

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001101-MR

JOYCE NELSON HENDERSON

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Joyce Henderson has appealed from a judgment of conviction and sentence entered by the McCracken Circuit Court on May 2, 2002, convicting her of theft by deception over \$300.00¹ for failing to report income increases to the Paducah Housing Authority. Having concluded that the circuit court did not err by refusing to accept her guilty plea to a lesser offense and by denying her motion for a directed verdict of acquittal, we affirm.

¹ Kentucky Revised Statutes (KRS) 514.040.

In 1998 Henderson began living in federally-subsidized housing managed by the Paducah Housing Authority. The amount of rent paid by tenants of the Housing Authority was adjusted according to their income, and tenants were required to report any changes in their income within ten days to the property manager. In addition, a recertification of each tenant's eligibility and rent level was conducted annually. This case arose from Henderson's failure, during the period from August 1999 to September 2000, to notify the Housing Authority of increases in her income resulting from her qualifying as a teacher and gaining employment in that field. The Housing Authority initiated a civil action against Henderson to recover the unpaid rent, and it was awarded a partial default judgment of \$3,033.00. On February 16, 2001, Henderson was also indicted for the felony of theft by deception over \$300.00. The indictment alleged that Henderson took benefits or property from the Paducah Housing Authority and the United States Department of Housing and Urban Development (HUD) by issuing false financial statements or failing to correct financial statements issued to the Paducah Housing Authority and HUD.

Following the indictment, Henderson accepted a plea offer made by the Commonwealth, consisting of a reduction of the

charge to the misdemeanor of theft by deception under \$300.00,² a restitution payment of \$4,236.00, and a recommendation of a 12-month sentence. However, the circuit court refused to accept the guilty plea and recommended sentence. In response to questioning by the trial court, Henderson stated that she understood the plea agreement and that she had knowingly entered into it. When the trial court asked her whether she had issued a false statement or had failed to correct existing records regarding her income as the indictment alleged, she did not answer immediately and the trial court warned her that even under the plea agreement, it was possible that she would have to serve 12 months in jail. Henderson then stated that she "pled to it to have it over with." She explained that she had in fact sent notices of her increases in income to the Paducah Housing Authority, but that she could not prove it because she had not sent them by certified mail or confirmed their receipt in any other manner. Her defense counsel interjected that Henderson had already lost a civil judgment "on the same facts" and that Henderson had "failed to report" the required information. Defense counsel also stated that it had been Henderson's responsibility to ensure that the authorities received the information. The trial court responded that it "did not want her pleading guilty if she didn't do it." The Commonwealth's

² See KRS 514.040(8).

Attorney then stated that if Henderson did not do it, he wanted her to have a trial, but stressed that "there's nothing subtle about this," and that the Commonwealth would show proof of actual deception. He acknowledged that if Henderson had put the information in the mail, there could be no deception, and he repeated that the Commonwealth did not want her entering into the plea agreement if she was innocent. The trial court explained that it could not accept Henderson's guilty plea because "there had to be an admission of a violation [of the statute]." The Commonwealth's Attorney then stated that the plea bargain only included a reduction in the charge from a felony to a misdemeanor because of Henderson's age and lack of criminal record, but that there was no question that she had committed the offense. The trial court then stated that if Henderson had mailed the notices as she claimed, "no crime had been committed" and it suggested that after further investigation, the Commonwealth might discover that what Henderson was saying was true and the issue might be "resolved" in that way.

Henderson was tried by a jury and she was convicted of the felony of theft by deception over \$300.00. She was sentenced to serve 12 months in jail and to pay restitution.

Neither Henderson nor her counsel objected at any time to the trial court's refusal to accept her guilty plea.

Henderson urges us, nonetheless, to review the question pursuant to RCr³ 10.26.⁴ "RCr 10.26 provides that an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice.

Palpable error affects the substantial rights of a party and, under Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996), relief will only be granted if the reviewing court concludes 'that a substantial possibility exists that the result would have been different' absent the error."⁵ Although there is no constitutional right to plead guilty,⁶ if the trial court did err in refusing Henderson's guilty plea, the error had a substantial effect on the result of her case in that she was convicted of a felony rather than a misdemeanor. Accordingly, we will review her claim.

Henderson maintains that by refusing to accept her guilty plea, unless she admitted to committing the offense, the trial court abused its discretion by demonstrating that it would never accept a plea pursuant to Alford, where a defendant

³ Kentucky Rules of Criminal Procedure.

⁴ RCr 10.26 states: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by a appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

⁵ Butcher v. Commonwealth, Ky., 96 S.W.3d 11 (2002).

⁶ See North Carolina v. Alford, 400 U.S. 25, 38 n.11, 91 S.Ct. 160, 168, 27 L.Ed.2d 162, 172 (1970).

declines to acknowledge guilt, but admits that the Commonwealth can present strong evidence of guilt.⁷

Contrary to Henderson's claim on appeal, there is no indication whatsoever in the record that Henderson's plea was offered pursuant to the principles of Alford. The plea agreement was never characterized as an Alford plea to the trial court, and the Commonwealth certainly did not see the agreement in that light since it reiterated during the course of the proceedings that the plea should not be accepted if Henderson was in fact innocent. Similarly, Henderson's counsel never attempted to present the plea as an Alford plea, either through explicitly mentioning Alford or by stating that her client wished to plead guilty while maintaining her innocence. Indeed, defense counsel appeared not to expect her client's assertion that she had mailed the income notices. It was certainly not up to the trial court to suggest that the plea agreement be recast as an Alford plea. Indeed, had the trial court sua sponte decided to deem this an Alford plea, its action could well have constituted an impermissible interference in the plea bargaining process.⁸

The responsibility to specify that the plea agreement was being made pursuant to Alford rested with the Commonwealth,

⁷ Toppass v. Commonwealth, Ky.App., 80 S.W.3d 795, 796 (2002).

⁸ See Commonwealth v. Corey, Ky., 826 S.W.2d 319, 320-21 (1992).

the defendant and defendant's counsel. In discussing the 1989 amendments to RCr 8.10, which governs the withdrawal of guilty pleas, the Supreme Court of Kentucky stated that "it was not our intention to introduce trial judges into the plea bargaining process and supplant the role of the Commonwealth and the defendant in making the tentative agreement."⁹ Although a defendant has an absolute right to offer an Alford plea to the court, "if the guilty plea has strings attached which limit the sentence which may be imposed by virtue of it, the Commonwealth must be a party to the agreement."¹⁰ Consequently, we will not address the question posed by Henderson of whether an outright refusal on the part of a trial court to accept an Alford plea under any circumstances constitutes an abuse of discretion because that was not the factual situation in this case.

RCr 8.08 vests a very broad measure of discretion in the trial court in determining whether to accept a guilty plea. It provides as follows:

A defendant may plead not guilty, guilty or guilty but mentally ill. The court may refuse to accept a plea of guilty or guilty but mentally ill, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or guilty but mentally ill or if a defendant corporation

⁹ Id. at 321.

¹⁰ Id.

fails to appear, the court shall enter a plea of not guilty.

As Henderson acknowledges, there is "no requirement, constitutional or otherwise, that the court accept a guilty plea."¹¹ Furthermore, "[t]he discretion of the trial court exists whether the proposed guilty plea is offered with or without consideration in the form of a plea agreement."¹²

"Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision."¹³ A plea of guilty involves the waiver of several fundamental constitutional rights including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers.¹⁴ In view of the importance of the rights being abandoned, to be valid the plea must be knowing, intelligent and voluntary.¹⁵ Through its questioning of Henderson, the trial court was properly trying to ensure that her guilty plea met this standard. Henderson's assertion that she had accepted the plea agreement "to get it over with" and her insistence that she had

¹¹ Keller v. Commonwealth, Ky.App., 719 S.W.2d 5, 7 (1986).

¹² Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 294 (1993).

¹³ Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994) (quoting Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945)).

¹⁴ Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990).

¹⁵ Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

mailed notification of her income increases to the Housing Authority may well have appeared to the trial court to demonstrate that she did not fully understand the implications of her guilty plea. While "[a] guilty plea is a judicial admission to the underlying requisites of the charge[.]"¹⁶ Henderson steadfastly refused to admit to deception, the fundamental requisite of the charge against her. In light of these circumstances, we cannot conclude that the trial court was arbitrary, capricious, unreasonable or unfair in exercising its discretion to refuse Henderson's guilty plea.

Henderson's second argument concerns the trial court's denial of her motion for a directed verdict of acquittal. At the close of the Commonwealth's case, Henderson argued that the prosecution had failed to provide sufficient evidence to prove the elements of theft by deception pursuant to KRS 514.040. Defense counsel failed, however, to renew the motion at the close of all the evidence.

It is black-letter law that, in order to preserve an insufficiency-of-the-evidence allegation for appellate review, "[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence[.]" In other words, a motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence - i.e., after the defense

¹⁶ Toppass, 799 S.W.2d at 589.

presents its evidence (if it does so) or after the Commonwealth's rebuttal evidence - is insufficient to preserve an error based upon insufficiency of the evidence¹⁷ [footnotes omitted].

Therefore, this claim was not properly preserved for appeal and must also be reviewed, if at all, under the RCr 10.26 palpable error standard. We will examine the merits of Henderson's claim because her constitutional rights were implicated. The burden is on the Commonwealth to prove every element of the charged offense beyond a reasonable doubt, and if the trial court did in fact err by failing to direct a verdict of acquittal the result would have been substantially different.¹⁸ On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal.¹⁹

The essence of Henderson's claim is that the Commonwealth offered no proof that she intended to deceive the Paducah Housing Authority or to deprive it of property or services to which she was not entitled.

KRS 514.040 states as follows:

(1) A person is guilty of theft by deception when the person obtains property or services

¹⁷ Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003).

¹⁸ Id. at 837.

¹⁹ See Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

- (a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;
- (b) Prevents another from acquiring information which would affect judgment of a transaction;
- (c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship

Henderson points to the fact that no witness testified as to her intent to issue false financial information, that there was inconsistency in the testimony of the Commonwealth's witnesses regarding the amounts and time periods of the alleged deficiencies in her rent, that there was no testimony that the Paducah Housing Authority had relied on her failure to report her changes in income and that it was the duty of the Housing Authority to determine by independent means the accuracy of the information it was using to calculate rents. Henderson also claims that the Paducah Housing Authority failed to follow HUD criteria for rent calculation, and that this confusion led to her criminal prosecution rather than to the administrative procedures to which she was entitled under federal law. Finally, Henderson maintains that in order to establish theft by

deception, it must be shown that a defendant obtained something to which she was not entitled. Henderson argues that she was qualified for the subsidized housing under the criteria established by HUD and by the subsequent annual verifications performed by the property manager and that no proof was offered that she obtained a benefit to which she was not entitled.

Although it is true that no testimony was provided at the trial as to what went on in Henderson's mind, a reasonable juror could infer that her pattern of behavior showed a criminal intent to hide income from the Paducah Housing Authority. It is a well-established principle of Kentucky law that "the fact-finder has wide latitude in inferring intent from evidence of the defendant's conduct and knowledge, and/or the surrounding circumstances."²⁰

Evidence was offered at trial, through the testimony of the property manager and the director of leasing of the Paducah Housing Authority, that Henderson had been made aware that she was legally required to notify the Housing Authority about changes in her income, and that she had signed a form to that effect. Testimony at the trial also indicated that Henderson had in fact reported changes in her income on previous occasions, which had resulted in corresponding reductions and

²⁰ Marshall v. Commonwealth, Ky., 60 S.W.3d 513, 518 (2001); see also Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988).

increases in her rent. This constitutes sufficient evidence for a juror to reasonably infer that Henderson was familiar with the reporting system, and that she had intended to deceive the Housing Authority when she failed to report the income she received from her teaching positions. Evidence was also presented which confirmed that Henderson had been employed in teaching positions at three different institutions.²¹

Testimony also showed that the Housing Authority relied on the information Henderson provided in calculating her rent and that by not reporting her increases in income, Henderson caused it to rely on information that was outdated and incorrect. Furthermore, it was not shown to be the duty of the Housing Authority continuously to investigate every tenant to ensure that they were reporting their income changes. Any inconsistencies in the testimony of the Commonwealth's witnesses regarding the amounts of rent Henderson owed and the periods for which it was owed were minor enough that a juror need not have given them weight in determining the ultimate question of guilt or innocence; and sufficient evidence was offered in the property manager's testimony to support the jurors' determination of the amount of restitution.

²¹ For example, the bookkeeper for a Charleston, Missouri, school district testified that Henderson was employed as a business teacher there at a salary of over \$24,000 per year beginning in August 1999.

Henderson's argument that she was entitled to the housing and therefore derived no benefit from failing to report her increases in income is totally without merit. Clearly, the benefit she was receiving was the opportunity to live in housing at a rent level to which she was not entitled.

Finally, in regard to Henderson's claim that her failure to report her income increases should have been addressed in a federal administrative hearing rather than in state court criminal proceedings, we note that a document issued by HUD and signed by Henderson was entered into evidence which explained the federal penalties for committing fraud by giving false or incomplete information and also clearly stated that "[y]our State and local governments may have other laws and penalties as well [for committing fraud]."

Based on the evidence taken as a whole, it was not clearly unreasonable for the jury to find that the Commonwealth met its burden of proving the elements of intent and reliance and therefore the trial court did not err when it denied Henderson's motion for a directed verdict of acquittal.²²

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

²² Benham, 816 S.W.2d at 187.

BRIEF FOR APPELLANT:

Londa J. Adkins
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky