

RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000159-MR

STEVEN FRAZIER

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CR-00138

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Stephen Frazier appeals from a judgment of the Carroll Circuit Court, entered December 19, 2003, finding him guilty, pursuant to his guilty plea, of theft by unlawful taking of property worth more than \$300.00¹ and receiving stolen property worth less than \$300.00.² In accord with Frazier's plea

¹ KRS 514.030.

² KRS 514.110.

agreement, the court imposed concurrent sentences totaling three-and-a-half years' imprisonment and a \$1,000.00 fine. The court probated the prison sentence. Frazier, who has been found indigent, appeals from that portion of the judgment imposing a fine. He notes that under KRS 534.030, "[f]ines . . . shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." The trial court erred, he maintains, by sentencing him in violation of the statute. We affirm.

As the Commonwealth correctly points out, our Supreme Court has held several times that criminal defendants may waive rights provided by sentencing statutes and accept sentences that would otherwise be unlawful.³ In Johnson v. Commonwealth,⁴ the Court held that the trial court did not err by imposing a plea-bargained sentence in excess of statutory limits notwithstanding the fact that the plea colloquy had included no inquiry into the defendant's willingness to waive the statutory right. The plea agreement had been reached with the advice of counsel, the Court noted, making reasonable a presumption that the defendant's waiver of the statutory right had been knowing and voluntary.

³ Commonwealth v. Townsend, Ky., 87 S.W.3d 12 (2002); Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001).

⁴ Ky., 90 S.W.3d 39 (2002).

Here, Frazier entered his plea with the advice of counsel, but after entry of the plea and before sentencing, he moved to have the fine excluded from the plea agreement. Apparently, however, he did not move to withdraw from the plea. The trial court, accepting the plea as valid and holding Frazier to his bargain, denied the motion.

Frazier is not entitled to relief. Johnson authorizes his bargained-for sentence notwithstanding its deviation from KRS 534.030. And the trial court did not err or abuse its discretion by refusing Frazier's unilateral request to modify the bargain after the court had entered his plea. Accordingly, we affirm the December 19, 2003, judgment of the Carroll Circuit Court.

ALL CONCUR.

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