

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001384-MR

CARL WEST

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 15-CR-00903-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Carl West brings this appeal from a Final Judgment and Sentence of Imprisonment entered August 24, 2016, by the Fayette Circuit Court.

The judgment was entered in accordance with a guilty plea that resulted in a sentence of fifteen-years' imprisonment. We affirm.

In May of 2016, West entered into a plea agreement to plead guilty to first-degree trafficking in a controlled substance and an amended charge of being a

persistent felony offender in the second degree (PFO 2) and would receive a PFO-enhanced sentence of fifteen-years' imprisonment. Prior to accepting West's plea, the trial court engaged in a plea colloquy in accord with *Boykin v. Alabama*, 395 U.S. 238 (1969). During the colloquy West swore under oath that, *inter alia*, he was not under any drugs or medication influencing his judgment.

While awaiting sentencing, West failed a drug test, his pretrial release was revoked and he was ordered back to jail. At his first scheduled sentencing hearing on August 5, 2016, West insisted he had been under the influence of drugs when he pleaded guilty, even after the court reminded him that at the time he entered his plea he had sworn under oath that he was not under the influence of drugs. The court continued sentencing to August 19, 2016, to give West an opportunity to submit a motion to withdraw his plea.

On August 18, 2016, counsel for West filed two short motions with the court, one asking to withdraw West's guilty plea and to withdraw as West's counsel because West planned on claiming counsel was ineffective. However, on the August 19, 2016, sentencing date, West appeared with counsel and announced he was withdrawing his motion to withdraw his guilty plea. When West was specifically asked by the trial court if he wished to withdraw his previous motion to withdraw his guilty plea, West responded "yes". The court then immediately sentenced West to fifteen years' imprisonment. This appeal followed.

West's sole argument on appeal is that the trial court should have held an evidentiary hearing on his motion to withdraw his plea. We disagree.

In Kentucky to withdraw a guilty plea, a defendant may file a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10, which provides:

At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report.

The withdrawal of a voluntary guilty plea is within the trial court's sound discretion and will not be disturbed unless the decision is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

In this case, West filed a motion on August 18, 2016, under RCr 8.10 to set aside his guilty plea due to allegedly being under the influence of narcotics at

the time of his plea. However, he then voluntarily withdrew the motion in open court immediately before sentencing on August 19, 2016. Once West withdrew his motion to withdraw his plea, the motion became inoperative and the trial court had no duty to consider the motion to withdraw his plea – it was no longer a proper pending motion before the trial court nor was there any argument by West to consider the motion at the August 19 sentencing. We can find no authority nor has West presented any to this Court that would require a trial court to conduct a hearing on a motion that had been voluntarily withdrawn by a defendant, especially in this case where the defendant was represented by counsel.

This case is a direct appeal on the merits of the judgment imposing a sentence upon a guilty plea. From August 5, 2016, to the date of sentencing on August 19, 2016, West was imprisoned in jail and there is no evidence in the record that he consumed any drugs during that time. He made no statement to the court on August 19, 2016, that he was under the influence of drugs at the time he withdrew his motion. To the extent West takes issue with the effectiveness of his counsel regarding his plea and the withdrawal of his motion, that is a matter properly considered in an RCr 11.42 proceeding, not in a direct appeal.

We also reject West's alternative argument that he should receive palpable error relief under RCr 10.26. West admitted his guilt under oath at the plea colloquy and, aside from his bare allegation two and one-half months later

that he was under the influence of drugs at the time he made his plea in May 2016, he has presented no other evidence meriting relief. There is nothing before this Court in the record on appeal that looks to an infringement of West's substantial rights or otherwise constitutes a manifest injustice sufficient to justify palpable error relief. *See Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014).

For the foregoing reasons, we affirm the Final Judgment and Sentence of Imprisonment entered by the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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