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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JANUARY 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000234-TG

BILLY BOWMAN — APPELLANT

V.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
NO. 03-CR-072

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Billy Bowman, pled guilty to Second-Degree Rape and being a Second-Degree Persistent Felony Offender. The day after he entered his guilty plea, two witnesses came forward with potentially exculpatory evidence. Appellant then made a motion to withdraw his guilty plea, which the trial court denied. He now claims that the trial court erred in denying his motion because his guilty plea was involuntary or, in the alternative, because the denial of the motion in light of the newly discovered evidence was an abuse of discretion. We disagree and affirm the trial court.

II. BACKGROUND

According to the police report, late on the night of April 10, 2003, twelve-year-old CC and her fourteen-year-old cousin, SC, sneaked out of CC's home, took their

grandmother's car, and drove off to find a friend named Matt.[1] Eventually they knocked on the door of a trailer where they thought Matt lived. A man answered the door and told the girls he could show them where their friend lived. When the girls entered the trailer, two men, David Strum and Appellant, extended an invitation to stay and watch a movie, which the girls accepted.[2] The men also offered the girls vodka, which they tried but did not drink much of because of the taste. After some time, the men made sexual advances towards the girls. Appellant approached CC and began to kiss her. He asked her to take off her pants, but she declined. He then asked if he could take off her pants, which she also declined. Appellant then pulled her from her chair and took her to the bedroom. Appellant turned off the lights and told CC to take off her clothes. Appellant took off his clothes, but CC did not take off hers. Appellant then pushed CC down onto the bed, took off her pants, and had sexual intercourse with her.

Afterwards, Appellant asked CC how old she was. When she told him she was twelve, Appellant told her not to tell anyone what had happened because he could get in "big trouble." CC agreed not to tell anyone, and shortly thereafter Appellant left for work. The girls stayed with Strum, who took the girls with him while he drove to do some errands. He later dropped the girls off at the trailer, which belonged to Appellant. The two girls then drove to their friend Matt's home, where someone from the sheriff's department picked them up.

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[1] Matt's last name is not included in the police report. He is referred to herein simply as "Matt."

[2] Because there was no trial, the record on appeal is limited, and it is unclear if the man who answered the door of the trailer was one of the two men who extended the invitation to the girls. Based on Appellant's claim as to the witnesses present, however, it appears that only two men were present, David Strum and Appellant. It appears Strum was the man who answered the door and invited the girls into the trailer.

On May 28, 2003, Appellant was indicted for First-Degree Rape, committed by engaging in sexual intercourse with CC, a minor, through the use of forcible compulsion, and for being a First-Degree Persistent Felony Offender. Strum was also indicted, though the record on appeal does not indicate what his charges were, and subsequently refused to talk with Appellant's attorney. SC died before Appellant's trial attorney had an opportunity to interview her.

CC's parents refused to allow Appellant's attorney to interview her in preparation for Appellant's defense. However, the Commonwealth included in its discovery materials a statement of what CC's testimony would be. The statement indicated that CC would testify that she had been an unwilling participant, that she had not resisted Appellant's sexual advances because she was afraid he would kill her, and that Appellant had left a bite mark on one of her breasts. The Commonwealth also tendered a photograph of CC which had been taken a few days after the incident. The photograph, which was intended to be used as evidence of how old CC looked at the time of the incident, showed CC wearing no makeup and dressed in a t-shirt depicting a children's cartoon character.

In conversations with his attorney, Appellant denied that any forcible compulsion had occurred and claimed that he thought CC was seventeen years old when he had sex with her. Appellant's attorney informed him that his mistaken belief that CC was at least sixteen years old was a possible defense to the charge under KRS 510.030. However, in light of CC's proffered testimony, the photo the Commonwealth intended to use, and Appellant's belief that only his own testimony would be available to support his version of the events, Appellant chose not to proceed to trial, where if found guilty he faced a possible sentence of life in prison. Instead, on June 14, 2004, the day before

his scheduled trial, Appellant entered a plea of guilty to the lesser charges of Second-Degree Rape and being a Second-Degree Persistent Felony Offender. Less than a month later, Appellant filed a motion to withdraw his guilty plea under RCr 8.10 based on newly discovered evidence.

The day after Appellant entered his guilty plea, Misty Skinner and Brandy Imus, both of whom were related to Matt, found out that Appellant was scheduled to be tried that day for the alleged rape of CC. They claimed to have some knowledge of the incident. Imus called the courthouse to see if the trial was proceeding, and she was told that it was not. She then called Murray Police Detective Donald Bowman, who she knew was Appellant's brother. She told Detective Bowman that she had seen and talked to CC on the morning of April 11, 2003 and that, based on their meeting, she did not believe a rape had occurred. Detective Bowman contacted Appellant's attorney with the new information.

Appellant's attorney then contacted Skinner and Imus, who provided written affidavits and videotaped statements that sharply conflicted with the evidence that Appellant believed the Commonwealth would have presented had the case gone to trial. Both women stated that CC told them she was fifteen years old, but claimed that she had told Appellant that she was seventeen. Imus stated that on the morning of April 11, 2003, CC and SC had arrived at her cousin's house, where CC described the events from the night before. CC said that she had given Appellant a "lapdance" and had sexual intercourse with him. Imus also stated that, CC, who was wearing make up and a skin-tight, midriff-bearing shirt on the morning of April 11, 2003, looked like she was seventeen years old. Further, Imus said that CC had not appeared to be upset or distressed. Skinner stated that CC said that she had "f----d the hell out of" Appellant

and that he had been reluctant to have sex with her, but she had "seduced" him by taking off her shirt and rubbing against him. Skinner told CC that the Appellant could get in trouble over what happened, but that CC said "nothing['s] gonna come of it." Skinner also stated that CC said Appellant "was the best she had ever had." Skinner echoed Imus's claim that CC looked and acted older than twelve years old.

In his motion to withdraw his guilty plea, Appellant described the statements made by Skinner and Imus and argued that his plea had not been voluntarily and intelligently made because he was not aware of all the available evidence and possible defenses. Relying on Mounts v. Commonwealth, 12 S.W.311 (Ky. 1889), he also argued that had the evidence been discovered after a jury trial, he would have been entitled to a new trial, and that, as such, he was entitled to withdraw his plea.

On October 11, 2003, the trial court denied Appellant's motion to withdraw his guilty plea, making the following findings:

> [T]his case, based on the record, clearly shows that [the] Boyk[i]n requirements have been met. The Court did conduct a discussion to determine that the plea was intelligently, knowingly and voluntarily entered. While the Court did not go into great detail with respect to the facts of the crime, this particular case involved a negotiated plea to an amended charge. Defendant was initially charged with First Degree Rape and First Degree Persistent Felony Offender. Based upon the plea agreement, Defendant pled guilty to amended charges of Second Degree Rape and Second Degree Persistent Felony Offender. While there were a couple of instances in which the defendant paused before answering questions, the Court at the time found that the defendant's plea was made knowingly, intelligently and voluntarily, and the Court still believes that to be the case. As the Commonwealth noted in its opposition to Defendant's Motion to Withdraw Plea, defendant has an extensive criminal record. Defendant knew the ramifications of what could happen at trial, and defendant knew the defenses available to him. The court simply does not believe that the "newly discovered evidence" is such that the voluntariness or

> the intelligent nature of the plea was compromised in any way.
>
> Focusing on the issues at hand, the Court finds that the defendant entered his plea knowingly, voluntarily and intelligently, and that the newly discovered evidence would not be of such a nature that this Court would grant a new trial. The Court does agree with defense counsel that were the "newly discovered evidence" of such a nature that a new trial would be granted, that the Court would grant the Motion to Withdraw Guilty Plea. However, because the Court does not find that to be the case, the Court will not grant the relief requested.

On the same day, the trial court also entered its final judgment, sentencing Appellant to twenty years in prison.[3] Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

III. ANALYSIS

RCr 8.10 allows 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." If the plea was involuntary, the motion to withdraw must be granted. Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). If the plea was voluntary, however, the decision to allow the withdrawal is within the trial court's discretion. Id. In this appeal, Appellant resurrects both of the arguments he originally presented to the trial court. Thus, we address both aspects of the Rodriguez analysis, namely whether the guilty plea was voluntary and whether the trial court otherwise abused its discretion in denying withdrawal of the guilty plea.

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[3] Several days after the trial court ruled on the motion to withdraw the guilty plea, Appellant filed a pro se motion for a new trial that repeated the claims presented in the motion to withdraw the guilty plea. The trial court also denied this motion, noting, "[T]he motion should be more appropriately dealt with on appeal of this Court's Order which denied defendant's Motion to Withdraw his guilty plea."

A. Voluntariness of the Guilty Plea

Appellant argues that because he was unaware of all the existing evidence at the time he pled guilty, his plea was not voluntarily and intelligently made. He claims that even though he was aware of all of the available evidence and engaged in the Boykin colloquy with the trial judge, the fact that there were witnesses of whom he had no knowledge meant that he "lack[ed] sufficient knowledge of his legal alternatives . . . ." Appellant, however, cites to no case law in support of this specific contention.

We evaluate Appellant's claim under the general test for the validity of guilty pleas. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). The validity of a guilty plea under this standard depends "upon the particular facts and circumstances . . . including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Or, as we have stated in somewhat more colorful language, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 112 (1970).

But as to this claim of error, Appellant's own argument cuts against him. He repeatedly notes that he was fully aware of all the evidence that was available at the

time of his plea. He admits that he was informed by his attorney of the available defenses, including that he could deny any forcible compulsion and that he could argue that he thought CC was at least sixteen years old. He chose not to pursue these alternatives, however, because he felt that the weight of the evidence that was available would have overwhelmed his defenses and could have easily led a jury to convict him of the charged offense. In essence, Appellant pled guilty in order to limit the jail time he faced, which is, in and of itself, a valid reason for entering a guilty plea. See Alford, 400 U.S. at 31, 91 S.Ct. at 164 ("That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.").

The simple fact that a defendant would make a different decision at a later time does not render the earlier guilty plea involuntary; otherwise, the validity of most guilty pleas might potentially be challenged after defendants come to understand the reality of incarceration. Hindsight alone does not render the guilty plea unintelligent and involuntary. Appellant all but admits that at the time he entered his guilty plea, it was intelligently and voluntarily made. That is all that is required. Subsequent events that do not conform to a defendant's expectations do not automatically render an otherwise voluntary and intelligent guilty plea involuntary. For example, "[g]enerally, a plea cannot be automatically rendered involuntary by a subsequent change in the relevant law." Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky. App. 2004) (citing Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

Trial courts are charged with ensuring that there is an affirmative showing on the record that the defendant's plea is voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). There is no suggestion that the trial court failed to engage in an appropriate colloquy, as required by Boykin, when Appellant entered his plea of guilty. Furthermore, when considering Appellant's subsequent motion to withdraw his plea, the trial court reviewed the record of Appellant's guilty plea and the Boykin colloquy, and reiterated its finding that under the totality of the circumstances Appellant's plea was knowing, intelligent, and voluntary. As a factual finding, the trial court's determination in this regard is subject to review only for clear error, that is, whether the decision was supported by substantial evidence. See Bronk v. Commonwealth, 58 S.W.3d 482, 489 (Ky. 2001) (Cooper, J., concurring) ("[T]he decision is reviewed under the 'clearly erroneous' standard, i.e., whether the trial judge's denial of the motion was supported by 'substantial evidence.'"). Given the totality of the circumstances—including Appellant's previous experience with the legal system, his admission that his attorney had discussed the defenses available to him, and that he clearly understood the possible consequences of proceeding to trial—we conclude the trial court's finding was supported by substantial evidence and therefore was not clearly erroneous.

B. Abuse of Discretion

Appellant's second argument amounts to a more general claim that the trial court abused its discretion in denying his motion to withdraw his guilty plea. In making this claim, Appellant relies again on Mounts v. Commonwealth, 12 S.W.311 (Ky. 1889). He cites Mounts for the proposition that a trial court's denial of a defendant's motion to withdraw his guilty plea amounts to an abuse of discretion when the defendant, had the

case been decided by a jury, would have been able to make a sufficient showing to warrant the grant of a new trial. Appellant's interpretation of Mounts, however, is incorrect.

In Mounts, the defendant pled guilty to a charge of murder. The prosecutor proceeded to present evidence to the jury, which subsequently found the defendant guilty and sentenced him to death. The defendant then moved the trial court to allow him to withdraw his guilty plea, claiming that he had given it

> believing the jury would be merciful to him and spare his life, but that the attorney for the commonwealth introduced as a witness the mother of the person killed, and the character and manner of her testimony was such as calculated to arouse the passions and prejudices of the jury, and to induce them to inflict the severest penalty.

Id. at 311. He also moved the court for a new trial. Both motions were denied.

The applicable rule at that time, Section 174 of the Criminal Code of Practice, read: "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted." The rule is almost identical to RCr 8.10, which replaced Section 174 when the Rules of Criminal Procedure were enacted. In applying this rule to the defendant's situation in Mounts, our predecessor court noted:

> Though it is provided in that section the plea may with permission of the court be withdrawn at any time before judgment, obviously the intended effect of such proceeding, if occurring after the verdict of the jury has been rendered, is to retry the case, and, consequently, to authorize it to be then done, there must exist such reasons as would be sufficient to justify the granting of a new trial. A plea of guilty is inevitably followed by conviction of the offense charged in the indictment, and the only question left open in such case is the nature and extent of punishment to be inflicted, which is still within the legal discretion of the jury.

Id. (emphasis added). Appellant relies on this highlighted language in support of his contention that the new trial standard should be incorporated into RCr 8.10.

The "new trial" language in Mounts, however, is inapplicable to Appellant's case. Trial practice was fundamentally different at the time Mounts was decided. The defendant therein entered a guilty plea, but it was not the product of a plea bargain. Because there was no agreement as to the sentence, the defendant was still subjected to a limited trial, where, upon entry of the plea, the jury immediately returned a guilty verdict, and then heard evidence (consisting of a single witness) relating to the sentence to be imposed. Thus, the new trial standard was necessarily applicable to the defendant's claim and he could only withdraw his guilty plea if his trial, with its ensuing verdict and sentence, might potentially be undone. On the other hand, Appellant's plea was the product of a modern plea bargain, wherein a defendant typically enters a guilty plea, thereby waiving his right to a trial, in exchange for a specific penalty that is less than the maximum he would otherwise face. Even assuming that the new trial language of Mounts retains any viability in the modern era, Appellant never had a trial as to any part of his case. As such, Mounts has no applicability to the facts at hand.

Outside the specific situation in Mounts, the denial of a withdrawal of a guilty plea under the old Criminal Code of Practice was governed by whether the denial was an abuse of the trial court's discretion. See, e.g., Reed v. Commonwealth, 261 S.W.2d 630, 631 (Ky.1953) ("The only question in the case is whether the trial judge abused his discretion in failing to permit appellant to change his plea and in refusing to submit to a jury the issue of his guilt or innocence."). In fact, it appears that under the cases interpreting Section 174 of the Criminal Code of Practice, the only instances in which a trial court was found to have abused its discretion in denying the withdrawal of a guilty plea involved situations where the plea was involuntary. See Kidd v. Commonwealth, 255 Ky. 498, 74 S.W.2d 944, 946 (1934) ("Nor, according to the general rule, will the

court so exercise its judicial discretion by allowing the withdrawal of the plea after sentence, unless it appears that the accused's consent to plead guilty was unwillingly given and made under circumstances of fear, deceit, or coercion."); see also Robinson v. Commonwealth, 310 Ky. 353, 220 S.W.2d 846 (Ky. 1949) (error not to allow defendant to withdraw guilty plea, which was induced by a promise from the Commonwealth as to sentencing, when trial court later submitted question of sentence to jury); Williams v. Commonwealth, 25 Ky.L.Rptr. 2041, 80 S.W. 173 (Ky. 1904) (error not to allow defendant to withdraw plea induced by Commonwealth's promise not to present evidence to sentencing jury when Commonwealth then presented evidence to jury).

This understanding of the rule on withdrawal of guilty pleas was initially extended to apply to RCr 8.10 also. See Allee v. Commonwealth, 454 S.W.2d 336, 342 (Ky. 1970) (discussing the Section 174 of the Criminal Code of Practice and Kidd standard in the context of applying RCr 8.10). As noted above, however, we have since held that the trial court's ability to deny a motion to withdraw a guilty plea arises only after the plea has been shown to be voluntary. Once that showing is made, however, the decision to grant or deny the motion falls firmly within the trial court's discretion. Rodriguez, 87 S.W.3d at 10. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Appellant has shown no compelling reason for us to second-guess the trial court in denying the motion to withdraw the guilty plea. As such, we conclude that the trial court did not abuse its discretion in doing so.

For the foregoing reasons, the judgment of the Calloway Circuit Court is affirmed.

Graves, Johnstone, Roach and Wintersheimer, JJ., concur. Scott, J., dissents by separate opinion in which Lambert, C.J., joins. Cooper, J., dissents without separate opinion.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I dissent.

I believe the trial court abused its discretion when it denied Appellant's motion to withdraw his guilty plea.

The standard of review for denial of a motion to withdraw a guilty plea is abuse of discretion. Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001). In deciding if a guilty plea should be set aside, the trial court properly exercises its discretion when it "consider[s] the totality of the circumstances surrounding the guilty plea." Bronk at 486. Moreover, the standard to withdraw a guilty plea should be applied in a way that will "prevent injustice." Reed v. Commonwealth, 261 S.W.2d 630, 631 (Ky. 1953).

Too often, however, this standard is narrowly applied, focusing only on the plea having been made voluntarily and intelligently. Cf. Bronk at 487. This

limited focus provides no guidance or review standard, however, for the exercise of the court's authorized discretion once a determination is made that the plea was voluntarily and intelligently made. Plainly said, the court may still grant the motion, even once the knowingly and voluntarily determination is made. It is a lack of guidance for our trial judges after this determination, which the facts in this case point out to us so well.

Here, Appellant entered a plea based upon evaluation of the evidence against him at the time of the plea. From the record, the circumstances of the case were such that it was essentially Appellant's word as to what transgressed on the night of the alleged rape versus the words of the alleged minor victim. Other than his own testimony, Appellant lacked other disinterested, or credible witnesses, to substantiate his defense at the time of the plea; thus, upon counsel's recommendation, he avers he pled guilty to avoid the possibility of a life sentence from a jury which might be sympathetic to a minor.

Almost immediately after his plea, however, evidence surfaced that would have affected Appellant's decision regarding his plea. On its face, this new evidence arguably would have afforded him a substantial chance of success, if his case did proceed to trial. This evidence was not known to Appellant, the Commonwealth, or the Court, at the time of the plea.

At the hearing on Appellant's motion to withdraw his guilty plea, the trial judge reviewed the circumstances surrounding the guilty plea, i.e., whether it was made knowingly, intelligently, and voluntarily. The new evidence and any impact it might have had upon Appellant's plea, or in a following trial, appears to have been considered only minimally in its ruling. The impact of the newly discovered

evidence on Appellant's defense that he was mistaken about the victim's age appears to be the only other consideration by the trial court. In fact, the trial judge stated although he considered the newly discovered evidence, "the Court did not go into great detail with respect to all the facts of the crime" because it involved a negotiated plea; so, he basically made his determination based upon the fact that Appellant's plea was voluntarily and intelligently made.

Federal Rule of Criminal Procedure 32(d) allows for the withdrawal of a guilty plea upon a showing by the defendant of any "fair and just" reason.

> Prior to the 1983 amendment to Rule 32(d), courts granted presentence motions to withdraw pleas only when it was "fair and just" to do so. The 1983 amendment to Rule 32(d) expressly adopted this "fair and just" standard, and provides: If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), *the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.* At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

U.S. v. Triplett, 828 F.2d 1195, 1196-97 (6th Cir., 1987)(internal citations omitted).

The 6th Circuit in Triplett announced that a court, in deciding whether a "fair and just" reason exists for withdrawing a guilty plea, ***must review all*** the circumstances surrounding the original entry of the plea, as well as, the motion to withdraw. Id. at 1197. The court then enumerated several factors that should be considered when evaluating whether a defendant should be allowed to withdraw his plea, including: (1) whether the movant asserted a defense or whether he has consistently maintained his innocence; (2) the reasons that a stated defense was not raised at an earlier time; and (3) the length of time between the entrance of the plea and the motion to withdraw (the shorter the delay, the more likely a

motion to withdraw will be granted). Id.

In Triplett, the court disagreed with the defendant's assertion that his allegedly meritorious defense--insufficient eyewitness testimony--constituted a "fair and just" reason for granting his motion to withdraw. Factors the court considered in deciding this was not a "fair and just" reason for withdrawal, included the fact that this defense had been available to him from the day he entered his plea and that the defendant did not set forth any reason for failing to assert this defense at an earlier time. The court was also persuaded by the great length of time, 84 days, between the entry of his guilty plea and his motion to withdraw.

Under the circumstances here, I believe Appellant has produced a "fair and just" reason for withdrawing his guilty plea and that the trial court abused its discretion in not considering Appellant's newly discovered evidence in light of the totality of the circumstances as existed at the time of the plea. As to the narrow standard of whether Appellant voluntarily entered his plea of guilty, in circumstances such as this, the standard is somewhat broader; it must also be "fair and just."

The newly discovered exculpatory evidence in this case is such as would have afforded Appellant a new trial under a Rule 59.02 motion if he had not plead, but had been convicted by a jury. Adding a "fair and just" standard in circumstances such as this, brings the standard for withdrawal of one's plea closer to the standard for new trial, which is where it should be for newly discovered evidence. Therefore, under the facts and circumstances as occurred here, the standard for setting aside a plea should mimic, or at least be consistent

with, the standard as applied to considerations of newly discovered evidence on motions for new trial.

Although the standard for determining whether a criminal defendant should be afforded a new trial is in the discretion of the trial court, "the decision can not be arbitrary, unreasonable, unfair, or unsupported by legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1989), citing 5 Am.Jur.2d Appellate Review § 695 (1995); cf. Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

On a motion for new trial, when evidence is discovered that was unknown to the defendant at the time of trial, the trial judge must examine the evidence to determine if it is of "such a decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result, if a new trial was granted." Caldwell v. Commonwealth, 133 S.W.3d 445, 454 (Ky. 2004). If the newly discovered evidence is "sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial," then a motion for new trial should be granted. Id. at 455. The "fair and just" standard allows, or commands, at times, these considerations.

For example, in Dolan v. Commonwealth, 468 S.W.2d 277, 284 (Ky. 1971), the court reversed the denial of a new trial motion and the Defendant was afforded a new trial based on newly discovered evidence. The evidence in Dolan came from a disinterested witness whose identity was unknown at the time of trial, who had been at the scene of the crime, and also, who the defendant did

not know how to locate and, therefore, did not have any way to produce at trial. Id. at 284.

Also, in Mullins v. Commonealth 375 S.W.2d 832, 834 (1964), the defendant was afforded a new trial based upon the only eye-witness claiming to have been under coercion that was threatening the lives of her children. The court ruled that this sort of evidence was enough to give defendant a new trial and it would "be a miscarriage of justice if a new trial were not granted." Id. at 834.

Finally, in Boyd v. Commonwealth, 394 S.W.2d 934, the Court of Appeals granted the defendant a new trial when new evidence emerged in the form of an affidavit that supported defendant's defense. There the Court looked at factors such as the timeliness of the motion for new trial, the support for the new evidence, such as the affidavit(s), and the diligence of the defendant in finding evidence and witnesses prior to the trial that convicted him. Id. I think the same standard must be applied in determining whether a guilty plea should be set aside.

Like the successful defendants in Boyd, Dolan, and Mullins, Appellant filed a motion to set aside his guilty plea less than a month after he entered his guilty plea, and prior to sentencing. Also, Appellant timely acquired two affidavits, along with videotaped statements from the new witnesses, which supported the Appellant's version that he did not force himself upon the alleged victim (a defense not considered by the trial court) and was deceived about the age of the female.

The newly discovered exculpatory evidence in this case was "material" to Appellant's defense. It appears it was not discovered despite his diligence prior to his plea, but would have merited a new trial, had he been convicted by a jury, as opposed to pleading guilty. In such a situation as this, I believe the court should do much more than focus primarily on whether a defendant's plea was knowingly and voluntarily made. Thus, the true "totality of the circumstances" should be considered as mandated by our case law in order to arrive at a "fair and just" result. And, in looking at all the facts and circumstances of this case, I believe the trial court abused its discretion by failing to consider "the totality of the circumstances." Accordingly, I would reverse.

Lambert, C.J., joins this dissent.