

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002772-MR

GREG BANNISTER

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 01-CR-00028

COMMONWEALTH OF KENTUCKY and
WILLIAM L. SHADOAN, Ballard
Circuit Court Judge

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. On August 21, 2001, Greg Bannister, the appellant, pled guilty to the crime of cultivating more than five plants of marijuana, second offense (KRS¹ 218A.1423(2)). He appeals from the final judgment and five-year sentence of imprisonment imposed by the Ballard Circuit Court on November 19, 2001. He also appeals the court's order of November 16,

¹ Kentucky Revised Statutes.

2001, which denied his motion to withdraw his guilty plea. We affirm.

On March 9, 2001, Bannister was arrested on an outstanding warrant issued on June 15, 1998. The Ballard County Grand Jury subsequently indicted him on the charge of cultivating marijuana. On July 9, 2001, after serving four months in jail, Bannister was released on bond. His trial was scheduled for August 21, 2001.

The record reflects that some time prior to the trial date, the Commonwealth made him an offer. The terms of the offer provided that the Commonwealth would recommend a one-year sentence in exchange for Bannister's plea of guilty. The record also contains evidence that Bannister may have communicated his desire to accept this offer to his trial counsel. However, the plea bargain was not consummated before the day of trial. On the morning of trial, in chambers, the Commonwealth's attorney stated that he would not agree to a plea bargain unless it left sentencing to the jury. The trial judge stated that he would not allow the parties to enter a plea agreement at that late hour. The judge reminded the attorneys that he required plea agreements to be presented to the court on the motion day prior to trial. He also expressed his concern that jurors had been called in for duty and that they were waiting to hear the case.

He noted that the Commonwealth had gone to considerable expense in bringing in witnesses -- one from out-of-state.

During this pre-trial conference, Bannister's attorney objected to the Commonwealth's proposal to have Bannister sentenced as a subsequent offender. The trial court ruled that the Commonwealth was not required to give advance notice of its intent to enhance Bannister's sentence as a subsequent offender and overruled Bannister's objection. Bannister's attorney did not ask for a continuance or seek any other relief.

After the conference, Bannister and the Commonwealth reached an agreement in which Bannister agreed to plead guilty in exchange for the minimum sentence of five years for cultivating more than five plants of marijuana, subsequent offense. In a rather unusual procedure, the trial court seated a jury, conducted *voir dire*, and undertook a Boykin² colloquy with Bannister and his attorney. The court then instructed the jury to find Bannister guilty and to set his sentence at five years. The jury returned its verdict as instructed. Ten days later, Bannister moved to withdraw his plea and alleged that he had been intoxicated on the day of trial.

The motion to withdraw was continued until the date set for sentencing. At the hearing, Bannister appeared with a friend who had driven him to court on his original trial date.

² Boykin v. Alabama, 395 U.S.238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

They both testified that they had stopped at a liquor store on their way to court. They also stated that Bannister consumed one-half pint of whiskey prior to the proceedings in which he pled guilty. Finding that neither witness was credible, the trial court denied the motion to withdraw the plea. It also found that if Bannister had been impaired by the effects of alcohol, someone -- surely his attorney -- likely would have noticed his condition and would have advised the court accordingly. Next, Bannister was given the opportunity to dispute any matters in the pre-sentence investigation report; he was then sentenced to serve five years in prison. This appeal followed.

Bannister first argues that he was denied due process and fundamental fairness when the trial court refused to enforce the original one-year plea agreement he had negotiated with the Commonwealth. Relying on Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), and Commonwealth v. Reyes, Ky., 764 S.W.2d 62 (1989), he contends that the Commonwealth "welched" on its bargain. He complains that the court acted arbitrarily in refusing to enforce the earlier plea bargain under the pretext that the jury would be inconvenienced while later accepting a plea that provided for a stiffer penalty.

We believe that Bush v. Commonwealth, Ky., 702 S.W.2d 46 (1986), a factually similar case, is relevant precedent in

this matter. In Bush, the trial court rejected an original plea agreement; the defendant and the Commonwealth then reached a new agreement, which provided for a more severe sentence. The court accepted the defendant's plea of guilty and sentenced him according to the terms of the second agreement. Citing Workman, supra, the defendant appealed his sentence and claimed that he was entitled to have the original agreement enforced. Holding that Workman was not dispositive of the matter, the Kentucky Supreme Court ruled as follows:

[Bush] was sentenced exactly in accord with the new plea bargain. His acceptance of the new plea bargain and his entry of a plea of guilty thereon, followed by a sentence in accordance with the terms of the bargain, forecloses [sic] any right to insist upon appeal that the original plea bargain must be enforced.

Id., at 48.

Bannister seeks to distinguish the holding in Bush by arguing that his plea was not voluntary. The Bush court did observe that there was no question as to the voluntariness of the plea ultimately entered. Bannister seizes upon that issue and asserts that his plea was less than voluntary. He bases his claim on two contentions: that his counsel had not prepared for trial and that he was intoxicated at the time he entered his plea.

The alleged lack of preparation of his trial counsel would be raised more appropriately as a predicate for a collateral attack of the judgment pursuant to RCR³ 11.42. Additionally, this claim was not presented to the trial court. Consequently, there is no evidence in the record with respect to the level of trial counsel's preparedness. Preservation is yet another problem.

As to his alleged intoxication, the court already rejected Bannister's claim that he was not competent to make a voluntary plea as a result of a substance-induced impairment. We have reviewed the video recording of the colloquy upon the plea and have found no indication from Bannister's demeanor that he was impaired. We cannot dispute the court's finding that the plea was voluntary. Thus, we will not disturb its denial of the motion to withdraw the guilty plea.

Bannister raises three additional issues. He alleges: (1) that he was denied due process and a fair trial when his sentence was enhanced with a prior possessory offense; (2) that he was denied due process by the denial of his motion for a continuance needed by his attorney to investigate the prior offenses used to enhance his sentence; and (3) that he was denied his right to due process and confrontation when the trial

³ Kentucky Rules of Criminal Procedure.

court conducted the conference in chambers and in his absence prior to trial.

We note that none of these issues was raised in the trial court. Thus, they have not been preserved for our review. Regardless of the preservation problem, however, in entering an unconditional guilty plea, Bannister waived his right to appeal those issues that arose prior to the entry of the plea. Centers v. Commonwealth, Ky.App., 799 S.W.2d 51 (1994).

The judgment of the Ballard Circuit Court is affirmed.

ALL CONCUR.

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