

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000856-MR

ROBERT EBACH

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 02-CR-00043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Roger Ebach appeals from a judgment of the Monroe Circuit Court sentencing him to seven years in prison. He argues that the court erred in denying his motion to withdraw his guilty plea. We affirm.

Ebach was indicted by a Monroe Circuit Court grand jury on a charge of first-degree assault for allegedly cutting Brian Whitlow multiple times with a box cutter. Ebach entered an Alford plea of guilty to a charge of second-degree assault pursuant to a plea agreement with the Commonwealth. When he

appeared for sentencing, he moved the court to be allowed to withdraw his guilty plea. In support of his motion, Ebach stated that the victim had "allegedly" contacted Ebach's wife that morning and had asked her why Ebach was pleading guilty because he, not Ebach, had initiated the fight which led to the cutting. The court denied the motion and sentenced Ebach to seven years in prison pursuant to the plea agreement.

RCr<sup>1</sup> 8.10 provides in relevant part that "[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." "[T]he permission to withdraw a guilty plea and substitute a plea of not guilty is a matter within the sound discretion of the trial court." Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974), citing Hurt v. Commonwealth, Ky., 333 S.W.2d 951 (1960). Ebach argues that the court abused its discretion in refusing to allow him to withdraw his guilty plea in light of the "newly discovered evidence."

In response to Ebach's argument, the Commonwealth argues that "newly discovered evidence must be of such decisive value or force that the defendant would not have entered a plea of guilty had he had access to the evidence." In support of that argument, the Commonwealth cites Foley v. Commonwealth, Ky., 55 S.W.3d 809, 814-15 (2000). However, the Commonwealth

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

fails to note that the Foley case dealt with the denial of a motion for a new trial rather than a motion to withdraw a guilty plea.

Nevertheless, we conclude that the circuit court did not abuse its discretion in denying Ebach's motion to withdraw his guilty plea. First, the court noted that the guilty plea was voluntary and that Ebach had acknowledged that there was sufficient evidence to convict him of second-degree assault. Second, we fail to see where there was a compelling reason to require the court to allow the plea to be withdrawn.

Ebach did not produce either the victim in person or an affidavit from the victim to support his motion. In fact, according to Ebach's brief, the victim "allegedly" made the statement. There is no indication that the statement was positively made. Further, even if the victim had made the statement, such statement was likely merely impeaching of an earlier statement. Also, even if the victim instigated the fight, that fact would not necessarily be a defense to the charge of second-degree assault. In short, we see no abuse of discretion by the trial court in its denial of Ebach's motion.

The judgment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

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