

RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001023-MR

ALFRED ROBERT NICHOLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CR-001867

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Alfred Nichols appeals from an order of the Jefferson Circuit Court denying his motion to withdraw a guilty plea and sentencing him to ten years' imprisonment. He argues that the trial court abused its discretion in denying his motion to withdraw his guilty plea, alleging that his attorney promised him probation and that he was in fact innocent of the offenses

¹ 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 KRS 21.580.

to which he pled guilty. We affirm the trial court's determination that Nichols' plea was voluntary and that he was not promised anything in exchange for his plea.

Nichols was charged with third-degree burglary, possession of burglar's tools, third-degree terroristic threatening, possession of drug paraphernalia, and being a persistent felony offender in the second degree. The Commonwealth recommended a sentence of seven years' imprisonment in exchange for a guilty plea. The plea agreement stipulated that the Commonwealth would not object to Nichols remaining free on his own recognizance until his final sentencing; however, if he were arrested for another offense, failed to appear for sentencing, or failed to cooperate with probation and parole, he agreed to serve a ten-year sentence.

When he appeared for final sentencing, Nichols was represented by a different member of the Jefferson Public Defender's Office than he had at the time of his guilty plea. Counsel advised the court that Nichols wished to present *pro se* motions. Nichols asked to withdraw his guilty plea, to have the public defender's office removed as counsel, and for probation if his guilty plea were left standing. The trial court reviewed the terms of Nichols' plea agreement before denying his motion to withdraw his plea. Because Nichols had committed an additional offense while he was awaiting sentencing, the trial

court sentenced him to ten years' imprisonment, and this appeal followed.

Kentucky Rule of Criminal Procedure 8.10 states that before a final judgment is entered a trial court "may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." The decision whether or not to allow a defendant to withdraw a guilty plea rests within the sound discretion of the trial court. Nichols argues that the trial court abused its discretion in denying his motion to withdraw his plea without conducting a hearing. When asked to determine the validity of a guilty plea, this Court has previously stated as follows:

the test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was voluntarily made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Russell v. Commonwealth, 992 S.W.2d 871, 876 (Ky. App. 1999).

Nichols told the trial court that he had been tricked into pleading guilty to offenses that he did not commit. He stated that his previous attorney had promised him probation, and that he would prefer to take his chances with a jury. The judge reviewed the plea agreement which specified that Nichols would serve ten years if he committed any additional offense

before sentencing. As in Russell, the trial court had engaged in a lengthy guilty plea colloquy with the defendant. Nichols had stated, under oath, that he was guilty of the offenses charged. Moreover, Nichols had denied that he had been promised anything in exchange for his plea or had been threatened or coerced into pleading guilty. The plea agreement stated that the decision to grant probation rested solely with the trial court. Nichols contention that his guilty plea was involuntary is readily refuted by the record of his appearance in court. Thus, the trial court did not abuse its discretion by denying his motion to withdraw his guilty plea without a hearing.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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