

RENDERED: April 1, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000412-MR

ADRIAN POWELL

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 02-CR-00203

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE<sup>1</sup>.  
VANMETER, JUDGE: This is an appeal from an order entered by the  
Hopkins Circuit Court denying appellant Adrian Powell's motion  
to withdraw his guilty plea. For the reasons stated hereafter,  
we affirm.

Powell was indicted in August 2002 on fifteen counts  
of incest, first-degree rape and first-degree sodomy involving a

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

minor relative. On June 16, 2003, while represented by appointed counsel, Powell entered an *Alford*<sup>2</sup> guilty plea to one count each of incest, first-degree rape and first-degree sodomy. The Commonwealth dismissed the remaining charges and recommended a total of twelve years' imprisonment. On August 11, after the court accepted the plea but before sentencing occurred, Powell obtained private counsel and filed a motion to withdraw his guilty plea. The trial court conducted an evidentiary hearing and denied the motion to withdraw the plea, stating that it had

considered the video record of the entry of the plea, the affidavits of various persons, a report from Dr. Robert Sively concerning competency matters, memoranda of the parties, and the evidence presented at the hearing held on December 10, 2003. At the hearing the defense presented testimony by Adrian Powell, Barbara Powell, Paul Powell, Laura Powell, and Janet Jorgensen. The Commonwealth presented the testimony of Keith Virgin, Powell's previous attorney; and testimony by Darlene Huff, Virgin's investigator. Having considered the aforementioned, the Court concludes that Adrian Powell was not coerced into entering his guilty plea. The Court further finds that the plea was freely, voluntarily, knowingly, and intelligently made. The Court does not believe that the defendant's plea was based on any erroneous understanding of evidentiary matters related to Mr. Virgin's representation of the defendant. If there was any confusion of defendant's understanding of the Rape Shield Law it was likely limited to the victim's prior sexual activity and not to the matter of prior recantations. A review of all the

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<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

relevant materials in this case leads to the conclusion that Adrian Powell was not confused at the time his plea was entered. The inspiration for the motion to withdraw plea in all likelihood resulted from his family's opposition to defendant's guilty plea.

This appeal followed.

Powell first contends that the trial court abused its discretion by overruling his motion to withdraw his guilty plea. We disagree.

The Kentucky Supreme Court recently reaffirmed 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."<sup>3</sup> Subsequently, in *Rigdon v. Commonwealth*,<sup>4</sup> the applicable case law was well summarized as follows:

When a criminal defendant pleads guilty, Rule 8.10 of the Kentucky Rules of Civil Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty.<sup>5</sup> Whether a guilty plea is voluntarily given is to be determined from the totality of the

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<sup>3</sup> *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). See also *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001).

<sup>4</sup> 144 S.W.3d 283, 287-89 (Ky.App. 2004).

<sup>5</sup> *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). [Footnotes 4 - 18 have been renumbered from those used in the quoted text to comport with the footnotes used in this opinion. The footnoted citations have been modified to comply with CR 76.12(4)(g), effective January 1, 2005.]

circumstances surrounding it.[<sup>6</sup>] The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea.[<sup>7</sup>] Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted.[<sup>8</sup>] However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion.[<sup>9</sup>] Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires "a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered."<sup>[10]</sup> The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard.[<sup>11</sup>] A decision which is supported by substantial evidence is not clearly erroneous.[<sup>12</sup>] If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion standard.[<sup>13</sup>] A trial court abuses its discretion when it renders a decision which

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002).

<sup>9</sup> *Id.*

<sup>10</sup> *Bronk*, 58 S.W.3d at 489 (Cooper, J., concurring).

<sup>11</sup> *Id.*

<sup>12</sup> *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003).

<sup>13</sup> *Bronk*, 58 S.W.3d at 487.

is arbitrary, unreasonable, unfair, or unsupported by legal principles.[<sup>14</sup>]

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington*[<sup>15</sup>] inquiry into the performance of counsel." [<sup>16</sup>] To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

- (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and
- (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.[<sup>17</sup>]

Advising a client to plead guilty is not, in and of itself, evidence of any degree of

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<sup>14</sup> *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Cf. *Kennedy v. Commonwealth*, 962 S.W.2d 880, 882 (Ky.App. 1997) (holding that "fair play and honesty" as well as RCr 8.10, require a trial court to permit a defendant to withdraw his guilty plea, despite the fact that it was made knowingly, voluntarily, and intelligently as part of a plea agreement, where the trial court subsequently declined to follow the Commonwealth's sentencing recommendation).

<sup>15</sup> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

<sup>16</sup> *Bronk*, 58 S.W.3d at 486 (footnotes omitted).

<sup>17</sup> *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

ineffective assistance of counsel.[<sup>18</sup>] The Kentucky Supreme Court has stated that "[g]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing."<sup>[19]</sup>

Here, our review of the videotapes of the hearings shows that the trial court carefully reviewed the voluntariness of Powell's *Alford* plea before accepting that plea. The exchange between the court, Powell, and Powell's attorney included the following:

Judge: Have any threats been made to you to get you to plead guilty?

Powell: No, I've been pushed, and I didn't appreciate it, but that's fine.

Powell's Attorney: I think that's from the legal situation, is what he means by that, is the situation of the charges.

Judge: . . . If the pressure is to such an extent that it prevents you from doing this freely and voluntarily, then we shouldn't accept the plea.

Powell: No, I'm gonna go ahead and do it, I just didn't appreciate you giving me, what, um, three hours today to decide whether to take this or not. But I'm gonna go ahead and take it anyway, just to get it over with.

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<sup>18</sup> *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

<sup>19</sup> *Rodriguez*, 87 S.W.3d at 11.

Judge: Well - but is this - I don't want to accept your plea if this is not what you want to do -

Powell: I'd appreciate you going ahead and accepting it.

Judge: So at this point, even though it's been unpleasant, that you're doing this freely and voluntarily on your part?

Powell: Yeah, yes.

Judge: Are you doing this intelligently?

Powell: Yes, sir.

Powell indicated that although he did not understand why the rape shield law prevented certain evidence from being admissible against the victim, his attorney had explained the legal issues to him. He then indicated that he understood the trade-offs involved in an *Alford* plea. Finally, after stepping away from the bench to discuss matters with his attorney, Powell indicated that although he reluctantly was agreeing to the guilty plea and felt "a little aggravated," he wanted the court to accept his guilty plea.

Contrary to Powell's contention on appeal, substantial evidence clearly supports the trial court's finding that he entered his *Alford* guilty plea knowingly, intelligently and voluntarily. Moreover, although during the guilty plea hearing Powell expressed his dissatisfaction with the proceedings against him, several times he specifically asked the court to

accept his guilty plea. Having carefully reviewed the evidence, we cannot say that the trial court erred by finding that Powell voluntarily pleaded guilty, or by then exercising its discretion by denying Powell's motion to set aside the guilty plea.

Further, we are not persuaded by Powell's contention that his guilty plea was involuntary because he was afforded ineffective assistance of counsel. Although this issue was not fully developed below, it is clear that the trial court rejected any notion that, considering the circumstances as a whole, counsel provided ineffective assistance by making errors so serious that his performance "fell outside the wide range of professionally competent assistance," thereby so seriously affecting the plea process's outcome that, "but for the errors of counsel, there is a reasonable probability that [Powell] would not have pleaded guilty, but would have insisted on going to trial."<sup>20</sup>

Powell asserts on appeal that he was afforded ineffective assistance of counsel because his trial counsel failed to acknowledge that at least two witnesses could testify that the victim recanted her story. More specifically, he notes that his mother and sister attested, in affidavits attached to the motion to set aside the guilty plea, that they had advised trial counsel that the victim previously had admitted to

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<sup>20</sup> *Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky.App. 1986).

fabricating sexual abuse claims against Powell. Trial counsel testified, by contrast, that although he would have introduced at trial evidence that the Cabinet for Families and Children had been unable to substantiate prior claims that Powell sexually abused the victim, counsel was never told by Powell, or by Powell's mother or sister, that they had heard the victim recant her allegations. Having reviewed the record, we cannot say that the trial court erred by failing to find that counsel's advice was unreasonable under the circumstances or that Powell was afforded ineffective assistance of counsel.

The court's judgment is affirmed.

ALL CONCUR.

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