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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000239-MR

DATE 7-11-06 ELLA GRAVITT, D.C.

LUVELL WEST — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 03-CR-00091

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Luvell West, was sentenced to life imprisonment, based upon his guilty plea pursuant to North Carolina v. Alford,[1] for one count of murder, one count of first degree robbery, tampering with physical evidence, and of being a first degree persistent felony offender. He now appeals as a matter of right.[2]

On December 20, 2001, Appellant murdered sixty-two year old David Thomas by beating and strangling him during the course of a robbery in McCracken County. Appellant was indicted on March 21, 2003, in connection with the death of Mr. Thomas. Appellant was indicted on one count of murder for "causing the death of David Thomas by beating and strangling him or by committing a robbery which wantonly resulted in the death of David Thomas"; one count of first degree robbery for "using

[1] 400 U.S. 25, 91 S.Ct. 160, 27 L.E.2d 162 (1970).
[2] Ky. Const. § 110(2)(b).

physical force upon (Mr. Thomas) and causing physical injury to him in the course of committing a theft"; and tampering with physical evidence. Appellant was arraigned and appointed counsel. On April 25, 2003, a superseding indictment was returned against Appellant, charging him, in addition to murder, robbery, and tampering with physical evidence, with being a first degree persistent felony offender.

On May 15, 2003, the Commonwealth filed notice of aggravating circumstances and of its intent to seek the death penalty. The aggravating circumstances included murder committed during the course of a robbery, murder for the purpose of receiving a thing of monetary value, and Appellant's substantial history of serious assaultive criminal convictions.

On May 27, 2004, Appellant filed a "Motion to Enter Guilty Plea Pursuant to North Carolina v. Alford."[3] In exchange for Appellant's Alford plea to the murder and for his guilty pleas to the remaining charges, the Commonwealth offered Appellant life on the murder charge, twenty years on the robbery charge enhanced to life on the persistent felony offender enhancement, and five years on the tampering with physical evidence charge enhanced to ten years on the persistent felony offender enhancement, for a total sentence of life imprisonment.

Appellant's guilty plea was accepted by the McCracken Circuit Court on May 27, 2004. At the sentencing hearing on July 14, 2004, Appellant moved to withdraw his guilty plea. After noting that Appellant's guilty plea had been voluntarily entered, the McCracken Circuit Court denied the motion. Appellant filed a belated

[3] 400 U.S. 25.

notice of appeal and a motion to proceed *in forma pauperis*. This Court granted both motions and this appeal followed.

Before addressing the legal arguments, it is necessary to include an overview of the colloquy during the guilty plea proceeding and during the final sentencing hearing. During the guilty plea proceeding Appellant was represented by Vince Yustas of the Capital Trial Branch of the Department of Public Advocacy. Mr. Yustas stated that he was the former chief of the Capital Trial Bench, and that he had tried close to thirty death penalty cases in the past four or five years. He further stated that he discussed Appellant's constitutional rights with him, and that he had no reason to believe that Appellant's guilty plea was anything other than freely, willingly, knowingly, voluntarily, and intelligently offered. Mr. Yustas also stated that he had no cause to believe that Appellant was under the influence of drugs, alcohol, or any medication that would impair his judgment, further noting that Appellant had two psychiatric evaluations that indicated there were no mental problems.

At the outset of the guilty plea proceeding, Appellant swore that any testimony he would give in the courtroom would be the truth. Appellant testified that he had an eleventh grade education, and that he was not under the influence of drugs, alcohol, mental disease or any disease or other substance that would impair his judgment. He further noted that he had spoken with three attorneys regarding his case. Regarding the actual guilty plea document, Appellant testified that he read and signed the motion to enter a guilty plea as well as the Commonwealth's offer on a guilty plea. Appellant also acknowledged that he believed his attorney was fully informed about his

case, and that he had fully discussed and understood the charges against him, as well as any possible defenses.

The guilty plea form contained a list of Appellant's constitutional rights, and he acknowledged that he understood these rights, including his right to plead not guilty. He noted that he understood that he was waiving these rights by pleading guilty. Appellant stated that he understood what the range of possible penalties could be, and that the trial court could reject the Commonwealth's recommendation. Most importantly, Appellant acknowledged that no one had forced him to take the plea, or had made any promises to him in exchange for his plea of guilty. Finally, Appellant acknowledged that he had been represented by competent counsel.

At the sentencing hearing, Appellant asked the trial court for permission to withdraw his guilty plea. Among the reasons stated for this request, he asserted that he had been forced by his counsel to accept the plea, and that he did not really understand what was happening during the earlier judicial proceedings. Upon hearing this, the trial court responded that Appellant had previously stated that his plea was entered voluntarily and knowingly. In reference to Appellant's alleged misunderstanding of the legal proceedings, the trial court recounted Appellant's extensive criminal record and court appearances. Appellant had been previously in court for no driver's license, possession of a schedule two drug, evading arrest, violation of open container law, driving under the influence, two counts of driving on a revoked license, two counts of aggravated assault, possession of a hand gun, suspended license, alcohol under age, possession of cocaine, failure to appear, violation of probation, possession with intent to

sell the schedule two drug, cocaine, less than five grams, and giving an officer a false name or address.

Appellant also claimed that his guilty plea was not voluntarily entered because he was not provided discovery in the case. The trial court informed Appellant that his counsel was initially provided with discovery on May 15, 2003, and that counsel had been provided with continuing discovery throughout the proceedings. The trial court stated that Appellant's motion to withdraw his guilty plea was improperly made, but even if properly made, would be rejected because Appellant had previously acknowledged that he was entering his guilty plea freely and willingly.

Appellant argues on appeal that the trial court abused its discretion and denied him due process of law when it refused to allow him to withdraw his guilty plea prior to sentencing pursuant to RCr 8.10. Our withdrawal of plea rule, RCr 8.10, states, *inter alia*, 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."[4] The starting point for our analysis would naturally begin with the rule itself. In the rule, the word "may" is used to designate whether the court has discretion to allow withdrawal of a plea before sentencing. In statutory interpretation and construction "may" is deemed permissive, unlike "shall" which is deemed mandatory.[5] Therefore, as the rule is written, a trial court has the discretion, not a mandate, to allow the withdrawal. Furthermore, "[t]his provision would appear to connote, though we have not so held, that a voluntary plea of guilty, once made, cannot thereafter be withdrawn as a matter of right."

---

[4] RCr 8.10 (emphasis added).

[5] See Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60, 68-69 (Ky. App. 2005); see also KRS 446.010(20) (The General Assembly has included a definition for "may" in the KRS, deeming the word permissive.).

Although there is discretion within RCr 8.10, we have held that this discretion is not unfettered. In Rodriguez v. Commonwealth[6] we stated the following:

> [T]he word "may" in RCr 8.10 does not give a trial judge unfettered discretion to deny a motion to withdraw a guilty plea without affording the defendant a hearing on the motion. Our case law is clear that the discretion to deny a motion to withdraw a guilty plea exists only after a determination has been made that the plea was *voluntary*. If the plea was *involuntary*, the motion to withdraw it must be granted.[7]

The evidence of record is clear that the trial court properly conducted a hearing to determine if Appellant's guilty plea was entered voluntarily and knowingly. "Admissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.'"[8] Although the trial court determined that Appellant's motion to withdraw his guilty plea was made improperly, the court still heard Appellant's reasons for withdrawal of the plea at sentencing, and informed him that the earlier guilty plea proceeding showed that Appellant's plea was not coerced and was entered willfully. Furthermore, our review of the record leaves no doubt that Appellant did in fact enter his guilty plea voluntarily and knowingly. In this case, the trial court's discretion in denying Appellant's requested relief was not abused.

For the foregoing reasons, we affirm the trial court and the guilty plea entered by Appellant will stand.

All concur.

---

[6] 87 S.W.3d 8 (Ky. 2002).
[7] Id. at 10 (emphasis in original) (citations omitted).
[8] Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (citing Jackson v. Denno, 378 U.S. 368, 387, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)).

COUNSEL FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael Harned
Kevin Ricky Branscum
Assistant Attorneys General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204