

RENDERED: AUGUST 21, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001823-MR

ANTHONY SPARKS

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 07-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Anthony Sparks appeals from a judgment of  
the Green Circuit Court wherein he was convicted of first-degree sexual abuse

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

following his guilty plea. He also appeals from the court's order denying his motion to withdraw his plea. We affirm.

Sparks was charged with six counts of first-degree sodomy against a child less than 12 years of age. Because first-degree sodomy is a Class B felony, each count carried a maximum sentence of 20 years in prison. On the day before his scheduled trial, Sparks entered into a plea agreement with the Commonwealth whereby he would plead guilty to a single count of first-degree sexual abuse, a Class D felony, and would receive a five-year sentence. On September 3, 2008, Sparks and his attorney appeared before the trial court, and Sparks pleaded guilty to the amended charge. Prior to final sentencing, Sparks hired a new attorney and moved the court to allow him to withdraw his guilty plea. The court denied the motion, and this appeal followed final sentencing.

Sparks' first argument is that it was error for the court to find that he had intelligently and voluntarily entered his guilty plea. This argument relates to the court's finding, following Sparks' entry of his guilty plea, that the plea had been entered in that manner. Sparks contends that when the court asked him if he wanted to enter a plea of guilty, he replied with a question of "Guilty?" and never answered affirmatively.

While it is true that the record does not clearly indicate that Sparks responded affirmatively to the trial court's first question inquiring into his desire to

plead guilty, Sparks' answers to additional questions clearly indicate that he desired to plead in that manner. For example, when the court asked him whether he understood that by pleading guilty he was waiving certain legal rights, Sparks responded by answering "Yes." Also, the court asked, "Are you stating at this time that you are guilty, that you make no claim of innocence and wish to plead guilty based on the Commonwealth's offer on a plea of guilty?" Sparks again answered "Yes." Sparks also answered affirmatively when asked if he understood that by pleading guilty, he might later be subject to enhanced penalties if he were to be convicted of future offenses. Finally, prior to appearing before the court, Sparks had signed forms entitled Motion to Enter Guilty Plea and Commonwealth's Offer on a Plea of Guilty.

"[T]he validity of a guilty plea is determined not by some magic incantation recited at the time it was taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978). Considering the totality of the circumstances, we find no error in the court's finding that Sparks had pleaded guilty and that his plea was knowingly, voluntarily, and intelligently entered.

Sparks' second argument is that the trial court erred by failing to properly consider the relevant factors in determining whether he should have been permitted to withdraw his plea. Sparks asserts that the court should have considered the following six factors stated in *U.S. v. Durham*, 178 F.3d 796, 798 (6<sup>th</sup> Cir. 1999): 1) the length of time between the entry of the guilty plea and the

filing of the motion to withdraw; 2) the reason for not presenting the grounds earlier; 3) whether the movant has asserted or maintained his innocence; 4) the circumstances surrounding the guilty plea, the nature and background of the movant, and whether the movant has admitted guilt; 5) whether there would be any prejudice to the prosecution; and 6) whether the movant had prior experience with the criminal justice system.

In determining whether or not to allow Sparks to withdraw his guilty plea, the trial court was not required to follow the *Durham* case. *See Bell v. Commonwealth*, 566 S.W.2d 785, 788 (Ky. App. 1978) (“The Kentucky appellate courts need not follow the Federal Circuit Court of Appeals on rulings involving Kentucky law”).

“[T]rial courts have the discretion to permit a defendant to withdraw his or her guilty plea before final judgment and proceed to trial.” *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). *See also* Kentucky Rules of Criminal Procedure (RCr) 8.10. If a guilty plea was voluntarily entered, as it was here, the trial court may, in its discretion, either grant or deny a defendant’s motion to withdraw his or her guilty plea. *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007). “A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles.” *Id.* Under the circumstances in this case, we conclude that the trial court did not abuse its discretion when it denied Sparks’ motion to withdraw his guilty plea.

The judgment and order of the Green Circuit Court are affirmed.

ALL CONCUR.

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