

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001642-MR

WILLIE ELKINS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 02-CR-00293

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: Willie Elkins (hereinafter appellant) appeals the order of the Pike Circuit Court which denied his motion to withdraw his guilty plea. Appellant alleges that the plea agreement was breached by the Commonwealth's presentation of evidence at sentencing in spite of the Commonwealth's agreement not to oppose probation. Appellant states that justice requires that he be allowed to withdraw his plea. We have reviewed the

record surrounding the plea<sup>1</sup> and we affirm the decision of the court to deny the motion to withdraw.

Appellant entered a guilty plea to assault in the second degree. The terms of the plea agreement were that the Commonwealth would recommend seven years to serve with "no position on probation." The trial court entered a judgment on the guilty plea finding that appellant's plea was voluntary. It recorded the Commonwealth's sentence recommendation, including that the Commonwealth took no position on probation. The court set a date for sentencing following preparation of the presentence investigation report. At the sentencing hearing on July 1, 2003, the court denied appellant probation for the reason that it would unduly depreciate the seriousness of the crime. The court sentenced him to confinement in the penitentiary for a maximum term of seven years in accordance with the plea agreement.

Appellant soon after filed a motion to withdraw his plea, vacate the judgment and set the matter for a jury trial. Appellant alleged that the Commonwealth breached its agreement to take no position on probation. Appellant cited a statement made by the Commonwealth's Attorney, Ron Burchett, in a

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<sup>1</sup> The Commonwealth argued that appellant failed to include a videotape of the sentencing hearing in the record, which precluded review. However, we observed that appellant properly designated the videotape of the hearings as part of the record on appeal, and it was erroneously omitted. The videotape was made part of the record we reviewed.

newspaper article that he "would oppose probation at the June sentencing" in appellant's case. Appellant's motion noted that at the sentencing hearing the Commonwealth presented pictures of the victim's injuries following the assault. Appellant asserted that the Commonwealth called a witness to read letters in opposition to probation. Appellant argued that these actions violated the plea agreement. The trial court denied the motion to withdraw the guilty plea, and this appeal follows.

Appellant first argues that he did not understand the plea, his counsel did not adequately advise him before his plea and he would have gone to trial because he had a meritorious defense. We find no indication that appellant raised these issues below, and so these assertions do not afford a basis for relief. Moreover, the trial court found the plea to have been voluntarily made at the plea hearing.

Next, appellant believes that the Commonwealth circumvented its agreement not to oppose probation by presenting victim impact evidence at the sentencing hearing. Appellant further challenges the victim impact evidence on the grounds that the victim himself did not testify or submit documentary evidence at the hearing.

We do not share appellant's belief that the Commonwealth violated its agreement at the sentencing hearing. First and foremost, we believe the Commonwealth upheld its

promise not to take a position on probation by expressly informing the court of that position. Wood v. Commonwealth, Ky., 469 S.W.2d 765 (1971). The trial court's written judgment shows that the court was aware of the agreement and the Commonwealth's stance. It is of no consequence that the Commonwealth Attorney said something different in the news media, since his office in actual fact took no position in the trial court.

As for the pictures submitted by the Commonwealth to the court, appellant has not convinced us that this was a violation of the Commonwealth's promise. The Commonwealth on appeal relies on KRS 532.055 as allowing the Commonwealth to offer any evidence during the sentencing hearing that is relevant to sentencing, but that statute has no application to the case at bar as it specifically pertains to jury sentencing. Nevertheless, we agree that it is appropriate and necessary for the court to be informed of the nature of the crime prior to sentencing. The Commonwealth's promise as to its probation recommendation does not preclude its addressing the nature of the crime at the hearing. Moreover, we note that the Commonwealth simply submitted the photographs without elaboration.

The victim impact evidence certainly did not violate the agreement. The Commonwealth's stand on probation, or any

other condition in a plea agreement, does not affect the rights of the victim established in KRS 421.500 et seq. A victim has rights independent of the Commonwealth and may assert an objection regardless of the Commonwealth's position. Wilson v. Commonwealth, Ky. App., 839 S.W.2d 17, 21 (1992). In this case, as in Wilson, the victim was not made a part of the plea agreement and thus could not be bound by it. The victim impact evidence in opposition to probation did not breach the Commonwealth's agreement to take no such position.

Appellant additionally complains that the person who spoke at the sentencing hearing was the wife of the crime victim rather than the victim, when there is no provision for such evidence under KRS 421.500. While we agree that there is some question whether a victim's relative may testify at a sentencing hearing instead of the victim, we do not believe appellant adequately preserved this issue. KRS 421.500 defines a victim as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime . . . ." We find no express provision in KRS 421.500 for allowing the spouse of an assault victim to act under the statute for the purpose of delivering victim impact evidence at the sentencing hearing. Nevertheless, appellant did not object during the sentencing hearing when the victim's wife read

letters she and her daughter had written. Thus, this issue was not preserved.

Furthermore, appellant has not shown that if he had timely objected, he would have been entitled to withdraw the guilty plea. A defendant who has pled guilty may move the trial court to withdraw his guilty plea, pursuant to RCr 8.10, and the trial court may as a matter of discretion grant or deny the motion. Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001). When the court denies the defendant's motion to withdraw the plea, the reviewing court will not reverse unless the trial court has abused its discretion. Id. at 487. We find no abuse of discretion. Appellant was sentenced in accordance with the plea agreement and the Commonwealth's sentencing recommendation. Appellant was not assured of receiving probation but was only afforded the chance to argue for it without the Commonwealth arguing against it. Appellant voluntarily pled guilty and his plea agreement was followed, and so we affirm the order of the trial court denying the motion to withdraw his guilty plea.

ALL CONCUR.

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