

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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

2004-SC-1067-MR

DATE 1-12-06 E. A. G. v. H. D.C.

BROOKS PEACHER

APPELLANT

V.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
02-CR-332

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Brooks Peacher, pled guilty in the Christian Circuit Court to two counts of trafficking in a controlled substance in the first degree, first offense, KRS 218A.1412, and was sentenced to the maximum penalty of ten years on each count, which sentences were ordered to be served consecutively for a total of twenty years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting that the trial court erred in (1) overruling his motion to withdraw his guilty pleas, and (2) failing to hold an evidentiary hearing on that motion. Finding no error, we affirm.

On November 22, 2002, Appellant, his attorney, and the Commonwealth's attorney executed a plea agreement, pursuant to which Appellant pled guilty in open court to the two offenses described above. In the plea agreement, the Commonwealth agreed that, in exchange for Appellant's pleas, it would recommend imposition of the

minimum sentence of five years for each offense and that the sentences be served concurrently for a total of five years in prison, subject to the following conditions:

- (1) Appellant must "testify truthfully in pending case w/ Williams & Williams," and
- (2) "Failure to appear at sentencing shall result in the Commonwealth opposing probation and the Commonwealth Attorney requesting the sentence to be the maximum allowed by law."

The original sentencing date was December 18, 2002. However, the sentencing was continued until January 2, 2003, and Appellant was released on his own recognizance until that date. When he failed to return on January 2, 2003, the trial court issued a bench warrant for his arrest. Appellant was not apprehended until September 6, 2004, more than twenty months later. He was finally sentenced on September 22, 2004, exactly twenty-two months after entry of his guilty pleas. Pursuant to the plea agreement, the Commonwealth moved that Appellant be sentenced to "the maximum allowed by law," i.e., twenty years. Appellant moved the court to impose the initially agreed concurrent sentences of five years on each count or, in the alternative, that it permit him to withdraw his guilty pleas and stand trial. Contrary to his assertion on appeal, the trial court gave Appellant an opportunity prior to sentencing to explain his failure to appear on January 2, 2003, or at any time thereafter until his rearrest on September 6, 2004.

According to Appellant, he learned that a "hit" had been ordered against him because of his agreement to testify against the Williamses (both of whom subsequently entered guilty pleas). As proof, he claimed that he was shot in the leg by an unknown assailant who forced his way into his girlfriend's residence. However, this event did not occur until February 2004. The trial court rejected Appellant's explanation, finding on

the record that his failure to appear for sentencing was "willful and voluntary," expressing skepticism at Appellant's claim to be "hiding from a hit man" at his girlfriend's residence, and concluding, instead, that Appellant had been "on the run" from the law. The trial court then sustained the prosecutor's motion and imposed the maximum sentence.

Criminal Rule 8.10 provides: "At any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." Upon a motion to withdraw a guilty plea on the ground that it was entered involuntarily, the trial judge must make factual findings, evaluating the totality of the circumstances as to a defendant's volition in entering the guilty plea. Rodriguez v. Commonwealth, 87 S.W.3d 8, 10-11 (Ky. 2002). An evidentiary hearing is usually required in these circumstances. Id. at 10-11. If a plea is found to have been involuntary, the motion to withdraw must be granted. Id. at 10; see also Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69, 25 L.Ed.2d 747 (1970); Haight v. Commonwealth, 760 S.W.2d 84, 87-88 (Ky. 1988); Wood v. Commonwealth, 469 S.W.2d 765, 766 (Ky. 1971). However, if a plea is found to have been voluntarily made, it is within the sound discretion of the trial court whether to permit its withdrawal, and that decision will be reversed only upon a showing of an abuse of discretion. Rodriguez, 87 S.W.3d at 10; Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky. App. 2004). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In accepting Appellant's guilty pleas, the trial court followed the required procedures outlined in Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S.Ct. 1709, 1711-13, 23 L.Ed.2d 274 (1969), for determining whether a guilty plea is voluntarily and

intelligently entered. Appellant does not assert that his guilty plea was involuntary, and there is no basis in the record for such a claim. Thus, there was no requirement for an evidentiary hearing to determine that issue. The only issue is whether the trial court's decision to deny Appellant's request to withdraw his pleas was an abuse of discretion.

Appellant claims the trial court abused its discretion because (1) he had a reason for failing to appear for sentencing (the alleged "hit"), and (2) the Commonwealth was not prejudiced by his absence (the Williamses pled guilty, thus his testimony against them was not required). However, the trial court specifically rejected Appellant's "excuse" for his absence, and Appellant's contention that the Commonwealth was not prejudiced by his absence conveniently ignores the fact that the Commonwealth was unable for twenty months to exact the agreed punishment for his offenses, whereas he enjoyed a liberty to which he was not entitled. Furthermore, law enforcement officials presumably expended resources attempting to locate and rearrest him. The bottom line, however, is that Appellant knew and agreed that imposition of the maximum penalty could be sought if he failed to appear for final sentencing. Under that circumstance, we cannot say that the trial court abused its discretion in denying Appellant's motion to withdraw his guilty pleas and imposing the punishment which he agreed could be sought.

Accordingly, we affirm the judgment of conviction and the penalty imposed by the Christian Circuit Court.

All concur.

COUNSEL FOR APPELLANT:

Donna L. Boyce
Appellate Branch Manager
Department of Public Advocacy
Suite 302
100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
State Capitol
Frankfort, KY 40601

Tami Allen Stetler
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204