

RENDERED: October 22, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001615-MR

JAMIE DANIELLE GRIMM

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 00-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Jamie Danielle Grimm (Grimm) appeals her conviction for one count of assault in the second degree;<sup>1</sup> operating a motor vehicle while under the influence of substance which impairs driving ability, first offense;<sup>2</sup> and possession of

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<sup>1</sup> KRS 508.020.

<sup>2</sup> KRS 189A.010(1)(c).

marijuana,<sup>3</sup> based on a plea which she tried to withdraw prior to the entry of a final judgment. The trial court has the discretion to allow a defendant to withdraw her guilty plea and we believe the trial court did not abuse its discretion. Hence we affirm.

On November 1, 2000, Grimm was the driver of a car which hit another vehicle head-on. The driver of the other car, John Blackburn, received a broken leg. A passenger in Blackburn's car, Janie Salyer, broke her collar bone. The investigating officer arrested Grimm, noting in the uniform offense report that the suspect's car "smelled strong of Marijuana. Suspects car would knock you down with the smell OF FRESH BURNED MARIJUANNA." Also, the officer noted, "MARIJUANNA Cigarette & seeds Found in CAR." Grimm was charged with DUI, KRS 189A.010(1)(d), which provides, "While under the combined influence of alcohol and any other substance which impairs one's driving ability; . . ." Grimm was also charged with possession of marijuana and two counts of assault in the second degree. Blood and urine samples were taken from Grimm and sent to the Kentucky State Police lab for analysis. A Toxicology Analysis Report dated March 14, 2001, reported "Drug content of Blood: Diazepam 0.005 mg%; Nordiazepam 0.005 mg%" and "Drug content of Urine: Hydrocodone 0.02 mg%; Cannabinoid Metabolites."

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<sup>3</sup> KRS 218A.1422.

Grimm was indicted for two counts of assault in the second degree under KRS 508.020; operating a motor vehicle while under the influence of substance which may<sup>4</sup> impair driving ability, first offense, under KRS 189A.010(1)(c); and possession of marijuana under KRS 218A.1422. On October 14, 2002, the Commonwealth offered five years on each assault charge, thirty days on the DUI, and twelve months for the possession of marijuana, all concurrent for a total of five years, without the Commonwealth objecting to probation. That same day, Grimm made a motion to enter a guilty plea which was accepted by the court. Sentencing was postponed pending a pre-sentence investigation. A lot happened before sentencing, but suffice it to say Grimm requested to withdraw her guilty plea, which was denied. She was eventually sentenced on July 2, 2003, to five years, and also granted shock probation the same date.

On appeal, Grimm contends the trial court erred in not allowing her to withdraw her plea because there was no final judgment and because she was not advised as to the elements or nature of the offenses. RCr 8.10 provides that before judgment, "the court may permit the plea of guilty . . . to be withdrawn. . . ." (emphasis added.) This is discretionary, not mandatory on a trial court.

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<sup>4</sup> This subsection of the statute does not say "may impair" but which "impairs" driving ability.

However, the word "may" in RCr 8.10 does not give a trial judge unfettered discretion to deny a motion to withdraw a guilty plea without affording the defendant a hearing on the motion. 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. (citations omitted.)

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

The second part of Grimm's argument is that the plea was involuntary because she was advised incorrectly about the elements of the crimes, specifically that she could be convicted of DUI and wanton conduct if her operation of her car was under the influence of drugs which may impair her driving, while the law requires that her driving be impaired by the drugs or alcohol. Even though the indictment and plea stated she was under the influence of drugs which may impair driving ability, both Grimm's previous attorney and her current attorney agree that wantonness requires proof of actual driver impairment. They both agreed that the prescription drugs did not impair Grimm. However, they disagree about the proof concerning the marijuana use. The current attorney advises Grimm that the presence of marijuana metabolites only indicates past use but does not measure current impairment. While that may be true, that argument ignores the evidence that Grimm may have been smoking pot at the time of the accident. Could the new attorney

have won or was the previous attorney correct in assessing the case a loser?<sup>5</sup> We do not know, but assault in the second degree, KRS 508.020, required that Grimm wantonly caused the injuries.

Wanton conduct is defined by KRS 501.020(3) to be:

[W]hen he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Grimm's new attorney contends the Commonwealth "must prove she was operating her vehicle under the influence of drugs beyond a reasonable doubt in order to convict her of assault." We disagree. Under the statute, voluntary intoxication is only one form of wanton conduct. Even if the presence of marijuana metabolites do not prove current impairment, the evidence could still show her conduct was wanton. See Martin v. Commonwealth, Ky. App., 873 S.W.2d 832, 834 (1993). Whether the evidence was sufficient to convict is a judgment call by her attorney at the time of Grimm's plea. He thought it was and so advised his client. Again, see Hodge, 116 S.W.3d 463. The advice appears to have been reasonable and competent and a guilty plea is not

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<sup>5</sup> See Hodge v. Commonwealth, Ky., 116 S.W.3d 463 (2003), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). Counsel's strategic choices are not subject to second guessing in hindsight.

open to attack unless the counsel provided the defendant with unreasonable or incompetent advice. See Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333 (1980). Under the totality of the circumstances, the plea appears to be voluntary. Rodriguez, 87 S.W.3d at 10.

Grimm's second argument is that the indictment should have been dismissed because the indictment did not follow the language of the statute and did not adequately inform Grimm of the elements of the offense. Again this refers to count three only, the DUI charge, because the wanton element of counts one and two of second-degree assault do not require drug or alcohol impairment. Also not included is the possession of marijuana charge which likewise has no requirement of intoxication. As to the DUI, the indictment was for:

"KRS: 189A.010 (1c) [sic]  
**OPERATING A MOTOR VEHICLE  
WHILE UNDER THE INFLUENCE OF  
SUBSTANCE WHICH MAY IMPAIR  
DRIVING ABILITY, FIRST OFFENSE  
WITHIN FIVE YEARS**  
Penalty: Imprisonment of not  
Less than 48 hrs. nor more than  
30 days and/or fine not more  
than \$500  
U.O.R. # 00148" (emphasis added.)

Page two of the indictment charged, as to the DUI only:

"The Grand Jury charges: That on or about the 1st day of November, 2000, in Johnson County, Kentucky, and before the finding of the indictment herein, the above-named defendant:

. . .

3. The above named defendant committed the offense of Operating a Motor Vehicle While Under the Influence of Drugs Which May Impair Driving Ability, First Offense within Five Years, against the peace and dignity of the Commonwealth of Kentucky." (emphasis added.)

KRS 189A.010(1) has five subsections. Subsections(a) and (e) are per se violations, meaning the Commonwealth does not have to prove impairments, only the amount of alcohol in one's breath or blood. Subsections (b), (c), and (d) all require the Commonwealth prove impairment to drive. Grimm was charged under subsection (c) which requires that the defendant operated the vehicle "[W]hile under the influence of any other substance or combination of substances which impairs one's driving ability. . . ." Technically, the particular charge in the indictment against Grimm should not have included the word "may" because it was not a per se violation. However, defects in the indictment are waived when a defendant enters a guilty plea without objection. Skaggs v. Commonwealth, Ky. App., 885 S.W.2d 318 (1994). "The general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense." (citations omitted.) Hughes v. Commonwealth, Ky. 875 S.W.2d 99, 100 (1994). The question becomes whether the indictment charges an offense because it

improperly inserted the word "may." We believe it does because KRS 189A.010(1) has both per se violations and violations which require actual impairment to be proven. Even though the Commonwealth was proceeding on subsection (c) which requires that impairment be proven, the per se violations are included in the same statute, thus the indictment does charge a crime, albeit not the subsection Grimm pled guilty to, nor the one she was originally charged with.

For the foregoing reasons, the judgment of the Johnson Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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