick's attorney filed a verified motion to supplement the record. In the motion the attorney acknowledges that he filed the appeal but failed to designate the record. He requested that "the only record needed in this appeal is that tape of the motion of the Commonwealth to increase the charges from a Class D to a Class

C felony; re-arraignment tapes, and the final sentence.” He did not include any dates or times of the video tapes he was requesting. Thereafter, on November 22, 2006, this Court granted his motion and ordered that the “[a]ppellant shall provide the Clerk of the Magoffin Circuit Court with a designation of record specifically identifying the dates of the proceedings requested in the motion on or before 10 days from the date of entering this order.” Counsel for Patrick filed his designation of record on appeal on December 4, 2006, but failed to specifically identify the dates of the proceedings he wished to include in the record. On December 13, 2006, the Magoffin Circuit Clerk notified this Court that Patrick’s attorney had failed to comply with this Court’s order stating the dates of the video record he needed for appeal. Notice was sent to that attorney on that date. Counsel for Patrick took no further action to properly designate the record and this Court is without the video tape record of the alleged conditional plea. The court is in agreement with the Commonwealth that Patrick has failed to preserve any issue for appellate review. From the record on appeal it appears that Patrick entered a guilty plea on February 1, 2006, and was sentenced to five years confinement on May 4, 2006. The written judgment and sentence was entered on August 25, 2006. None of the written documents in the record or the video tape provided for appellate review (May 4, 2006) provide documentation that a conditional plea was properly entered. The record merely indicates that Patrick entered a guilty plea and thereafter was properly sentenced to serve five years. A valid guilty plea entered waives all issues except jurisdiction. Jurisdiction is not an issue in this appeal.

While Patrick has not preserved the issues upon which she bases her appeal, this court has reviewed the issues argued and finds no merit to her claims. The amendment of the indictment to reflect the second offense and thus increase the penalty range did not change the theory of the case or unfairly surprise Patrick. She was put on notice that the Commonwealth intended to use the prior offense in the December 19, 2005 plea offer letter. She declined the plea offer to a first offense and cannot now argue that she was somehow treated unfairly. *See Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003) and *Commonwealth v. McKenzie*, 214 S.W.3d 306 (Ky. 2007). Also her contention that she was entitled to more information than the name of the confidential informant is unfounded. *See KRE 508; Thompkins v. Commonwealth*, 54 S.W.3d 147 (Ky. 2001).

For the foregoing reasons the judgment and sentence of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lowell E. Spencer
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BRIEF FOR APPELLEE:

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