

RENDERED: July 16, 2004, 2:00 p.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2003-CA-000581-MR  
AND  
NO. 2003-CA-000582-MR  
AND  
NO. 2003-CA-000583-MR

JOEY WALKER

APPELLANT

v. APPEALS FROM McCracken Circuit Court  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 99-CR-000181

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE. Joey Walker appeals pro se from an order of the McCracken Circuit Court, denying his motion to vacate judgment and sentence pursuant to RCr 11.42 and for an evidentiary hearing.

Walker was indicted in August 1999 for possession of a handgun by a convicted felon. In March 2000, he was indicted

for first-degree possession of a controlled substance, theft by deception over \$300, complicity to second-degree criminal possession of a forged instrument and five counts of theft by deception under \$300.

In consideration for Walker's plea of guilty, the Commonwealth offered to amend one of his felony charges to a misdemeanor and to recommend a total sentence of six years on all the charges. On May 30, 2000, Walker, represented by counsel Carolyn Keeley, entered a plea of guilty in McCracken Circuit Court. At Walker's sentencing hearing, held two months later, he was represented by a different attorney, LaMer Kyle-Reno. Walker attempted to withdraw his guilty plea at the hearing, on the grounds that Keeley had "talked him into the gun charge." The circuit court refused to allow him to withdraw his plea and sentenced him to serve six years in accordance with the plea agreement.

On December 16, 2002, Walker filed a motion to vacate and set aside judgment and sentence pursuant to RCr 11.42. The Commonwealth filed a response. The motion was denied without a hearing by the circuit court on January 24, 2003. This appeal followed.

Walker has presented three arguments: first, that the circuit court abused its discretion when it denied his request to withdraw his guilty plea; second, he was denied due process

when the prosecutor, Christopher B. Hollowell, was allowed to respond to the RCr 11.42 motion after he had been disqualified from prosecuting the case; and third, the circuit court erred in failing to grant him an evidentiary hearing.

In Walker's original RCr 11.42 motion, he alleged that under the terms of the plea agreement as it was represented to him by his first attorney, Carolyn Keeley, he was offered a sentence of six years' imprisonment with the possibility of probation. Keeley was thereafter replaced by LaMer Kyle-Reno, who allegedly informed Walker that the possibility of probation was no longer part of the plea offer. He claims that he then tried unsuccessfully to persuade Kyle-Reno to file a motion to withdraw his guilty plea, and finally attempted to do so himself at the sentencing hearing.

On appeal, however, Walker makes a different argument regarding his guilty plea. He claims that he was coerced into making the plea by the threat that he could serve a maximum sentence of sixty years if a jury found him guilty on all counts of the indictments.

The Commonwealth has argued that Walker's appeal of the latter issue is procedurally barred because he failed to raise it in his original RCr 11.42 motion. We agree. It is well settled that an appellant may not raise on an RCr 11.42

appeal an issue that was not presented to the trial court in the original motion or through amended pleadings.<sup>1</sup>

As to Walker's original argument regarding the promise of probation, he admitted in the RCr 11.42 motion that Keeley had told him there was only a **possibility** that he would be granted probation. The granting of probation is a matter entirely within the discretion of the trial judge.<sup>2</sup> Furthermore, Walker signed the Commonwealth's offer on a plea of guilty which plainly stated that the Commonwealth would recommend a sentence of six years and made absolutely no mention of probation. Keeley's comment that there was a possibility of probation was accurate and cannot be said to constitute coercion or a misrepresentation of the terms of the plea offer.

As to the broader question of whether he should have been allowed to withdraw his guilty plea, Walker relies on RCr 8.10, which provides in relevant part as follows: "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." (Emphasis added.)

We note that the circuit court conducted a thorough colloquy with Walker prior to accepting his plea, informing him

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<sup>1</sup> See Angelo v. Commonwealth, Ky., 451 S.W.2d 646, 647 (1970); Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 419 (2002).

<sup>2</sup> See Turner v. Commonwealth, Ky., 914 S.W.2d 343 (1996); Aviles v. Commonwealth, Ky. App., 17 S.W.3d 534, 536 -537 (2000).

of his rights and of the consequences of a guilty plea. Walker stated that he understood the effects of such a plea, and also signed the "motion to enter guilty plea" form stating that he understood the proceedings.

Our case law is clear that the discretion to deny a motion to withdraw a guilty plea exists only after a determination has been made that the plea was *voluntary*. If the plea was *involuntary*, the motion to withdraw it must be granted.<sup>3</sup>

Therefore, it was well within the court's discretion to refuse to allow him to withdraw a plea that had been made voluntarily.

Walker has cited in support of his claim the case of Kennedy v. Commonwealth,<sup>4</sup> which held that when a trial court chooses to reject a plea agreement it must inform the defendant of its decision and allow him to withdraw the guilty plea if he so chooses. He asserts that he had an absolute right to withdraw his guilty plea in the event that the trial court failed to sentence him in accordance with the plea agreement. The sentence imposed, however, was fully in accordance with the terms of the plea agreement signed by Walker himself. Therefore, the circuit court did not abuse its discretion nor was Walker improperly denied his right to a trial by jury.

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<sup>3</sup> Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8, 10 (2002).

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

Walker next asserts that he was deprived of process of law, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two, Seven, and Eleven of the Kentucky Constitution when the circuit court permitted Christopher B. Hollowell, an assistant commonwealth's attorney, to file a response to his RCr 11.42 motion.

Walker asserts that Hollowell's response to his RCr 11.42 motion erroneously led the court to believe that Walker was only moving to vacate the judgment and sentence because the court had failed to grant him probation, and that the response also erroneously informed the court that Walker had been facing a twenty year sentence when in fact he had been threatened with a sentence of sixty years. Walker also claims that Hollowell is married to someone related to Walker and that on these grounds the court previously had agreed to disqualify Hollowell from prosecuting this case.

In regard to the claim that Hollowell in some way misled the court into believing that Walker was only challenging the judgment because he had not been granted probation, we note that this is precisely the argument Walker made in his RCr 11.42 motion. His argument that he was coerced into making the guilty plea by the prospect of a sixty year sentence was only raised by him in the present appeal. Furthermore, Hollowell's statement in the response, that Walker could have faced a sentence of

twenty years had he chosen to go to trial, was entirely accurate. As to Hollowell's alleged disqualification on the grounds of his relationship to Walker, there is no evidence in the record of any such action by the court, nor has Walker explained how the relationship prejudiced (or could have prejudiced) his case in any way.

Finally, Walker argues that the circuit court erred in failing to grant an evidentiary hearing on his RCr 11.42 motion. A hearing is required for an RCr 11.42 motion if there exists a material fact that cannot be conclusively resolved by an examination of the record.<sup>5</sup> The evidence in the record indicates that Walker's guilty plea was voluntary, and it also indicates that the Commonwealth's offer on a plea of guilty that Walker signed did not mention probation, properly so because it is a matter within the sole discretion of the circuit court. The record refutes Walker's arguments and a hearing was therefore not required.

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

ALL CONCUR.

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<sup>5</sup> Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 457-58 (2001).

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