IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 5-15-03 ElnaGraunt, D.C.

2002-SC-0185-MR

IRVIN THOMAS JENKINS, JR. — APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE THOMAS STEVEN BLAND, JUDGE
95-CR-00018

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Irvin Thomas Jenkins, Jr. pled guilty in Hardin Circuit Court to ten counts of first degree rape and five counts of first degree sodomy for acts committed against his fifteen year old stepdaughter. He was sentenced to 270 years imprisonment. He appeals as a matter of right.[1]

On May 4, 2001, he pled guilty to fifteen felony counts. Thereafter, Appellant wanted to withdraw his pleas, and a motion to withdraw the pleas was filed by his new counsel. On June 21, 2001, the trial court held a hearing on the motion and subsequently overruled the motion. At a penalty phase hearing on July 9, 2001, held by the trial court without a jury as agreed by the parties, Appellant stated that he had not wanted to plead guilty, but had done so only at the insistence of his former counsel.

[1] Ky. Const. §110(2)(b).

Appellant stated that he had not raped the fifteen year old victim, but had engaged in consensual sexual intercourse with her. The trial court then sentenced Appellant to eighteen years on each of the counts, to run consecutively for a total of 270 years.

Appellant's first claim of error is that the trial court improperly refused to let him withdraw his guilty pleas. He maintains that the voluntariness of the pleas is suspect because they were entered 'blind,' i.e., without any sentencing recommendation from the prosecution. He contends that "there was no perceived benefit" for him to enter such pleas, that a "reasonable defendant, acting knowingly and intelligently" would have had a jury trial, "especially considering the sentence decided upon at the penalty phase." He thus concludes that the guilty plea "was not the act of a rational defendant."

Appellant's contention is not persuasive. There was a reasonable benefit to the guilty pleas, i.e., that Appellant would not have to face jury recommended sentencing on strong evidence of offensive crimes committed against a minor. At the time of the plea, Appellant was faced with compelling testimony against him not only by his accuser but also by his co-defendant who was present during several of the offenses. Appellant also admitted repeatedly that he had committed the acts. Appellant also stated that he pled guilty to save the families from having to go through a trial. Thus, there is no merit in Appellant's contention that he was not rational in entering the plea.

Moreover, the severity of the ultimate sentence does not determine the prior rationality of the decision to plead guilty. If we adopted Appellant's logic, guilty pleas would have to be vacated in every guilty plea in which a long sentence was imposed, upon the reasoning that the decision to plead guilty was not rational. The

voluntariness of a plea is determined at the time of the plea, not when the penalty is determined. Appellant was advised by his counsel at the time, prior to the pleas, that the penalty could be well over 100 years. Thus, Appellant was aware that he faced a long term of imprisonment.

Appellant further argues that one of the trial court's comments during the penalty phase indicates that Appellant was confused when he pled guilty. The trial court's comment was: "I'm not sure that [Appellant] is able to understand the truthfulness of these acts and what really occurred." Appellant has taken this statement out of context, however. The statement was made after Appellant acknowledged having had sex with his fifteen year old stepdaughter, but then stated his belief that it was not rape. The trial court's comment refers to Appellant's belief that the acts inflicted upon the minor were consensual, and his resulting belief that the acts were not rape.

A guilty plea is valid when it is entered intelligently and voluntarily.[2] The validity of a guilty plea is not determined by incantation of specific phrases, but from the totality of the circumstances surrounding the plea.[3] This is an inherently factual inquiry requiring consideration of the accused's demeanor, background, experience, and whether the record reveals the plea was voluntary.[4] Pursuant to RCr 8.10, the trial court may permit the plea to be withdrawn. The language of the rule is permissive.

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[2] Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001).
[3] Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447(1978)(*citing* Brady v. United States, 397 U.S. 742 (1970)).
[4] Bronk at 487;D.R. v. Commonwealth, Ky.App., 64 S.W.3d 292, 294 (2001)(*citing* Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986)).

Thus this decision is within the trial court's discretion.[5] Here, Appellant failed to make a sufficient showing that his pleas were not voluntary. Accordingly, the trial court's refusal to permit the pleas to be withdrawn was no abuse of discretion.

Appellant's next claim of error is that the trial court incorrectly sentenced him to 270 years. He argues that KRS 532.110(1)(c) limits a term of years to the longest aggregate consecutive sentence authorized by KRS 532.080(6)(a) for the highest class of crime for which any of the sentences is imposed, i.e., fifty years. However, the Commonwealth points out that KRS 532.110 was not adopted until 1998, and Appellant was indicted for offenses occurring from 1992 to 1994. The Commonwealth observes that KRS 446.110 allows the application of newly authorized penalties when they are mitigating, and when the defendant's consent is given; but that no such consent was given here, and thus that the claim was unpreserved.

In Commonwealth v. Phon[6], this court construed KRS 446.110 and recognized that if new law mitigates punishment, upon consent, a party may have benefit of the new law. Appellant's case appears to fall within this provision, but he did not inform the court nor assert any claim under KRS 446.110. No conceivable trial strategy would have suggested foregoing the clearly ameliorative effect of KRS 446.110 on Appellant's sentence. Nevertheless, as the issue was not presented and is thus not preserved, the final judgment will be affirmed.[7]

All concur, except Cooper, J., not sitting.

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[5] Bronk at 486; Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974)(*citing* Hurt v. Commonwealth, Ky., 333 S.W.2d 951 (1960)).
[6] Ky., 17 S.W.3d 106 (2000).
[7] *See* Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 550-51(2001).

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