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**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-000966-MR

KENNETH HUNT

APPELLANT

APPEAL FROM GREENUP CIRCUIT COURT  
v. HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NOS. 98-CR-00116; 98-CR-00133; AND 98-CR-00183

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Kenneth Hunt (Hunt) brings this appeal from an April 21, 2003, order of the Greenup Circuit Court. We affirm.

Hunt was indicted in 1998 by the Greenup County Grand Jury upon charges of trafficking within 1000 yards of a school (98-CR-00116); and upon trafficking within 1000 yards of a school, possession of a hand gun by a convicted felon, unlawful possession of a police radio, possession of marijuana, and

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 10(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

first-degree persistent felony offender (98-CR-00133); and escape in the second degree (98-CR-00183). He was arraigned on all charges, and entered into a plea agreement with the Commonwealth. Pursuant to the agreement, Hunt pled guilty on all of the above charges in exchange for the Commonwealth's recommended sentence of six years' imprisonment and dismissal of the persistent felony offender charge.

On August 15, 2002, a motion to enter guilty plea was filed with the Greenup County Circuit Court. The court accepted the plea agreement, and Hunt was sentenced to a concurrent term of six years on all charges. At the time he was sentenced, Hunt was incarcerated at the Kentucky Men's Reformatory, serving sentences for unrelated crimes in Action Nos. 89-CR-00070 and 92-CR-00039. However, neither the plea agreement nor the court's judgment indicated whether Hunt's six-year sentence was to run concurrently or consecutively with the term of imprisonment he was already serving.

Thereafter, the Commonwealth filed a motion to clarify the sentence. Specifically, the Commonwealth requested the court elucidate the sentence as to the charge for escape second degree. The Commonwealth agreed the sentences for the charges contained in the plea agreement should run concurrently. However, the Commonwealth argued the sentence for second-degree escape must run consecutively with the sentence Hunt was already

serving. In support thereof, the Commonwealth cited Kentucky Revised Statute (KRS) 532.110(3).<sup>2</sup>

On December 12, 2002, the court entered an order amending judgment and final sentence. The court held that Hunt's sentence must run consecutively with the sentence he was serving as the time of escape. Accordingly, Hunt was re-sentenced on April 21, 2003, to six years' imprisonment to run consecutively with the sentence he was already serving. This appeal follows.

Hunt first argues the circuit court erred by "setting aside" the plea agreement and re-sentencing him. We disagree.

In Skiles v. Commonwealth, 757 S.W.2d 212 (Ky.App. 1988), appellant pled guilty to trafficking in cocaine. Although the Commonwealth recommended that appellant be sentenced to a ten-year prison term, the court ordered him to serve only five years. Thereafter, the Commonwealth filed a motion to vacate the judgment, stating that the sentence did not comport with statutorily required enhancement provisions. The original sentence was set aside, and appellant was re-sentenced to a ten-year term of imprisonment. On appeal, this Court held that because the language of the statutory enhancement provision was mandatory, "the trial court was without authority to avoid

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<sup>2</sup> KRS 532.110(3) states, "[t]he sentence imposed upon any person convicted of an escape or attempted escape offense shall run consecutively with any other sentence which the defendant must serve."

it." Id. at 214. Therefore, "the initial sentence was unlawful." Id. The Court adopted the position that "a trial court which has imposed an unlawful sentence can correct that sentence at any time . . . ." Id. at 215.

The rule in Skiles was upheld by the Supreme Court of Kentucky in Neace v. Commonwealth, 978 S.W.2d 319 (Ky. 1998). In Neace, a jury sentenced appellant to a five-year prison term, despite the fact that the statutory minimum was twenty years. The trial court disregarded the jury's recommendation and instead sentenced appellant to the legally required term. The Court applied the Skiles rule, stating that regardless of whether the flawed sentence originated from a plea agreement or a jury recommendation, "the sentence must be corrected to conform to the law." Neace, 978 S.W.2d at 322.

In this case, the circuit court's decision to re-sentence Hunt in accordance with the requirements of KRS 532.110(3) was not error. Because KRS 532.110(3) mandates that a sentence for escape must run consecutively with any other sentence, the court was obligated by law to amend Hunt's sentence to reflect the statutory prescription. Both the plea agreement and Hunt's original sentence were silent as to whether the six-year term was to run concurrently or consecutively with the term that Hunt was already serving. Therefore, by re-sentencing Hunt in compliance with the statutory requirement,

the circuit court did not set aside his plea agreement. Rather, the court simply did that which it was legally obligated to do. As such, we reject Hunt's claim that circuit court erred in re-sentencing him.

Hunt's second argument is that circuit court erred by denying his motion to withdraw his guilty plea upon the second-degree escape charge. We disagree.

Ky. R. Crim. P. (RCr) 8.10 states that if the court rejects a plea agreement, the court shall advise the defendant of the rejection and:

[A]fford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Based upon the above language, we interpret RCr 8.10 as only allowing a defendant to withdraw a guilty plea in its entirety. The rule does not state that a *portion* of a plea may be withdrawn, but rather a defendant must be afforded the opportunity to withdraw his plea.

Hunt argues that he should have been permitted to withdraw a portion of his guilty plea - the charge of second-degree escape. However, he cites this Court to no authority that permits a defendant to withdraw only a portion of his guilty plea. Based upon the plain language of RCr 8.10, we

think it axiomatic that a partial withdrawal of guilty plea is impermissible. Therefore, we reject Hunt's argument that he should be allowed to withdraw his guilty plea only upon the charge of second-degree escape.

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

EMBERTON, SENIOR JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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