

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2003-SC-0013-TG

DATE 1-8-04 E.A.R. Grawitt, D.C.

TERRY ROACH

APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
2001-CR-0037

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Terry Roach, pled guilty to murder and first-degree robbery. Pursuant to the plea, he was sentenced to two concurrent sentences of twenty-five years' imprisonment. His appeal comes before this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant argues that his due process rights were violated as a result of the trial court's refusal to allow him to withdraw his guilty plea. Secondly, Appellant argues that there was an invalid waiver of his right to be sentenced by a jury. We disagree and affirm.

On January 30, 2001, Appellant robbed and murdered Clifford Donald Robinson. Appellant pled not guilty to both charges and later the Commonwealth gave notice that it would seek the death penalty. The trial was to begin on June 3, 2002, when defense counsel informed the court that a plea agreement had been reached. After a lengthy

colloquy between the judge, defense counsel, and Appellant, the court accepted Appellant's guilty plea and set a date for sentencing. On August 8, 2002, without apparent notice to anyone, Appellant moved to withdraw his guilty plea based on an unspecified claim of coercion. The trial court denied Appellant's motion and imposed the Commonwealth's recommended sentence. This appeal followed.

Appellant argues that his due process rights were violated by the trial court's refusal to allow him to withdraw his guilty plea. Specifically, Appellant argues that the trial court abused its discretion under RCr 8.10 by refusing to inquire further into the circumstances surrounding the voluntariness of his guilty plea.

RCr 8.10 states in pertinent part that "[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." (Emphasis added). However, a trial court does not have complete discretion under this rule to deny the withdrawal of a guilty plea. Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8, 10 (2002). The trial court must first determine that the plea was voluntary before it can deny the withdrawal of a plea. Id. When determining the voluntariness of a plea, the trial court must look at the totality of the circumstances surrounding the guilty plea. Bronk v. Commonwealth, Ky., 58 S.W.3d 482 (2001).

Upon review of the record, we are convinced that the trial court correctly determined that Appellant's guilty plea was voluntary. During the lengthy plea colloquy, Appellant acknowledged that he understood his constitutional rights and the charges against him. Moreover, Appellant acknowledged the waiver of those rights and specifically admitted to the murder and robbery of Clifford Robinson. The trial court specifically questioned Appellant and counsel as to the voluntariness of the plea. The

trial court gave Appellant ample opportunity to withdraw his plea or to express dissatisfaction with counsel during the plea colloquy. Appellant stated that he was as pleased with the plea agreement as he could be under the circumstances. We are convinced that the trial court adequately determined the voluntariness of Appellant's plea. There was no abuse of discretion.

In his final assignment of error, Appellant asserts that his waiver of jury sentencing was invalid. While conceding that this alleged "error" is unpreserved for appellate review, Appellant contends that he is entitled to relief under the palpable error rule. RCr 10.26. Under RCr 10.26, a palpable error which affects the substantial rights of a party may be reviewed even if not preserved if it is determined that a manifest injustice has occurred. Cash v. Commonwealth, Ky., 892 S.W.2d 292, 295 (1995). There is no merit to Appellant's request for relief under RCr 10.26.

Appellant argues that there was no written waiver of jury sentencing included on the motion to enter guilty plea. In addition, Appellant argues that the trial court was obligated to specifically question him regarding the waiver of jury sentencing during the plea colloquy. Neither argument has any merit.

Regarding the written waiver of jury sentencing, clause five of the motion to enter guilty plea specifically states "I understand that if I plead **"GUILTY,"** the Court may impose any punishment within the range provided by law" (Emphasis added). As for the obligation of the trial court to question Appellant regarding the waiver of jury sentencing, a trial judge is not required to read a defendant his rights that have already been waived by a written waiver and the defendant has acknowledged that he signed and understood the waiver. Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990). There was no error.

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., dissents and would vacate the McCracken Circuit Court's judgment and remand the case to the trial court with directions for it to proceed in accordance with Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002), because Appellant's motion to withdraw his plea of guilty on the grounds that he was "forced into this," required an evidentiary hearing followed by the entry of findings of fact as to the voluntariness of Appellant's plea before the trial court could exercise its discretion to deny Appellant's RCr 8.10 motion to withdraw his guilty plea. Rodriguez, 87 S.W.3d at 10; Bronk v. Commonwealth, Ky., 58 S.W.3d 482 (2001).

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