

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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: MARCH 19, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000623-MR

DATE 4/9/09 Kelly Klaber D.C.  
APPELLANT

JOSEPH SIMPSON

V. ON APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE CHARLES C. SIMMS, JUDGE  
NOS. 06-CR-00165 AND 06-CR-00261

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Joseph Simpson, entered an Alford<sup>1</sup> plea in the Nelson Circuit Court to the charges contained against him in two separate indictments. Consequently, no evidence was presented at trial. However, the investigative reports have been made a part of the record and referred to in the briefs. Because Appellant is claiming, in part, ineffective assistance of counsel, we recount herein the results of that investigation and, presumably, what evidence Appellant would have confronted at trial.

On or about March 12, 2005, the first victim, CH, a 13-year-old girl, and SB, her 16-year-old friend, were invited to Simpson's house for a sleep-over with Simpson's daughter. CH and SB were watching a movie with Simpson and his 19-year-old cousin. Simpson served the girls alcohol and provided them with lingerie to wear while they watched the movie. Later, Simpson and

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

CH retired to Simpson's bedroom. There, Simpson pressured CH to pleasure him with her hand and to perform oral sex. According to CH, Simpson set up a camcorder on a tripod and videotaped her performing oral sex. Further, CH stated Simpson inserted his fingers and a vibrator into her vagina. According to CH, Simpson retrieved the vibrator from a night stand near the bed.

CH reported the incident to school officials when she became frightened after seeing Simpson at her school. Police were contacted and during the ensuing investigation, officers recovered the lingerie top Simpson had provided to CH. According to CH, the bottoms had been soaked in blood as a result of the attack, so she had thrown them away. A subsequent medical examination confirmed CH's hymen had an old laceration or tear consistent with her story.

Pursuant to a warrant, officers discovered corroborating evidence during a search of Simpson's house. Those items included a tripod (on the floor by the bed), a camcorder (on the dresser in the bedroom), and several vibrators and lingerie (in a bedroom dresser). Further, officers recovered three videotapes. While none of the videotapes contained images of CH, they did contain images of other minors exposing their breasts and genitalia and performing sexual acts.

While officers were conducting the search, Simpson arrived home. After being advised of his Miranda rights, Simpson signed a waiver of rights form. In addition to confirming CH had spent the night at his home, he admitted to having given her lingerie. Further, Simpson confirmed that he had taken CH to his bedroom, but denied having sex with her. Regarding the videotapes,

Simpson confirmed that he had made them, but contended that the juveniles had asked him to make the videos.

Simpson was indicted by the Nelson County Grand Jury under Indictment No. 06-CR-00165 for the following charges: (1) one count of use of a minor in a sexual performance (with the minor incurring injury);<sup>2</sup> (2) one count of second-degree rape;<sup>3</sup> (3) one count of second-degree sodomy;<sup>4</sup> (4) one count of second-degree sexual abuse;<sup>5</sup> (5) and two counts of third-degree unlawful transaction with a minor.<sup>6</sup>

As a result of a local newspaper reporting the indictment, a second victim came forward. The second victim, TM, told officers that she had babysat for Simpson in June of 1998. She stated that once Simpson's children were in bed, Simpson pressured her to take a bath. TM said that she locked the bathroom door and refused to allow Simpson inside. Once she came out of the bathroom, Simpson massaged her legs. In the guise of continuing the massage, Simpson also rubbed TM's bottom and genitalia. As a result of this disclosure, Simpson was indicted by the Nelson County Grand Jury under Indictment No. 06-CR-00261 for one count of first-degree sexual abuse.<sup>7</sup>

After plea negotiations, the Commonwealth agreed to amend Count One of Indictment No. 06-CR-00165 to reflect "no injury" to the minor, thus reducing the charge from a Class A to a Class B felony. In addition, the Commonwealth agreed to recommend a sentence of ten (10) years each on the

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<sup>2</sup> Kentucky Revised Statute (KRS) 531.310.

<sup>3</sup> KRS 510.050.

<sup>4</sup> KRS 510.080.

<sup>5</sup> KRS 510.120.

<sup>6</sup> KRS 530.070.

<sup>7</sup> KRS 510.110.

counts of second-degree rape and second-degree sodomy. While these 10-year terms were to run consecutively, the Commonwealth agreed the sentences on the remaining counts would run concurrently, for a total of twenty (20) years. Further, the Commonwealth agreed that the five-year sentence imposed under the second indictment would run concurrently with the total sentence imposed under the first indictment. Finally, the Commonwealth agreed not to seek any further charges based on the videotapes discovered in Simpson's home.

Simpson accepted this offer on the condition that he would be allowed to enter an Alford plea. Therefore, on March 2, 2007, Simpson appeared before the Nelson Circuit Court to enter his guilty plea. During the Boykin plea colloquy,<sup>8</sup> Simpson informed the court that he had taken nitroglycerin tablets that day because he was suffering from angina. However, Simpson assured the court that he had taken the medication on previous occasions, that he had taken it only as prescribed, and that his ability to think or act knowingly had not been affected as a result of having taken the medication. Simpson then entered his plea and sentencing was set for May 3, 2007. Prior to sentencing, Simpson filed a motion to withdraw his guilty plea. Following a hearing, the court denied Simpson's motion and sentenced him to a total of twenty (20) years in prison.

Appealing to this Court as a matter of right,<sup>9</sup> Simpson argues the court abused its discretion by denying his motion to withdraw his guilty plea because: (1) he lacked the capacity to voluntarily enter a plea due to his angina

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<sup>8</sup> See Boykin v. Alabama, 395 U.S. 238 (1969).

<sup>9</sup> Kentucky Constitution §110(2)(b).

and the effects of the nitroglycerin; and (2) he received ineffective assistance of counsel.

Simpson raises the following issues for our consideration:

First, Simpson contends his plea could not have been knowingly, intelligently, and voluntarily made because at the time he entered his plea he was experiencing chest pain as a result of angina, and also because he was suffering from the effects of medication he had taken prior to entering his plea. Simpson contends that while he was in this state, his attorney pressured him into entering a guilty plea. Second, Simpson argues his plea was invalid because he received ineffective assistance of counsel. And finally, Simpson argues for the first time in his Reply Brief to this Court that if we find his plea was made voluntarily, we must then conclude that the trial court abused its discretion by not allowing him to withdraw his plea. In support of this argument, Simpson purposes that this Court should adopt the American Bar Association (ABA) standard for granting the withdrawal of a voluntary plea. Each argument will be addressed in turn.

**1. The trial court did not err in rejecting Simpson's claim that his guilty plea was involuntary because of his angina and the medication he had taken.**

In support of his argument that his waiver of rights and subsequent guilty plea are not binding absent proof that this decision was made knowingly, intelligently, and voluntarily, Simpson cites to the case of Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001). In making this determination, Simpson also argues the Court must look beyond his responses to the plea colloquy and consider the totality of the circumstances. See Kotas v.

Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978). Going beyond the colloquy, Simpson argues he was experiencing chest pain as a result of his angina, and that he had taken nitroglycerin tablets to alleviate the pain. Simpson claims that he cannot fully recall the afternoon of March 2, 2007, and that his attorney had to physically hold him up during the proceeding. Simpson also states that he was taken to the hospital by ambulance immediately after leaving the courtroom that day.

Further, Simpson argues one of the tests for determining the validity of a plea is that it be a “voluntary or intelligent choice among the alternative courses of action open to the defendant.” See Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986). In this case, Simpson claims he was unclear as to the extent of negotiations with the Commonwealth. Thus, under the totality of the circumstances, Simpson argues his plea was not knowingly, voluntarily, and intelligently entered and, therefore, the trial court erred in denying his motion to withdraw his plea. See Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002) (If, after an evidentiary hearing the court determines defendant’s plea was not voluntary, the defendant has an absolute right to withdraw it.).

Simpson’s arguments fail to address findings of fact made by the trial court following the hearing on his motion to withdraw his guilty plea. Those findings are based on the evidence presented by both Simpson and his attorney, as well as a captain employed at the Nelson County Jail and the medical records custodian for the jail. The court also relied on the video record of Simpson’s Boykin colloquy.

In rejecting Simpson's claim that he was disoriented throughout the plea colloquy, the court noted that its own visual observation of Simpson during the plea did not reveal any disorientation. The court also noted the video record of the colloquy showed that Simpson accurately provided his personal background, i.e., date of birth, social security number, and education. Further, the record demonstrated that during the proceeding Simpson volunteered additional information, such as the fact that he had received professional counseling after the death of a fellow soldier in Panama in 1989.

Likewise, the court rejected Simpson's claim that he repeatedly asked to go to trial, and that his attorney coerced him into entering a guilty plea. Accepting the testimony of Simpson's attorney, the court found Simpson had not repeatedly asked to go to trial. Further, the court accepted counsel's testimony that Simpson had specifically requested to enter an Alford plea. In addition to counsel's testimony, the video record showed that Simpson was specifically asked by the court if he wished to go to trial or if he wished to waive his rights and enter a guilty plea. The court noted that Simpson's answers indicated his wish to enter an Alford plea.

Regarding Simpson's claim that his attorney had to physically hold him up during the proceeding, the court found that the video record of the colloquy refuted such a claim. The video record demonstrated that from 2:05 p.m. until 2:21 p.m., Simpson stood at the podium alone. From 2:21 p.m. to 2:23 p.m., the videotape shows Simpson's attorney standing by him with his arm behind Simpson's back in a gesture appearing to provide moral support, not



assistance in standing. Based on the video record, the court found Simpson's claim to be an exaggeration.

While acknowledging Simpson was taken to the hospital immediately following his plea, the court found no credible evidence to suggest the plea was not entered knowingly, intelligently, and voluntarily. From the evidence presented, the court found Simpson was returned to the jail at 4:01 p.m. on the same day. In releasing Simpson from the hospital, the court noted that no additional medication had been prescribed. Further, the court noted that the jail records reflected Simpson had been taken to the hospital on previous occasions for symptoms of angina, and in each instance he was released after very short periods of time and returned to the jail with no additional medication having been prescribed. As to the effects of the nitroglycerin, the court relied on Simpson's own assurances during the colloquy that he had taken the medication only as prescribed, and that the medication had not affected his judgment. Thus, the court concluded Simpson had failed to introduce any medical evidence demonstrating that his medical condition on the day of the colloquy had affected the voluntariness of his plea.

While Simpson argues evidence exists to support his contentions, he has failed to demonstrate that no substantial evidence exists to support the court's findings. Further, Simpson has failed to designate for the record the final sentencing hearing which occurred on July 19, 2007. Where the record is silent, we must assume the evidence supports the trial court's findings. See Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

As for resolving conflicts in evidence, the trial court is in the best position to determine credibility and weight. See Bronk, 58 S.W.3d at 487. Further, the trial court is in the best position to judge any reluctance, misunderstanding, involuntariness, or incompetence of the defendant to enter a guilty plea. Id. Under the circumstances presented here, we cannot find an abuse of discretion in the court's conclusion that Simpson failed to demonstrate that his plea was involuntary because of his angina or the nitroglycerin he took on the day he entered his plea. Nor can we find the court abused its discretion by rejecting Simpson's claim that his attorney coerced him into accepting the plea offer.

**2. The trial court did not err in rejecting Simpson's claim that his Alford plea was involuntary because of ineffective assistance of counsel.**

"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." Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998). "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 the issue." Id. at 872-73 (citations omitted). Such is the case here.

Strickland v. Washington, 466 U.S. 668 (1984), sets out a two part test for analyzing claims of ineffective assistance of counsel. This Court adopted the two prong test in Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985). Under the test, as applied to guilty pleas, the claimant must show:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk, 58 S.W.3d at 486-87, citing Sparks, 721 S.W.2d at 727-28; Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990). "Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of 'the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.'" Id. at 487, citing Centers, 799 S.W.2d at 54. The burden on the claimant is heavy and includes overcoming "the presumption that counsel's conduct falls within the acceptable range of reasonable and effective assistance of counsel[.]" Humphrey, 962 S.W.2d at 873.

Simpson offers several assertions in support of his claim of ineffective assistance of counsel. First, Simpson argues his attorney failed to make an independent investigation of the facts. Instead, Simpson contends his attorney relied solely on the summary provided by police. Second, Simpson claims his attorney failed to fully inform him of the charges, the underlying facts, and the defenses available to him. Finally, Simpson contends his attorney failed to fully inform him of the consequences of the proposed plea. Given these circumstances, Simpson claims his attorney was ineffective and, further, but for that performance he would not have entered the plea.

In denying Simpson's motion to withdraw his guilty plea, the court rejected Simpson's contention that his counsel was ineffective. Specifically, the

court found Simpson's attorney had negotiated on Simpson's behalf. On the first indictment, counsel obtained an offer of 20 years in lieu of a penalty range of 20 – 50 years to life in prison. This included the amendment of the first count from a Class A felony to a Class B felony, and the agreement that the Commonwealth would recommend that all other penalties run concurrently. Further, counsel obtained the recommendation that the penalty imposed under the second indictment would run concurrently with the total sentence imposed under the first indictment. Finally, counsel obtained the agreement that no further charges would be brought based on the videotapes found in Simpson's home.

While the court acknowledged Simpson's attorney had not viewed the videotapes, it noted the attorney's testimony that Simpson did not dispute or react negatively to the Commonwealth's claim that the videotapes were incriminating. Although not noted by the trial court, the record also indicates that Simpson confirmed in his statement to police that he had made the videotapes at the request of the juveniles, and that they contained images of juveniles exposing their breasts and genitalia and performing sexual acts. Under these circumstances, Simpson has failed to demonstrate how the failure of counsel to view the videotapes prejudiced his case. Nor has he pointed to any information he provided to his attorney, separate from the videotapes, which should have been pursued. See Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Likewise, we find no merit in Simpson's claim that he was prejudiced by his attorney's failure to inform him of possible defenses. While Simpson relies on this claim, he has made no showing that any possible defenses would have

been available to him. Without a showing of defenses that were available, the facts supporting them, and the likelihood of their success, we find Simpson has failed to demonstrate either prong of the Strickland inquiry. Cf. Hill, 474 U.S. at 59 (“resolution of the ‘prejudice’ inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial”).

Finally, we note, as did the trial court, that Simpson declared in open court that his attorney had informed him of the charges, the facts, and possible defenses. Such declarations “carry a strong presumption of verity.” Blackledge v. Allison, 431 U.S. 63, 74 (1977). Further, the record contains AOC Form 491, signed by Simpson, indicating he had been “fully informed about [his] case[,]” and that he had discussed “the charges and any possible defenses to them” with his attorney. Finally, the court noted that in addition to the testimony of Simpson’s attorney that he had informed Simpson of the consequences of an Alford plea, the colloquy demonstrates that the court also informed Simpson of such consequences. Under these circumstances, we cannot say the trial court abused its discretion by finding Simpson failed to demonstrate ineffective assistance of counsel, and that he was not fully informed of the consequences of entering his guilty plea.

**3. Simpson has failed to demonstrate an abuse of discretion in the court’s decision denying his request to withdraw a voluntary guilty plea.**

Simpson’s final argument, raised in his Reply Brief to this Court, is that the court abused its discretion by failing to allow him to withdraw his guilty plea, even if it was made voluntarily, knowingly, and intelligently. Simpson supports this contention by noting that the motion was made before final

sentencing, was based on fair and just reasons, and would not have substantially prejudiced the Commonwealth. Finally, Simpson proposes that this Court should adopt ABA Standard 14-2.1 concerning the withdrawal of guilty pleas.

In considering this argument, we must reject Simpson's claim that his motion is based on fair and just reasons. According to Simpson, those reasons were: (1) involuntariness due to his medical condition and the effects of the medication; (2) coercion by counsel to accept the offer in light of his medical condition; and (3) ineffective assistance of counsel. As we have rejected each of these contentions, we are left with what Simpson describes as "a sudden change of heart."

Of course, a "change of heart" has never, in and of itself, been sufficient grounds for setting aside a guilty plea. While it is clear that Simpson had a change of heart, we find he has failed to demonstrate an abuse of discretion on the part of the trial court in denying his motion to withdraw a voluntary plea. Simpson's reliance on the ABA standard is misplaced as that is not the law in this Commonwealth. Rather, in Kentucky, the applicable criminal rule states in part that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." See Kentucky Rule of Criminal Procedure (RCr) 8.10. This Court has held that the decision to allow a voluntary plea to be withdrawn lies within the sound discretion of the trial court. See Rodriguez, 87 S.W.3d at 10. See also Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky.App. 2004). Further, "[a] trial court abuses its discretion when it renders a decision which is arbitrary,

unreasonable, unfair, or unsupported by legal principles.” Elkins, 154 S.W.3d at 300, citing Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). As Simpson has failed to show that the trial court’s actions were arbitrary, unreasonable, unfair, or unsupported by legal principles, we cannot find an abuse of discretion.

In conclusion, Simpson has failed to show that the trial court abused its discretion by rejecting his claim that his medical condition, the medication he took for it, or the actions of his attorney support his argument that his Alford plea was involuntary. Nor has Simpson demonstrated ineffective assistance of counsel. For these reasons, we find no error in the trial court’s conclusion that Simpson’s plea was voluntarily, knowingly, and intelligently made. Finally, Simpson has failed to show that the trial court abused its discretion by denying his motion to withdraw his voluntary guilty plea. Accordingly, the judgment of the Nelson Circuit Court is affirmed.

All sitting. All concur.

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