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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000252-MR

VERNON MCCOMBS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00135

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Vernon McCombs brings this appeal from a January 24, 2005, judgment of the Hardin Circuit Court imposing a ten year sentence upon a guilty plea to criminal attempt to commit first-degree rape, incest, and distribution of obscene matter to a minor. We affirm.

Appellant was indicted by the Hardin County Grand Jury upon one count of first-degree rape, incest, and distribution of obscene matter to a minor. Pursuant to a plea bargain,

appellant pleaded guilty to criminal attempt to commit first-degree rape, incest, and distribution of obscene matter to a minor, and in exchange, the Commonwealth recommended a total prison sentence of ten years. Approximately one month later, appellant filed a motion to withdraw guilty plea. This motion was denied by order entered January 7, 2005. On January 24, 2005, the circuit court entered judgment and sentenced appellant to the recommended ten years' imprisonment. This appeal follows.

Appellant contends the circuit court committed error by denying his motion to withdraw guilty plea. Ky. R. Crim. P. (RCr) 8.10 states that "[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." It is well-established the withdraw of a guilty plea before judgment is a matter within the sound discretion of a trial court. Hurt v. Commonwealth, 333 S.W.2d 951 (Ky. 1960).

Appellant specifically argues that he neither admitted commission of the crime nor acknowledged a factual basis for the crime; thus, he believes that his guilty plea was "tantamount to a plea of *nolo contendere*." Appellant points out that a plea of *nolo contendere* is not a proper plea in this Commonwealth. See Commonwealth v. Hillhaven Corp., 687 S.W.2d 545 (Ky.App. 1985).

Appellant quotes to the following exchange that occurred during the guilty plea hearing:

> Court: At this point Mr. McCombs, this is the formal part of the plea. I'll ask you how you plead to all three of the charges. Okay? How do you plead to criminal attempt to commit first-degree rape, incest and distribution of obscene matter to a minor?
>
> McCombs: Guilty.
>
> Court: Are you pleading guilty to those three charges Mr. McCombs because you are in fact guilty of all three of those charges and for no other reason?
>
> [Pause by McCombs]
>
> Court: Are you guilty of those three charges?
>
> McCombs: I guess.
>
> Court: Did you have a sexual contact with the person who is mentioned in the indictment?
>
> [No response]
>
> . . . .
>
> Court: I'll put it this way. You are faced with the allegation by a person who is identified as "JM" in the indictment that these things occurred, that there was obscene videos that she might have seen, that this was your daughter, and that there was a sexual action that took place between you. That's why I'm asking you is [sic], even if you don't remember that, you are *not denying* that. You understand that if you enter a guilty plea you cannot deny it in the future. You will

> have pled guilty to doing it. Do you understand that?
>
> McCombs: Yes, your honor.
>
> Court: And you still wish to plead to these charges?
>
> McCombs: Yes.

Upon review of the record, we believe appellant entered a plea of guilty at the hearing. When specifically asked by the court if he pleaded guilty to the charges against him, he responded "I guess." Even if appellant's plea could be otherwise interpreted, we think it necessarily would constitute a type of an Alford plea. See North Carolina v. Alford, 400 U.S. 25 (1970). In United States v. Tunning, 69 F.3d 107, 110 (6th Cir. 1995), the Sixth Circuit Court of Appeals explained:

> In its strictest sense, then, an "*Alford* plea" refers to a defendant who pleaded guilty but maintained that he is innocent. See United States v. Harlan, 35 F.3d 176, 180 n.1 (5th Cir. 1994). Tunning is not such a defendant because he never stated on the record that he was innocent. The Federal Rules of Criminal Procedure recognize only three pleas: Fed. R. Crim. P. 11(a)(1) states that "[a] defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead ..., the court shall enter a plea of not guilty." The so-called "*Alford* plea" is nothing more than a guilty plea entered by a defendant who either: 1) maintains that he is innocent; or 2) without maintaining his innocence, "is unwilling or unable to admit" that he committed "acts constituting the crime." Alford, 400 U.S. at 37, 91 S. Ct. at 167. Because we believe it is important

> to bear in mind that in either situation the defendant's plea is guilty, we will use the term "*Alford*-type guilty plea," rather than merely "*Alford* plea."

We view the reasoning of Tunning as persuasive. As in Tunning, appellant refused to admit specifically that he committed the acts constituting the offenses to which he was pleading guilty nor did he state that he was innocent. We believe appellant's colloquy with the court sufficiently constituted a plea of guilty to the charges against him.

Accordingly, we hold that appellant did not enter a *nolo contendere* plea, and the circuit court did not abuse its discretion by denying appellant's motion to withdraw guilty plea.

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

ALL CONCUR.

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