

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002463-MR

DONALD C. LEWIS

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 02-CR-01110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

MINTON, JUDGE: Donald G. Lewis appeals from the final judgment and sentence, which imposed a maximum term of five years' imprisonment. The judgment followed what the record proves to be a voluntary and intelligent guilty plea to third-degree sodomy in accordance with a plea bargain made with the Commonwealth. Finding no error in the proceedings in circuit court, we affirm.

Lewis was indicted for first-degree sodomy for allegedly performing forced oral sodomy on a 14-year-old girl.

He entered an unconditional plea of guilty to an amended charge of third-degree sodomy in exchange for the Commonwealth's recommendation of five years in prison. The court accepted the Commonwealth's recommendation and Lewis was sentenced accordingly.

Lewis was appointed appellate counsel; but counsel later filed a motion to withdraw, claiming Lewis's appeal was frivolous. Defense counsel filed an Anders¹ brief in support of his motion to withdraw. Counsel's motion to withdraw was granted by a panel of this Court on January 24, 2004. Lewis failed to file a supplemental *pro se* brief.

Under the rule articulated in Anders:

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal

After reviewing the record, we agree that there are no valid issues to address on appeal. Lewis's guilty plea came in

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); see also Fite v. Commonwealth, 469 S.W.2d 357 (Ky. 1971).

the midst of his jury trial. Counsel for both parties conducted *voir dire*, and a 13-member panel was selected and sworn to try the case. But before opening statements, Lewis consulted with counsel and decided to plead guilty. The jury was excused from the courtroom, and the judge conducted a plea colloquy with Lewis.

During the plea colloquy, the judge asked Lewis to state exactly why he was pleading guilty to sodomy in the third degree. At first, Lewis responded that he had allegedly performed oral sex on a minor but that the only reason he was pleading guilty was because there were no witnesses willing to testify in his favor. The judge refused to accept the guilty plea, stating that Lewis would have to affirmatively state why he was guilty before the plea could be accepted.

Lewis consulted again with counsel. The colloquy resumed following a recess, and the judge again asked Lewis to state why he was guilty of sodomy in the third degree. Lewis responded that he was guilty because he had performed the alleged acts. The judge then concluded the plea colloquy, accepted the plea agreement, and placed Lewis in custody. The jury was called back into the courtroom and discharged.

After viewing the videotape from Lewis's guilty plea hearing, we do not see any errors with either the judge's questions or Lewis's answers that would warrant an appeal.

Lewis's decision to plead guilty was made freely and voluntarily and knowingly and intelligently. Although he initially claimed he was not guilty and was only pleading guilty due to a lack of favorable witnesses, Lewis later changed his response and admitted to the charges. He was not coerced to change his answer. In fact, the judge twice pointedly asked defense counsel to confirm that he had not pressured Lewis to change his response. Moreover, at the end of the colloquy, Lewis stated that he realized by pleading guilty he was waiving any right to appeal.

Since we do not perceive any error with Lewis's guilty plea or with the court's colloquy, we agree with counsel that pursuit of an appeal in this case would be frivolous. Without a supplemental brief from Lewis highlighting specific errors, we are left with our own analysis of the record. Finding no error, we believe the order granting counsel's motion to withdraw was proper. So we affirm.

ALL CONCUR.

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