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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001251-MR

JEFFREY MCCLAIN

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 01-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: After Jeffrey McClain entered an *Alford* plea to felony charges, he filed a motion to withdraw his guilty plea with the Mason Circuit Court. Because the totality of the circumstances surrounding the guilty plea indicate that McClain voluntarily and intelligently waived his constitutional rights, we hold that the trial court did not abuse its discretion in denying McClain's motion to set aside the guilty plea.

On March 5, 2001, a confidential informant for the Maysville Police Department bought crack cocaine from a drug dealer in a controlled drug buy. The confidential informant wore a recording device and the police recorded the transaction. The confidential informant identified the drug dealer as McClain. On June 29, 2001, the Maysville police arrested McClain on the charge of trafficking in a controlled substance. During the arrest, the police found marijuana, crack cocaine, a crack pipe, and rolling papers on McClain's person. A Mason County grand jury subsequently indicted McClain for possession of a controlled substance in the first degree, second or subsequent offense; possession of marijuana; possession of drug paraphernalia; trafficking in a controlled substance in the first degree, second or subsequent offense; and persistent felony offender in the first degree ("PFO I").

On August 10, 2001, the Commonwealth offered to McClain that if he pled guilty then the commonwealth would dismiss the PFO I charge and recommend a total of twelve years. On November 21, 2001, McClain's public defender filed a motion to enter a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). That same day, McClain appeared in Mason Circuit Court to enter the *Alford* plea. But McClain insisted on proceeding to trial, which was scheduled for

the following Monday. McClain was removed from the courtroom but in short order he was brought back for a second hearing.

During the second plea hearing, McClain asked the trial court several questions. He asked the trial court about the possibility of severing the trafficking charge from the rest of the charges. He asked if it were possible for him to plead guilty to the possession charges but not the trafficking charge. The trial court stated that charges could be severed for good cause but that it would not sever McClain's charges. The trial court also told McClain that if he went to trial he could plead guilty to any count contained in the indictment but he would be tried on any remaining charges. McClain asked that if he were to do that would he still receive twelve years. The trial court responded that he would be sentenced by the jury and he would receive whatever the jury decided. At this point, McClain told the court to "[p]roceed." McClain entered an *Alford* plea, which has the same effect as a guilty plea.

After pleading but before sentencing, McClain filed a motion to withdraw his guilty plea. He claimed that his public defender had coerced him. Because of the alleged coercion, McClain received the representation of conflict counsel for McClain, and the trial court held a hearing to consider McClain's allegations. After finding that McClain had knowingly

and voluntarily pled guilty, the trial court denied his motion to withdraw his guilty plea. This appeal followed.

Under RCr 8.10, "[a]t any time before judgment, the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." In the recent case of *Rigdon v. Commonwealth*, Ky. App., 144 S.W.3d 283, 287-88 (2004), we had the opportunity to address the withdrawal of a guilty plea:

When a criminal defendant pleads guilty, Rule 8.10 of the Kentucky Rules of Criminal Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires "a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered." The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard. A trial court abuses its discretion when it renders a decision which is

arbitrary, unreasonable, unfair, or unsupported by legal principles.

(footnotes and citations omitted).

After McClain filed his motion to withdraw his guilty plea, the trial court conducted a hearing, at which McClain had an opportunity to testify. Essentially, his claim was that his counsel coerced him into pleading guilty through a promise that he "would be home by Thanksgiving." However, during the plea colloquy, the trial court thoroughly questioned McClain to determine if he were truly pleading guilty knowingly and voluntarily. The trial court specifically asked if anyone forced McClain to plead or promised him anything in exchange for his plea. The trial court asked if McClain understood the consequences of pleading guilty. The trial court thoroughly explained McClain's constitutional rights to him and asked if he understood them. McClain answered all the trial court's questions and demonstrated that he understood the charges against him; understood his constitutional rights; and understood the consequences if he pled guilty. The trial court answered all of McClain's questions and explained to him that he did not have to plead guilty. The trial court explained that the decision to plead belong exclusively to McClain. Furthermore, the trial court and McClain discussed the McClain's options of pleading guilty or going to trial the following week, and the consequences of that decision.

From the totality of the circumstances surrounding the entry of the guilty plea, McClain clearly entered the guilty plea voluntarily. The trial court's actions in denying McClain's motion were neither arbitrary nor capricious, and it did not abuse its discretion when it denied McClain's motion to withdraw his guilty plea.

The judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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