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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001503-MR

CHARLES BRIAN RUSSELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 02-CR-002162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM,¹ HENRY, AND VANMETER, JUDGES.

VANMETER, JUDGE: Charles Brian Russell appeals from a judgment entered by the Jefferson Circuit Court after Russell sought to set aside his guilty plea. For the reasons stated hereafter, we reverse the court's judgment and remand this matter for further proceedings.

As a result of a motor vehicle accident, Russell was charged with second-degree assault, first-degree wanton

¹ Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

endangerment, first-degree criminal mischief, and first offense of operating a motor vehicle under the influence of alcohol (DUI). After the Commonwealth and Russell reached a plea agreement, the following recommendations were made to the court:

On a plea of guilty to the charges the Commonwealth recommends the following: Assault 4th - 12 months, C/D [conditionally discharged] two years; MVDUI 1st - \$500 fine. The defendant will not commit any new offenses as a condition of this plea. Furthermore the defendant will have an Alcohol and Drug Abuse Assessment and complete all recommended follow through treatment. The defendant shall have his license suspended for the 30 days from the date of sentencing in this case. The Commonwealth agrees to amend the charges as set forth above and dismisses the WE1 and Criminal Mischief 1 counts.

Russell subsequently moved to enter a guilty plea to the amended charges of fourth-degree assault and DUI, first offense. On the record, the trial court reviewed Russell's legal rights and advised him that it would not be bound by the Commonwealth's recommendations as to conditional discharge or sentencing but that, if it chose to impose a "higher" sentence than the Commonwealth recommended, Russell could withdraw his plea. Russell entered his guilty plea after indicating that he understood.

The trial court subsequently sentenced Russell as recommended by the Commonwealth, but it also ordered him to serve thirty days in jail and to be on supervised probation

throughout his two-year conditional discharge period. The court denied Russell's motion to withdraw his guilty plea, declining to find that RCr 8.10 applied to the imposition of additional terms of conditional discharge. Subsequently, pending the outcome of this appeal, the court of appeals stayed the trial court's final judgment to the extent it required Russell to serve time in jail or to be subject to supervised probation

RCr 8.10, pertaining to the withdrawal of guilty pleas, was amended in 1989 so as to eliminate both "the pernicious practice of having criminal defendants come to court and declare that no promise had been made to them when, in fact, the plea of guilty was in express reliance upon a promise or representation[,]" and "the possibility of arbitrary or freakish sentencing[.]"² The amended rule, which was intended to "validate honest plea bargaining between the Commonwealth and the defendant while reserving unto the trial court the final decision as to sentencing[,]"³ now provides in pertinent part:

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that

² *Commonwealth v. Corey*, 826 S.W.2d 319, 321 (Ky. 1992).

³ *Id.* at 321.

guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

As expressed by the Kentucky Supreme Court in *Haight v. Commonwealth*,⁴ a defendant now "has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point" if a trial court declines to follow the plea agreement reached by the Commonwealth and a defendant.

The application of RCr 8.10 then was examined in detail in *Kennedy v. Commonwealth*,⁵ wherein this court considered a plea agreement situation involving the Commonwealth's recommendation that the defendant's multiple sentences should run concurrently for a total of three years' imprisonment. This court described the guilty plea hearing as follows:⁶

Before accepting his guilty plea, the court thoroughly advised the appellant of his rights as well as the effect and consequences of entering a guilty plea. The court specifically informed the appellant that the decision to run the sentences concurrently or consecutively was wholly a matter of the court's discretion. However, the court advised him that if it chose to reject the plea agreement, it must so inform the appellant and allow him either to persist with his plea in light of the possibility of a less favorable disposition

⁴ 938 S.W.2d 243, 251 (Ky. 1996), citing *Commonwealth v. Corey*, 826 S.W.2d 319 (Ky. 1992).

⁵ 962 S.W.2d 880 (Ky.App. 1997).

⁶ *Id.* at 881.

or to withdraw his plea and proceed to trial.

The trial court accepted the defendant's guilty plea after determining that it was entered voluntarily, intelligently and knowingly. However, despite the negotiated recommendation of concurrent sentences, the court subsequently ordered the defendant to serve three consecutive three-year terms, with the remaining sentences running concurrently, for a total of nine years' imprisonment. The trial court then denied the defendant's motion to withdraw his guilty plea.

On appeal, the *Kennedy* court recognized that RCr 8.10 does not infringe upon the trial court's ultimate sentencing authority or discretionary power,⁷ and the trial court retains the sole right to accept or reject a negotiated plea agreement. However, RCr 8.10 requires the trial court to act honestly and fairly by affording a defendant "the opportunity to withdraw his plea when and if the court elects to deviate from the plea agreement."⁸ A defendant's withdrawal of a plea does not harm society, as the defendant does not go free but instead the slate is "wiped clean of the defective plea negotiations[.]"⁹ Thus, the defendant simply returns to his or her post-indictment

⁷ *Id.* at 882, citing *Commonwealth v. Doughty*, 869 S.W.2d 53 (Ky. 1994), overruled on other grounds by *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002).

⁸ *Id.* at 882.

⁹ *Id.* at 882, quoting *Haight*, 938 S.W.2d at 250.

status quo and then "must proceed to run the gauntlet of a trial with the attendant risk of the maximum punishment prescribed by statute."¹⁰ The court expressed its concern that a

pernicious mischief would result to our entire system of jurisprudence should we adopt a dangerous "ends-justifies-the-means" approach to plea bargaining by permitting a court to depart from RCr 8.10 and to alter a negotiated plea *sua sponte* without allowing a defendant the right to withdraw his plea. No litany of incantations about whether a plea had been knowingly and voluntarily entered can camouflage the essential spirit of honesty and fair play that RCr 8.10 requires of all the players: the Commonwealth, the criminal accused, and the court.¹¹

Here, the court advised Russell during the guilty plea hearing that he could withdraw his plea if it imposed a sentence higher than that which was recommended, but not if the court chose terms of conditional discharge or probation different from those recommended by the Commonwealth. The court subsequently imposed thirty days' imprisonment and probationary supervision as additional terms of the conditional discharge. In seeking to withdraw his guilty plea, Russell specifically indicated that because his work required him to frequently travel with little advance notice, the Commonwealth's recommended terms of conditional discharge were critical to his acceptance of the plea offer. Nevertheless, the court refused to set aside

¹⁰ *Id.* at 250.

¹¹ *Id.* at 882-83.

Russell's guilty plea, stating in its order that a trial court must exercise its discretion in setting terms of probation or conditional discharge pursuant to KRS 533.010 and 533.030. The court opined that supervision and incarceration were necessary conditions herein, and that its actions did not constitute a rejection of the plea agreement for purposes of RCr 8.10.

We cannot agree with the trial court's conclusion that the imposed sentence did not amount to a rejection of the plea agreement. Granted, the court accepted the plea agreement insofar as it amended or dismissed charges against Russell, and it imposed the recommended terms including the two-year conditional discharge. However, the additional conditions of supervised probation and thirty days' jail time amounted to such significant restrictions on Russell's liberty interests, and constituted such significant deviations from the recommended plea agreement, that it cannot be said that the court did not "reject" the plea agreement for purposes of RCr 8.10. That being so, Russell clearly was entitled to withdraw his guilty plea, and the trial court erred by failing to permit him to do so.

Our conclusion is not inconsistent with the trial court's ultimate sentencing authority, including its authority to impose conditions of probation or conditional discharge pursuant to KRS 533.030, or with its ability to accept or reject

a plea agreement.¹² Instead, our decision merely reaffirms that if a trial court chooses to reject the terms of a negotiated plea agreement, it must afford the defendant the opportunity to withdraw the plea and proceed to trial.¹³

The trial court's order is reversed, and this matter is remanded with directions that Russell shall be permitted to withdraw his guilty plea and proceed on the original charges.

BUCKINGHAM, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹² See *Doughty*, 869 S.W.2d 53; *Kennedy*, 962 S.W.2d at 882.

¹³ *Kennedy*, 962 S.W.2d at 883.