

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000956-MR

MARK STEVEN BYRD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 01-CR-01275

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant Mark Steven Byrd brings this appeal from his conviction in the Fayette Circuit Court for trafficking in a controlled substance in the first degree and being a persistent felony offender in the second degree. In the trial court, appellant announced his intention to enter a conditional guilty plea. The Commonwealth argues against review on appeal on the ground that appellant did not preserve issues as necessary under RCr 8.09.

RCr 8.09 states that, with the court's approval, "a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." In this case, there is a written "Judgment on Conditional Guilty Plea" in the record. Other than this writing, however, appellant did not give written notice of the issues he was raising on appeal or specify the pretrial motions being appealed. When appellant stated his intention to enter a conditional plea at his plea proceeding, he did not state the issue or issues he was reserving. In addition, defense counsel stated at sentencing that the plea was conditional, but only stated that appellant intended to "appeal the ruling that the court made."

Appellant asserts that he has preserved this issue sufficiently according to Gabbard v. Commonwealth, Ky., 887 S.W.2d 547 (1994). In Gabbard, the Commonwealth had argued that the defendant had not preserved issues for appeal on a conditional guilty plea because the specific issues for review were not set forth and the court had not ruled on some defense motions. Id. at 550. The defendant had, however, verbally set forth what the issues were during his sentencing hearing. Id. The Court found that this showed the trial court and Commonwealth were aware of what issues were being appealed. The

court stated it was "inartfully done," but the defendant managed to preserve issues for appellate review by the conditional plea proceedings. Id.

Turning to the record before us, we do not find the same identification of issues as in Gabbard. It is not clear from the record that the parties and the court were in agreement as to what was being appealed. In the case at bar, appellant raised two separate issues in the trial court before he entered his plea. At the sentencing hearing, defense counsel did not indicate appellant was appealing more than a single "ruling." In his brief on appeal, appellant raises two issues. We do not think it would be fair or efficient for this court to simply assume that appellant wanted to appeal all of his issues below. The Rule requires issues be specified so as to avoid the necessity of a wholesale review of everything that has occurred in the trial court, and to favor addressing only those issues that the defendant deemed worthy of appealing.

We decline to review appellant's arguments on appeal because of his failure to preserve specific issues with his conditional guilty plea. Appellant's convictions for trafficking in a controlled substance in the first degree and being a persistent felony offender in the second degree are affirmed.

GUIDUGLI, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING BY SEPARATE OPINION. I

concur with the majority opinion that the judgment of the circuit court should be affirmed. However, I do so for a different reason. I respectfully disagree with the portion of the majority opinion which holds that the appellant did not satisfactorily preserve any issue for appeal pursuant to his conditional guilty plea. However, I agree that the judgment should be affirmed because the trial court did not err in denying the suppression motion and did not err in refusing to order the Commonwealth to disclose the identity of the informant.

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