

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001196-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 03-XX-000011

JEROME SALMON

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; COMBS AND DYCHE, JUDGES.

DYCHE, JUDGE. The Commonwealth of Kentucky has been granted discretionary review of an opinion of the Jefferson Circuit Court which affirmed an order of the Jefferson District Court granting Jerome Salmon's motion to withdraw his plea of guilty to the amended charge of Trafficking in Marijuana, less than eight ounces. We reverse.

Salmon, a Jamaican citizen who has lived in the United States since July 1974, was arrested and charged with

Trafficking in Marijuana, more than eight ounces, less than five pounds; his counsel negotiated a plea agreement whereby the charge was amended to less than eight ounces, a misdemeanor, and he entered a plea of guilty to the amended charge, receiving a sentence of 365 days' confinement, conditionally discharged for two years.

As a result of the conviction, the Immigration and Naturalization Service arrested Salmon and charged him with being removable from the United States. He then sought to withdraw his plea, alleging ineffective assistance of his counsel, and that his plea was not knowingly and voluntarily made due to his ignorance of the deportation ramifications of his plea. A hearing was held in the Jefferson District Court, and his motion was granted. The District Court found that counsel was not ineffective, but that "the defendant certainly was not aware when he pleaded guilty to this misdemeanor charge that he was subjecting himself to a removal proceeding." The court allowed him to withdraw his plea. The Commonwealth appealed to the circuit court, which affirmed; the motion for discretionary review followed.

This issue has recently been decided by this Court, adverse to Salmon. *Fuortado v. Commonwealth*, Ky. App., 2003 WL 22749013 (decided November 21, 2003), held that

the trial court did not err by accepting Fuartado's guilty plea without first advising him of the possible deportation consequences. . . . Accordingly, Fuartado's claim that his plea was not knowingly, intelligently, and voluntarily entered is without merit.

The same rationale applies to Salmon. The trial court found no ineffective assistance of counsel, but found Salmon's plea not to be knowing, intelligent, and voluntary. The trial court therefore abused its discretion and erred in allowing Salmon to withdraw his plea. The opinion of the Jefferson Circuit Court is reversed, and this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Chris Melton
Special Assistant Attorney
General
Louisville, Kentucky

BRIEF FOR APPELLEE:

John M. Vickerstaff
Law Office of Dennis M. Clare,
P.S.C.
Louisville, Kentucky