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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000082-MR

TERRANCE FINCH — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
05-CR-000412

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2007-SC-000083-MR

TERRANCE L. FINCH — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
05-CR-000687

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2007-SC-000084-MR

TERRANCE L. FINCH — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
06-CR-000060

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on direct appeal from the denial of Appellant's, Terrance Finch's, motion to withdraw his guilty plea and the subsequent final judgment of the Christian Circuit Court sentencing him to a total of twenty (20) years imprisonment on convictions for first degree trafficking in a controlled substance (first offense), first degree trafficking in a controlled substance (second offense), and second degree persistent felony offender (PFO). Appellant argues two grounds on appeal. He first alleges that the trial court abused its discretion and denied him due process of law by refusing to permit him to withdraw his guilty plea prior to sentencing, or in the alternative, by failing to hold an evidentiary hearing on his request to withdraw his guilty plea. Appellant's second claim is that he was denied his Sixth Amendment right to counsel during a critical stage of the criminal proceeding. Having considered the record, the parties' briefs, and the applicable case law, we affirm the final judgment and sentence of the Christian Circuit Court.

Appellant was indicted on July 15, 2005, for first degree trafficking in a controlled substance (cocaine), first offense, a crime that took place in March 2005. On December 16, 2005, he was indicted for first degree trafficking in a controlled substance (cocaine), second offense, a crime that took place in May 2005. Finally, on February 2, 2006, Appellant was indicted for being a first degree persistent felony offender.

In exchange for a guilty plea to the crimes charged, the Commonwealth agreed to recommend that Appellant's first degree PFO charge be amended to second degree PFO, that Appellant be sentenced to a total of ten (10) years, and that he be released on his own recognizance pending final sentencing. The prosecutor's written plea offer

also included a provision stating that failure to appear at sentencing would result in the Commonwealth's recommendation that the maximum sentence allowed by law be imposed on all charges. Appellant agreed and signed the Commonwealth's plea offer.

Pursuant to the plea agreement, on May 17, 2006, Appellant appeared in court with counsel and entered a guilty plea to one count of trafficking in a controlled substance, first offense, one count of trafficking in a controlled substance, second offense, and to being a persistent felony offender in the second degree. During this hearing, Appellant was duly sworn and informed the court that he understood the offer. Appellant stated that he had ten (10) years of education, was not under the influence of any medication or alcohol, did not have mental or emotional problems affecting his ability to understand, was satisfied with the performance of his attorney, and understood the rights he was waiving by pleading guilty. He also stated that his signature appeared on the motion to enter a guilty plea along with his attorney's signature. The trial court then informed Appellant that he was to receive a ten (10) year sentence on the aforementioned charges unless he failed to appear at final sentencing. The judge explicitly warned,

> Judge: You are not going to make the mistake of running off are you?
>
> Appellant: No sir.
>
> Judge: Okay, because if you do, you are going to get the maximum on these sentences, they are going to run consecutively, and you are going to get whatever additional time you get for bond jumping. So please don't make the foolish mistake of not coming back to court for final sentencing.

The court then informed Appellant that if he failed to appear for sentencing, he would be sentenced to the maximum penalty, twenty (20) years. During the guilty plea colloquy, Appellant stated that he was not under any pressure to enter a plea or under any

threats. He admitted that he had committed the aforementioned offenses set out in the indictment. Appellant told the court that the plea was a sensible and reasonable way to resolve his case. Appellant's attorney informed the court that he was satisfied that his client was entering the plea voluntarily, understandingly, and knowingly. More specifically, Appellant's attorney explicitly stated that he had discussed with Appellant the consequences of failing to appear at final sentencing. The trial court accepted Appellant's plea as knowing, voluntary, and intelligent and released Appellant on his own recognizance pending sentencing.

At the scheduled sentencing hearing on June 21, 2006, Appellant failed to appear. Defense counsel informed the court that he had been unsuccessful in attempting to reach Appellant. The court subsequently issued a bench warrant for Appellant's arrest.

After Appellant was taken into custody, sentencing was held on August 23, 2006. In accordance with the provision in the plea agreement expressly stating that the Commonwealth would recommend the maximum penalty if Appellant failed to appear at the sentencing hearing, the Commonwealth so recommended and Appellant was sentenced to twenty (20) years. Prior to the court's decision, Appellant stated that if the prosecutor chose to pursue the higher sentence, he desired to withdraw his guilty plea and proceed to trial. Appellant alleged that he had not understood the terms of the agreement and there was new evidence available that had been unknown to him at the time of his plea. The trial court responded, "In view of the fact that Mr. Finch failed to appear for sentencing being aware of the consequences of that failure," Appellant's motion to withdraw his guilty plea was denied.

In reviewing Appellant's first claim of error, we look to a similar factual scenario appearing in Jones v. Commonwealth,[1] a case not cited by either party. The defendant in Jones entered into a plea agreement in which the Commonwealth promised to recommend a sentence of six (6) years upon the conditions that Jones give a statement of his illegal activities; meet with a member of the Attorney General's office and give a full and complete statement; and reappear in court for the final sentencing.[2] If the defendant complied with these provisions, the Commonwealth agreed not to oppose parole in his case and to advise the parole board of his cooperation. As with the facts in the case sub judice, if the defendant did not comply with these conditions, the Commonwealth would recommend a maximum sentence of twenty (20) years instead of the agreed upon six (6) years. The trial court accepted the defendant's guilty plea and released him on bond pending his date of sentencing. The defendant in Jones did not appear for sentencing and a bench warrant was issued for his arrest. Ultimately, he was sentenced to twenty (20) years in prison in accordance with the provision in the plea agreement that provided for the maximum penalty.

In Jones, we concluded that the circuit court did not err by imposing the twenty (20) year sentence as recommended by the Commonwealth and reflected in the plea agreement. We held,

> [Defendant] pled guilty and agreed to abide by the terms of the plea bargain including the requirement that he appear in court on the date assigned for sentencing. He acknowledged his understanding of the possible sentencing consequences should he fail to appear. Therefore, because [defendant] failed to appear for sentencing the recommended sentence was correctly imposed under the terms of the plea agreement.[3]

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[1] Jones v. Com., 995 S.W.2d 363 (Ky. 1999).

[2] Id. at 365.

[3] Id. at 365.

We discovered no due process violation, no substantial or palpable error of any kind, and therefore, no manifest injustice. Instead, "The plea condition providing for a six-year sentence if the plea agreement was complied with, was a legitimate plea bargain offer which was properly withdrawn by the Commonwealth after the breach by [defendant]."[4]

In the case sub judice, the facts are comparable. Appellant pled guilty and agreed to abide by the terms of the plea bargain, including the requirement that he appear in court for sentencing. The court concluded that Appellant's guilty plea was knowing, voluntary, and intelligent. Not only did the plea agreement discuss the penalty for his failure to appear, his attorney reiterated the ramifications and the judge explicitly warned Appellant on the record that he would receive the maximum sentence for the "foolish mistake of not coming back to court for final sentencing." With that knowledge, Appellant subsequently failed to appear for sentencing. Upon Appellant's breach of the plea bargain, the Commonwealth was no longer obligated to recommend the lower sentence of ten (10) years.

Appellant next argues that the trial court abused its discretion and denied him due process of law by refusing to allow him to withdraw his guilty plea prior to sentencing. Aware that his failure to appear for the sentencing hearing would destroy the Commonwealth's offer to recommend a ten (10) year sentence, he moved to withdraw his guilty plea. Appellant expressed concern that his breach of the plea agreement could result in a higher sentence recommendation by the Commonwealth.

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[4] Id. at 366.

In fear of a higher penalty, he asked the court to withdraw his guilty plea and proceed to trial.

In reviewing the trial court's decision to deny Appellant's motion to withdraw, we must first analyze the trial court's finding that Appellant's guilty plea was voluntary. If a guilty plea is made voluntarily, the trial court may, within its discretion, either grant or deny the motion to withdraw. Conversely, if a guilty plea is made involuntarily, a motion to withdraw shall be granted.[5] A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court.[6] Appellant does not make any of those allegations on appeal.

In evaluating the voluntariness of Appellant's guilty plea, we view the totality of the circumstances surrounding the plea, and because the trial court is in the best position to make this determination, we review the trial court's determination under the clearly-erroneous standard.[7] In this case, the trial court conducted a guilty plea colloquy on the record, questioning Appellant under oath regarding the contents of the plea and of its consequences.[8] Appellant said he understood the offer, had ten (10) years of education, was not under the influence of medication or alcohol, did not have mental or emotional problems affecting his ability to understand, was satisfied with the performance of his attorney, and understood the rights he would be waiving by pleading guilty. He was also informed about the recommended ten (10) year sentence in the

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[5] Rodriguez v. Com., 87 S.W.3d 8, 10 (Ky. 2002).

[6] Edmonds v. Com., 189 S.W.3d 558, 566 (Ky. 2006).

[7] Rigdon v. Com., 144 S.W.3d 283, 288 (Ky.App. 2004).

[8] O'Neil v. Com., 114 S.W.3d 860, 863 (Ky.App. 2003), citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

plea agreement and the ramifications for failure to appear for the final sentencing. The judge explicitly warned that if Appellant failed to appear at the sentencing hearing, he would face the maximum sentence of twenty (20) years. Appellant still chose to enter the plea and stated he was not under any pressure or threats to do so. The trial court accepted the plea on the record as knowing, voluntary, and intelligent. Thus, the trial court's determination that the plea was voluntarily made is supported by substantial evidence in the record. As we have previously said, "The extensive exchange on the record, recounted above, between the trial court and Appellant prior to his plea constitutes substantial evidence that Appellant was aware of the sentencing implications and was making a voluntary and intelligent plea."[9] Thus, "[a] decision which is supported by substantial evidence is not clearly erroneous."[10] Therefore, we conclude that Appellant voluntarily entered the guilty plea, and because it was voluntary, the trial court had the discretion to grant or deny his motion to withdraw.

Upon a determination that the guilty plea was voluntary, the trial court had discretion to grant or deny the motion to withdraw the voluntary guilty plea. Our review is for abuse of discretion.[11] We have previously held that a trial court abuses its discretion when it renders a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[12] Appellant does not allege that the court's denial of his motion to withdraw fits in any of these categories. Instead, Appellant relies on RCr 8.10, which provides that "[a]nytime before judgment the court may permit the

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[9] Edmonds v. Com., 189 S.W.3d at 568.

[10] Rigdon v. Com., 144 S.W.3d at 288.

[11] Id. at 288.

[12] Id. at 288, citing Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

plea of guilty . . . to be withdrawn and a plea of not guilty substituted." Appellant contends that because his motion to withdraw the guilty plea took place "before judgment," he is entitled to withdraw the plea. The language of the Rule does not support this view. Rather, RCr 8.10 merely provides the trial court with discretion to "permit the plea of guilty . . . to be withdrawn." The trial court applied its discretion, and we see nothing even close to an abuse of discretion in denying Appellant's motion to withdraw.

In the alternative, upon his request to withdraw the plea, Appellant alleges that the court should have held an evidentiary hearing pursuant to RCr 8.10. In this regard, we said in Edmonds v. Commonwealth, "Though an RCr 8.10 motion is generally within the sound discretion of the trial court, a defendant is entitled to a hearing on such motion whenever it is alleged that the plea was entered *involuntarily*." (Emphasis added).[13] Only when the guilty plea is alleged to have been entered involuntarily, considering the totality of the circumstances, must a trial court grant a defendant's motion to withdraw the plea or provide the defendant with an evidentiary hearing. A hearing on Appellant's motion to withdraw was not required.

The final issue is that Appellant was denied his Sixth Amendment right to counsel during a critical stage of his criminal proceeding. At issue are statements by Appellant's attorney to the court when questioned about whether Appellant had understood the plea agreement at the time he pled guilty. Appellant's attorney told the court he had read over the plea agreement with Appellant and had believed that Appellant understood the

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[13] Edmonds v. Com., 189 S.W.3d at 566, citing Rodriquez v. Com, 87 S.W.3d 8, 10 (Ky. 2002); Bronk v. Com., 58 S.W.3d 482, 486 (Ky. 2002); see also Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

agreement. Otherwise, Appellant's attorney said he would not have signed the plea agreement. Appellant now contends that those statements by his attorney were "clearly advocating against Mr. Finch's cause at that point." This is nonsense as Appellant's attorney had a duty of candor with the tribunal.[14]

Appellant further argues that his attorney's conduct fell below an objective standard of reasonableness and prejudiced him, violating Strickland.[15] Thus, Appellant seems to be alleging ineffective assistance of counsel. This is not before us here. As we held in Humphrey v. Commonwealth, "As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered."[16] In this case, no trial court claim of ineffective assistance of counsel has been made. We have said, "[C]laims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made."[17] We therefore decline to review any issue in this regard in this proceeding and hold that an ineffective assistance of

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[14] SCR 3.130(3.3) ["Candor toward the tribunal. (a) A lawyer shall not knowingly: (1) Make false statements of material fact or law to a tribunal; (2) Fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal; (3) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."].

[15] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[16] Humphrey v. Com, 962 S.W.2d 870, 872 (Ky. 1998) [The Court continued, "This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on that issue." Citing Hopewell v. Com., 641 S.W.2d 744 (Ky. 1982); Wilson v. Com., 601 S.W.2d 280, 284 (Ky. 1980).].

[17] Humphrey v. Com., 962 S.W.2d at 872.

counsel claim must await another day after having been raised in a post-conviction RCr 11.42 motion.[18]

For the foregoing reasons, the final judgment and sentence of the Christian Circuit Court is affirmed.

All sitting. All concur.

[18] See Humphrey v. Com., 962 S.W.2d at 872.

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