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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 27, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000041-DG

JOSHUA PRIDDY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001935-MR
MCCRACKEN CIRCUIT COURT NO. 07-CR-00679

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Joshua Priddy, appeals from a judgment of the McCracken Circuit Court convicting him of trafficking in a controlled substance, marijuana, within 1000 yards of a school; use/possession of drug paraphernalia, first offense; and first-degree possession of a controlled substance, cocaine, first offense. The Court of Appeals affirmed Appellant's conviction, but we granted discretionary review to examine his complaint that he should have been permitted to withdraw his guilty plea to the charges because he was not given sufficient time to consider the ramifications of his plea, and therefore, his plea was not made voluntarily, knowingly, and intelligently. For the reasons set forth herein, we affirm the Court of Appeals.

Initially, Appellant was indicted on two charges – trafficking in a controlled substance, marijuana, within 1000 yards of a school and use/possession of drug paraphernalia, first offense. However, a superseding indictment later added a count of first-degree possession of a controlled substance, cocaine, first offense. Appellant's counsel and the Commonwealth negotiated a plea agreement to resolve all three charges with a sentence of imprisonment for two and a half years.

When the case came before the trial court for a pre-trial conference, Appellant's counsel announced to the judge that Appellant planned to plead guilty pursuant to the plea agreement. A misunderstanding about the agreement was then discovered. Appellant and his counsel believed that the plea agreement called for Appellant to plead guilty to the marijuana trafficking charge and the drug paraphernalia charge and that the cocaine possession charge would be dismissed. However, the formal plea agreement tendered by the Commonwealth included a guilty plea to the cocaine possession charge, with the sentences for the crimes to run concurrently. Appellant's counsel discussed the agreement with the Commonwealth and then explained to Appellant that, "Instead of dismissing that count [the cocaine charge, the Commonwealth] is simply making those two sentences run concurrent. So it's the same amount of time." An inaudible discussion ensued between Appellant and his counsel for approximately fifteen seconds, after which Appellant accepted the plea agreement by pleading guilty to the marijuana trafficking and drug paraphernalia charges and making an *Alford* plea to the cocaine

possession charge.[1] Appellant's counsel then handed the signed plea agreement to the trial judge and the following colloquy ensued:

> Judge: Do you stipulate to the factual basis of the plea agreement [Appellant's counsel]?
>
> Counsel: Yes, sir.
>
> Judge: Would you raise your right hand, Mr. Priddy?
>
> [Judge administers oath to Appellant and asks him his full name, birthday, address, and level of education]
>
> Judge: Are you at this time under the influence of drugs, alcohol, mental disease, any disease, or other substance impairing your judgment?
>
> Appellant: No, sir.
>
> Judge: Have you conferred with your attorney . . . and are you satisfied as much as you can be with the agreement you reached and the advice you received?
>
> Appellant: Yes, sir.
>
> Judge: Did you read the motion to enter a guilty plea and Commonwealth's offer on a guilty plea and sign those documents?
>
> Appellant: Yes, sir.
>
> Judge: Do you understand the charges against you and acknowledge you did in fact engage in those crimes?
>
> Counsel: Your honor, if I could just interject . . . . Count one is not a problem. We had, Mr. Harris and I, or I had, I guess, a

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[1] Appellant notes that the trial judge was having a private conversation with court personnel while the confusion over the terms of the plea agreement was discussed between the parties. He implies that as a result the trial judge was not paying attention and was unaware that Appellant just learned about the cocaine possession charge not being dismissed. However, as shown below, even if the trial judge was not paying adequate attention to what was occurring in front of him, Appellant's counsel explained the situation to the trial judge during the *Boykin* colloquy. Thus, we find the trial judge was aware of the circumstances surrounding Appellant's guilty plea.

misunderstanding concerning possession of cocaine, I had thought he was going to dismiss that charge, and basically he's doing an *Alford*-type plea on that particular count.

Judge: That's fine with me.

Counsel: I know it is. I just want to make the record clear.

Judge: So based on what your attorney said, do you admit your guilt of those charges?

Appellant: Yes, sir.

Judge: In paragraph five of your motion to enter a guilty plea are your Constitutional rights. Did you go over those with your attorney?

Appellant: Yes, sir.

Judge: Do you have any questions about those you want to ask me?

Appellant: No, sir.

Judge: Do you understand that by pleading guilty you waive those rights including your right to appeal to a higher court?

Appellant: Yes, sir.

Judge: Do you understand that based on your charge you could face a maximum term of up to ten years in prison?

Appellant: Yes, sir.

Judge: And do you understand that in exchange for your pleading guilty the Commonwealth is recommending a sentence of two and a half years?

Appellant: Yes, sir.

Judge: You understand I am not bound by that agreement, but if I don't accept it at sentencing you will be allowed to withdraw your plea and ask for a trial?

Appellant: Yes, sir.

Judge: How do you now plead to trafficking in a controlled substance within a 1000 yards of a school; possession of drug paraphernalia, first offense; and pursuant to *North Carolina v. Alford*, first-degree possession of a controlled substance, cocaine, first-degree?

Appellant: Yes, sir . . . Guilty.

Judge: Is your guilty plea offered freely, willingly, knowingly, voluntarily, and intelligently?

Appellant: Yes, sir.

Judge: [Appellant's counsel] have you discussed with your client his Constitutional rights and gone over the documents with him?

Counsel: I have your honor.

Judge: Do you have any reason why his plea is less than freely, willingly, knowingly, voluntarily, and intelligently offered?

Counsel: No, sir.

Judge: Do you have any cause to believe he suffers from mental illness, is under the influence of drugs, alcohol, any substance or other affliction that is impairing his judgment?

Counsel: No, sir.

After completion of the plea colloquy, the trial judge accepted Appellant's guilty plea and set the matter for sentencing. According to the record, the entire guilty plea hearing lasted about five and a half minutes.

Approximately two weeks later, Appellant made a motion to withdraw his guilty plea per RCr 8.10 for the following reasons:

1. Defense counsel had apparently misunderstood the Commonwealth's Offer and had told defendant that the offer included dismissal of the Possession of Cocaine charge.

2. At the plea recitation, the Commonwealth informed defendant it would not dismiss the Possession of Cocaine charge. Defendant

had approximately 15 seconds to decide to take the deal. Defendant entered an *Alford* plea to this count.

3. Defendant is 19 years old and this is his first experience in Court. He has not completed high school. *While defendant acknowledges that he understood his plea*, defendant lacked sufficient opportunity to consider his actions and further discuss the matter with counsel. Accordingly, defendant's plea was neither knowing nor intelligent nor was it freely made given the situational stress.

(emphasis added).

At the hearing on the motion, Appellant's counsel reiterated the argument presented in the motion and offered to present Appellant's testimony if the court so desired. The trial judge declined the offer and subsequently denied Appellant's motion to withdraw his guilty plea.

At final sentencing Appellant again requested that his guilty plea be withdrawn. The trial court overruled the motion and sentenced Appellant according to the Commonwealth's recommendation.[2] Appellant timely appealed from the final judgment to the Court of Appeals who, in a two to one decision, affirmed the conviction. He then filed a motion for discretionary review with this Court, which we granted.

Appellant's sole argument on appeal is that the trial court should have allowed him to withdraw his guilty plea because he did not make it knowingly, voluntarily, or intelligently. The basis for Appellant's argument is that he did not have sufficient time to consider the ramifications of making an *Alford* plea

[2] The final sentence was as follows: two and a half years for the marijuana trafficking charge; twelve months for the drug paraphernalia charge; and two and a half years for the cocaine charge all to run concurrently, probated for two years subject to various conditions.

to the cocaine possession charge. He further argues that his ability to make a quick decision was hampered by his young age, his lack of high school education, and his unfamiliarity with the court system.

A guilty plea is only valid when it is entered intelligently[3] and voluntarily[4]. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001); *see also North Carolina v. Alford*, 400 U.S. 25 (1970). If a defendant moves to withdraw his guilty plea because it was not made voluntarily, the trial court must hold a hearing and apply a "totality of the circumstances" analysis to the facts surrounding the making of the plea. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). If based on the evidence the trial court finds that the plea was made involuntarily, the motion to withdraw the plea must be granted. *Edmonds*, 189 S.W.3d at 566. On appeal, this determination is reviewed for clear error. *Id.* However, if the plea was found to be made voluntarily, it is within the trial court's discretion to withdraw the plea. *Id.*

A review of the totality of the circumstances surrounding Appellant's guilty plea leads to the conclusion that he made the plea voluntarily, intelligently, and knowingly. The *Boykin*[5] colloquy performed by the trial judge

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[3] A guilty plea is considered intelligently made if the defendant was "advised by competent counsel regarding the consequences of entering a guilty plea, including the constitutional rights that are waived thereby, is informed of the nature of the charge against him, and is competent at the time the plea is entered." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006)(citing *Brady v. U.S.*, 397 U.S. 742, 755 (1970)).

[4] A guilty plea is involuntarily made if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or trial court. *Edmonds*, 189 S.W.3d at 566.

[5] *Boykin v. Alabama*, 395 U.S. 238 (1969)

was adequate and Appellant did not hesitate answering any of the questions asked. Appellant appeared poised. He spoke with no apparent duress, and admitted that his judgment was not impaired by substance or illness. Further, while Appellant argues that he only had fifteen seconds to decide whether to make an *Alford* plea to the possession of cocaine charge, the record indicates otherwise. The trial judge did not impose a time limit for Appellant to make his decision or force him to hurry. Had Appellant wanted to take more time, he certainly could have, as there was no pressure from the judge or the Commonwealth compelling an immediate decision. As Appellant stated in his motion to withdraw the guilty plea he, "*acknowledges that he understood his plea.*"

We must assume that a defendant would ask for more time to think about the agreement if he needed it, or would express to the court any doubts or confusion he may have had. We see on the hearing's video record no indication whatsoever that Appellant had any concerns that affected his comprehension of the plea agreement or that his assent to it was other than voluntary and intelligent. We will not presume a constitutional defect simply because of the brevity of the hearing. Moreover, despite Appellant's effort to rescind his guilty plea to all the charges, his complaint of inadequate time pertains only to the cocaine possession charge. He offers no basis at all for setting aside his plea on the other charges.

There is sufficient evidence in the record to support the trial court's finding that Appellant's guilty plea was made voluntarily and intelligently. We

conclude that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea.

Thus, for the above stated reasons, we affirm the Court of Appeals and Appellant's conviction and sentence.

All sitting. All concur.

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