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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 3/12/09 Kelly Klaber D.C.

2007-SC-000959-MR

RODNEY A. ERVIN APPELLANT

V.

ON APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
NO. 07-CR-00061 & 07-CR-00083

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Rodney A. Ervin, appeals his Fulton Circuit Court conviction of three (3) counts of trafficking in a controlled substance in the first degree, second or subsequent offense, a single count of trafficking in marijuana, less than eight ounces, and two (2) counts of being a persistent felony offender in the second degree, as a matter of right, Ky. Const. § 110(2)(b). By way of this appeal, he asserts a single allegation of error: the trial court abused its discretion by refusing to allow Appellant to withdraw his guilty pleas. RCr 8.10.

Facts

Appellant was indicted, in separate indictments, in April and June of 2007, for three (3) counts of trafficking in a controlled substance in the first degree, second or subsequent offense, trafficking in marijuana (less

than eight (8) ounces, and two (2) counts of being a persistent felony offender in the second degree.

On October 17, 2007, Appellant entered guilty pleas on both indictments. However, the jury had already been summoned, so the trial court allowed the jury to hear the penalty phase evidence and recommend a sentence. During the voir dire of the jury, the trial court set out all the charges and the dates they occurred. Appellant acknowledged signing forms asking to be allowed to enter a guilty plea and said he understood them and fully discussed them with his attorney. The trial judge asked Appellant if he understood the charges against him. Appellant said that he did. The trial court explained the consequences of a guilty plea, that Appellant was saying he was guilty of the charged offenses. Appellant said he understood that and, further, no promises, threats, or coercion were used to make him plead guilty. The trial court explained that Appellant could be facing as many as 100 years in prison on the six charges.[1] Appellant said he understood and still wanted to plead guilty to each count. He told the court that he had no questions concerning the plea and had no objection to using the jury to assess the penalty.

On November 1, 2007, Appellant filed a motion to withdraw his guilty plea, alleging that he was forced or coerced into pleading guilty as a result of the makeup of the jury pool and the result of the jury selection

[1] We note that, pursuant to KRS 532.110(1)(c), Appellant would serve a maximum of seventy (70) years incarceration for his offenses.

process, thus making his guilty plea involuntary. Prior to final sentencing, the trial court heard and denied the involuntariness motion.

On November 13, 2007, Appellant was sentenced to fifteen (15) years imprisonment for each count of trafficking in a controlled substance in the first degree, second or subsequent offender, and twelve (12) months for trafficking in marijuana. Two (2) of the trafficking in a controlled substance counts, one in each indictment, were enhanced to twenty (20) years imprisonment by the convictions for being a persistent felony offender in the second degree. The count from indictment 07-CR-083 was run consecutive to the two counts from indictment 07-CR-061, for a total sentence of 40 years. This appeal followed.

Analysis

Appellant argues the trial court abused its discretion by denying his motion to withdraw his guilty plea and by failing to establish a factual basis for Appellant's guilty plea. We note that, at trial, Appellant, an African-American man, only objected to the racial make-up of the jury, arguing the make-up pressured him into making a guilty plea. He did not allege his guilty plea was involuntary nor did he argue the lack of a factual basis vitiates his plea. Thus, his arguments in the instant appeal are not properly preserved.

By first raising the lack of factual basis at the appellate level, it denied the trial court an opportunity to respond to, and possibly rectify, Appellant's complaint. We have long maintained that an Appellant may not raise an issue on appeal that was not first presented to the trial

court. RCr 9.22; Salisbury v. Commonwealth, 556 S.W.2d 922, 926 (Ky. App. 1977) (holding that RCr 9.22 requires contemporaneous objection because it gives the trial court the opportunity to correct any errors in the proceedings); Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived.").

However, even were we inclined to address the merits, it is clear from the record that the guilty plea entered was voluntarily, knowingly, and intelligently made, with Appellant's complete understanding of the charges. RCr 8.08; Boykin v. Alabama, 395 U.S. 238 (1969); North Carolina v. Alford, 400 U.S. 25 (1970); Haight v. Commonwealth, 760 S.W.3d 84, 88 (Ky. 1988); Sparks v. Commonwealth, 721 S.W.2d 726 (1986); Williams v. Commonwealth, 229 S.W.3d 49 (Ky. 2007); Kotas v. Commonwealth, 565 S.W.2d 445, 447 (1978) (citing Brady v. United States, 397 U.S. 742 (1970)).

"To be valid, a plea must be knowing, intelligent and voluntary, and a trial court shall not accept a plea without first determining that it is made voluntarily with understanding of the nature of the charge." Williams v. Commonwealth, 229 S.W.3d 49, 50-51 (Ky. 2007) (citing Haight, 760 S.W.3d at 88 and RCr 8.08). Pursuant to RCr 8.10, a guilty plea may be withdrawn with the permission of the court before judgment. Such a motion is usually within the discretion of the court, although if the defendant alleges the plea was involuntarily made, he is entitled to a

hearing on the motion. Edmonds v. Commonwealth, 189 S.W.3d 558, 566 (Ky. 2006). If the plea was voluntarily made, the trial court may, within its discretion, either grant or deny the motion to withdraw the guilty plea. Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004). The inquiry into the voluntariness of the plea is inherently fact-specific; accordingly, the trial court's determination as to whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. Edwards, 189 S.W.3d at 566.

Appellant first argues the trial court committed clear error because it never asked him whether he actually committed the acts charged in the indictment. We note that there is no constitutional requirement for a factual basis to a guilty plea. See Roddy v. Black, 516 F.2d 1380, 1385 (6th Cir. 1975) ("Alford held that there is no constitutional bar to accepting a guilty plea in the face of an assertion of innocence, so long as a defendant voluntarily, knowingly, and understandingly consents to be sentenced on a charge. This being the rule, there is no constitutional requirement that a trial judge inquire into the factual basis of a plea."). Cf. United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995) ("The requirement that a sentencing court must satisfy itself that a sufficient factual basis supports the guilty plea is not a requirement of the constitution, but rather a requirement created by riles and statutes."); United States v. Van Buren, 804 F.2d 888, 892 (6th Cir. 1986) ("Where the crime is easily understood, several courts have held that a reading of the indictment, or even a summary of the charges in the indictment and

an admission by the defendant, is sufficient to establish a factual basis under Rule 11."); Chapman v. Commonwealth, 265 S.W.3d 156, 182-183 (Ky. 2007) ("[I]t has been held that the requirement for a factual basis is satisfied in cases that do not involve unduly complicated crimes if a summary of the charges is read to the defendant and the defendant admits to having committed the offense."). Notably, Kentucky Rules of Criminal Procedure (RCr) 8.08, which governs pleas, does not expressly contain the requirement that a trial court ascertain a factual basis before accepting a guilty plea, unlike Federal Rules of Criminal Procedure 11(b)(3). Id. at 183 n.72. Thus, there was no clear error in accepting Appellant's guilty plea without establishing a factual basis for the plea.

Therefore, Appellant's primary assertion of error is without merit. Appellant, however, asserts that the underlying factual deficiency, which resulted from Appellant's guilty plea before trial, serves to invalidate the voluntariness of his guilty plea. We disagree again for reasons that a factual basis for a guilty plea is not constitutionally required. Moreover, the circumstances surrounding entry of the guilty plea clearly demonstrate the voluntariness of the plea.

Here, before Appellant pled guilty to all charges, he 1) engaged in a several minute long discussion about each of the charges and the

consequences of pleading guilty[2] and 2) signed a motion to enter a guilty plea which contained, *inter alia*, the following statements:

3. I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed, and I understand, the charges and any possible defenses to them.
4. I understand I may plead "not guilty" or "guilty" to any charge against me.
5. I further understand the Constitution guarantees to me the following rights:
    (a) the right not to testify against myself;
    (b) the right to a speedy and public trial by jury at which I would be represented by counsel and the Commonwealth would have to prove my guilt beyond a reasonable doubt;
    (c) the right to confront and cross-examine all witnesses called to testify against me;
    (d) the right to produce any evidence, including attendance of witnesses, in my favor;
    (e) the right to appeal my case to a higher court.
    I understand that if I plead "GUILTY," I waive these rights.
9. *I declare my plea of "GUILTY" is freely, knowingly, intelligently, and voluntarily made*; that I have been represented by counsel; that my attorney has *fully explained my constitutional rights to me, as well as the charges against me and any defenses to them*; and that I understand the nature of this proceeding and all matters contained in this document.

Given the Appellant's colloquy with the trial court as he entered his guilty plea taken in conjunction with his statements made in his motion to enter a guilty plea, it is clear that Appellant was fully aware of the

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[2] Judge: Alright sir. So you're pleading guilty essentially to six offenses. Four underlying offenses and two PFO's. Is that right? Pleading guilty to three trafficking in cocaine –

Ervin: Yes, yeah.
Judge: counts
Ervin: Trafficking in marijuana.
Judge: Two of those. One trafficking in marijuana. And two PFO seconds.
Ervin: Yes sir.
Judge: You understand all of that: You want to plead guilty to each and every one of those counts:
Ervin: Yes.

charges against him, aware that by pleading guilty he was, in effect, saying he was guilty of the crimes with which he was charged, and aware of the potential consequences he was facing. Thus, it is clear that Appellant entered a voluntary, knowing, and intelligent guilty plea.

Therefore, because the guilty plea was voluntarily made and Appellant's motion to withdraw his plea was made between the trial and final sentencing, pursuant to RCr 8.10, the trial court could have, within its discretion, either denied or permitted Appellant to withdraw his guilty plea. See Rigdon, 144 S.W.3d at 288. "A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles." Edwards, 189 S.W.3d at 570.

In the instant case, the trial court's decision was not arbitrary, unreasonable or unfair and was supported by the legal principles discussed above. Therefore, the trial court did not abuse its discretion by denying Appellant's motion to withdraw his guilty plea. Thus, no error occurred. Appellant's conviction is affirmed.

All sitting. All concur.

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