

RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002374-MR

ANDREW PHILLIPS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO.03-CR-000410

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Andrew Phillips appeals the denial of his RCr 11.42 motion for relief from a judgment entered pursuant to his guilty plea to murder, first degree robbery and tampering with physical evidence. He argues in this appeal that the trial court erred in denying his motion to set that plea aside, and

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the trial judge erred in failing to conduct an evidentiary hearing on his post-conviction claims that the guilty plea had been involuntarily entered. Because appellant's RCr 11.42 claims are conclusively refuted by the record, we find no error in the denial of that motion without a hearing.

The charges against appellant stem from the death of Kenneth W. Kelley who was shot in the course of a drug transaction that occurred on August 30, 1999. Appellant Phillips acknowledged that he cut school on that day and accompanied others to purchase marijuana. After proceeding to Kelley's apartment, the group apparently decided that they would not pay him for the drugs. Someone in the group grabbed the marijuana and ran. The victim gave chase and fought with members of the group until he was shot twice with a handgun appellant had been carrying in his pants. Kelley died shortly thereafter on the stairwell of his apartment complex.

Appellant then fled the scene and tossed the handgun in a field. The next day, appellant left Kentucky for California and, as a result of a prolonged investigation, was subsequently apprehended in Texas. While being transported back to Kentucky, appellant made a taped confession of his guilt in the crime.

An indictment charging appellant with capital murder, first-degree robbery and tampering with physical evidence issued

on February 3, 2003. In exchange for a plea of guilty, the Commonwealth offered to amend the indictment, reducing the charge of capital murder to murder, retain the other counts and to recommend a concurrent sentence of thirty (30) years' imprisonment. Appellant thereafter accepted the Commonwealth's offer and filed a motion to enter a guilty plea on AOC Form 491. Subparagraph (3) of that form contains a specific acknowledgment that the defendant has fully discussed the charges, the underlying facts and possible defenses with his attorney who was fully informed about the case. Subparagraph (4) details the constitutional guarantees associated with a plea of not guilty and clearly states that a plea of guilty waives those rights.

The record in this case also contains the thorough and clear colloquy undertaken by the trial judge concerning the knowing and voluntary nature of the plea. Prior to accepting appellant's plea, the trial judge gave him ample opportunity to ask questions and to reconsider his decision. After being satisfied that there was a factual basis for the plea and that it had indeed been a knowing and voluntary decision, the trial judge accepted appellant's guilty plea.

Approximately ten days later, appellant sent a letter to the trial judge alleging that there had been "a grave mistake, a terrible misunderstanding" in that he did not intend to waive his right of appeal and that he was now making a claim

of innocence. At the bottom of the handwritten letter was a statement prepared with the assistance of his trial counsel informing the court that he did not want a formal hearing, that he had fully discussed the matter with his attorney, and that he expressly waived the right to be represented by different counsel on the motion.

At the sentencing hearing conducted on October 23, 2003, the trial judge addressed appellant's letter, stating that he was treating it as a motion to withdraw the guilty plea. The trial judge took extraordinary pains to assure himself that appellant did in fact desire to proceed on the motion to withdraw his plea without a hearing and with his current counsel. Not only was appellant allowed to fully explain his contention that the guilty plea was involuntary, but his counsel also addressed the court on the matter, clearly stating his opinion that the plea had been validly entered and explaining his position that he could not represent appellant on this motion. Counsel also stated that the agreement that had been reached with the Commonwealth was the product of long and thorough negotiations; that the offer appellant accepted represented a significant reduction in the number of years the Commonwealth had initially sought; that he had discussed with appellant at length the matter of withdrawing the plea and why counsel could not represent him if he chose to go forward with

that motion; and that appellant had nevertheless expressed his desire to have the trial court make a ruling on his motion to withdraw the plea without different counsel or a hearing. The trial court again offered appellant an opportunity to make additional statements or to ask the court any questions he may have concerning the guilty plea or his motion to withdraw that plea.

After appellant again expressed his desire to proceed without appointment of new counsel, the trial judge carefully explained the basis for his decision that there was no basis for setting the guilty plea aside. The trial judge cited the thorough colloquy undertaken prior to his acceptance of the plea and the fact that he would not have accepted the guilty plea if he had any question that it was anything other than appellant's free and voluntary act. The trial judge stated that although appellant now contends that he did not fully understand his right of appeal, that subject was addressed during the colloquy. Furthermore, there was never any offer of a conditional plea and the trial judge recounted counsel's previous opinion that there was little likelihood of success with an appeal of the denial of appellant's motion to suppress his confession. Finally, the trial judge noted that the agreement reached with the Commonwealth was reasonable in light of the nature of the crime,

the severity of the charges against appellant and the court's ruling on the motion to suppress his confession.

In April 2004, appellant filed the RCr 11.42 at issue in this appeal alleging: 1) that the trial court abused its discretion in denying the motion to withdraw his guilty plea; 2) that the guilty plea was entered prematurely; 3) that his failure to understand that the guilty plea would result in loss of the right of appeal now renders his guilty plea as not having been knowing and voluntary; and 4) that his waiver of a hearing on the motion to withdraw was likewise unknowing. The trial judge denied the motion without a hearing stating that he had questioned appellant at length before determining that his plea was knowing and voluntary and that he found nothing in the record sufficient to undermine that determination. We fully concur in the trial judge's assessment.

A review of this record clearly demonstrates extraordinary efforts on the part of the trial judge to confirm the knowing and voluntary nature of appellant's plea prior to accepting it. Although there was technically no hearing on appellant's motion to withdraw that plea, a review of the trial judge's handling of the motion convinces us that appellant's contentions regarding the motion were explored from every conceivable angle. In fact, we are convinced that appellant's failure to advise us what additional information could have been

gleaned had there been a hearing is due to the fact there is nothing to add.

The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to a defendant.² This determination is to be made from a consideration of the totality of the circumstances surrounding the entry of the plea.³ The totality of the circumstances in this case reveal that appellant chose to accept the benefit of a very good bargain, and confirmed to the trial judge the knowing, intelligent and voluntary nature of that decision. On this state of the facts, there was no error in the trial judge's refusal to allow him to withdraw his plea; nor was there error in ruling on his RCr 11.42 motion without conducting an evidentiary hearing.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andrew Phillips, Pro Se
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BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
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² North Carolina v. Alford, 400 U.S.25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

³ Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).