

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000632-MR

JOSEPH A. BEARDEN

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 01-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

EMBERTON, CHIEF JUDGE. Joseph Bearden appeals from a judgment and sentence alleging that the trial court erred when it denied his motion to withdraw his guilty plea. We affirm.

On April 5, 2001, Bearden was indicted on twelve counts of sodomy, first degree. The indictment alleges that between the spring of 1987 and summer of 1991, Bearden engaged in deviate sexual intercourse with his daughter, K.B., who was less than twelve years old. The case was set for trial on

January 14, 2002. On the morning of trial, Bearden entered into a written plea offer on a motion to enter a guilty plea, and in return, all counts were merged into count two of the indictment, which was amended to sodomy, second degree. The Commonwealth recommended a ten year sentence. The circuit court accepted the plea making all the inquiries under Boykin v. Alabama.<sup>1</sup> After accepting the plea, sentencing was scheduled for February 21, 2002.

Between the entry of the plea and date of sentencing, Bearden obtained new legal counsel who, on February 21, 2002, filed a motion to withdraw the guilty plea. After the Commonwealth objected, the trial court held a hearing.<sup>2</sup> Finding there was no new evidence that was not discoverable prior to entry of the plea and no allegation that the entry of the plea was improperly entered, the court denied the motion and sentenced Bearden to ten years' imprisonment.

Bearden admits the trial court followed all the procedural safeguards due under Boykin, supra. Instead, he contends that it was unjust for the trial court to deny his

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<sup>1</sup> 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>2</sup> The videotape of the hearing was not included in the record on appeal but has been subsequently included pursuant to Kentucky Rules of Civil Procedure (CR) 75.08.

motion to withdraw his plea prior to sentencing where there is no prejudice to the Commonwealth. RCr<sup>3</sup> 8.10 provides in part:

At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.

Despite that RCr 8.10 does not contain explicit language referring to justice and fairness, the courts in this Commonwealth have recognized that the rule requires adherence to such standards. As stated in Kennedy v. Commonwealth:<sup>4</sup>

No litany of incantations about whether a plea had been knowingly and voluntarily entered can camouflage the essential spirit of honesty and fair play that RCr 8.10 requires of all the players: the Commonwealth, the criminal accused, and the court.

The trial court is given broad discretion in giving permission for an accused to withdraw a guilty plea.<sup>5</sup> That discretion should not be disturbed unless the reviewing court, after considering all the circumstances, finds that justice and fairness demand that the plea be withdrawn. In Kennedy v. Commonwealth,<sup>6</sup> the court found such circumstances where, after the entry of a negotiated plea, the trial court elected to reject the Commonwealth's recommendation. In this case, the

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

<sup>4</sup> Ky. App., 962 S.W.2d 880, 883 (1997).

<sup>5</sup> Commonwealth v. Corey, Ky., 826 S.W.2d 319 (1992).

<sup>6</sup> Ky. App., 962 S.W.2d 880 (1997).

trial court accepted the prosecutor's recommendation and sentenced Bearden to ten years' imprisonment.

The federal courts have adopted a series of six factors when considering a motion withdrawing a guilty plea:

(1) the length of time between the guilty plea and the filing of the motion to withdraw, (2) the defendant's reason for not presenting the grounds earlier, (3) whether the defendant had asserted or maintained his innocence, (4) the circumstances surrounding the plea, the nature and background of the defendant and whether the defendant has admitted guilt, . . . (5) any potential prejudice to the government . . . [and] the defendant's prior experience with the criminal justice system as a sixth factor.<sup>7</sup> (Citation omitted).

While the factors listed are useful to a court, we do not believe, as suggested by Bearden, that the trial court is required to make specific findings regarding each factor. The decision rests in the discretion of the trial court and must be reviewed under the totality of the circumstances.<sup>8</sup>

Bearden was informed of his rights, represented by counsel, and was not threatened or coerced into entering his plea. Although after entry of the plea Bearden obtained new counsel and now professes his innocence, there is nothing either unfair or unjust about the trial court's refusal to permit the withdrawal of the guilty plea.

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<sup>7</sup> United States v. Durham, 178 F.3d 796, 798 (6<sup>th</sup> Cir. Ky. 1999).

<sup>8</sup> Bronk v. Commonwealth, Ky., 58 S.W.3d 482 (2001).

The order of the trial court is affirmed.

ALL CONCUR.

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