

RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000441-MR

BRYAN KEITH HOOFER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 04-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

EMBERTON, SENIOR JUDGE: Bryan Keith Hooper appeals from a denial of his motion to withdraw his guilty plea to possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine in violation of KRS 250.991(2); first degree possession of a controlled substance in violation of KRS 218A.1415; and possession of drug paraphernalia in violation of KRS 218A.500. In accordance with the plea

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.

agreement, Hooper was sentenced to concurrent terms of imprisonment of ten years, five years, and twelve months for a total of ten years. On appeal he alleges that although as a part of the plea agreement with the Commonwealth that he was to be shock probated after serving 120 days of his sentence of ten years, that part of the agreement was not included in the filed Commonwealth's Offer on a Plea of Guilty. He now claims that he was induced to plead guilty based on the Commonwealth's assurance that he would serve only 120 days of his sentence, a promise, he contends, the court was unaware of at the time he entered his plea.

Following the entry of an Alford² plea on April 29, 2004, Hooper remained free on bond pending sentencing that was scheduled for July 12, 2004. Hooper failed to appear on the sentencing date and was again arrested on September 1, 2004. After a competency evaluation was conducted at defense counsel's request, the court found Hooper competent and prepared to sentence him; at that time, however, Hooper made an oral motion to withdraw his plea stating that the Commonwealth had promised to recommend shock probation after 120 days and he then produced a "not to be filed" plea form that provided:

Comm. agrees to recommend shock probation
120 days after sentencing provided no
further violations, Δ to undergo drug

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

assessment and to follow all recommendations of assessment for aftercare, therapy, or treatment.

He argued that based on his failure to appear for sentencing, he should be permitted to withdraw his plea because the Commonwealth would presumably no longer honor the agreement and would no longer recommend shock probation. The Commonwealth did not dispute the validity of the "not be filed" plea agreement and agreed with Hooper's prediction that his bail jumping would cause the Commonwealth to reconsider its position as to shock probation. The court found that Hooper's plea was voluntarily and willingly made and denied the motion to withdraw the guilty plea.

There is no evidence the Commonwealth promised Hooper he would serve only 120 days, then be shock probated. In fact, the plea colloquy reveals that Hooper acknowledged in open court that there were no promises or threats to induce his guilty plea and that the court would make the final determination as to sentencing, including probation. The plea agreement itself states only that the Commonwealth would recommend shock probation after service of 120 days of his sentence "provided no further violations...."

It is unclear to this court why the Commonwealth's stance on shock probation is in a separate form from the

recommendation as to sentencing or why it is marked "not to be filed." Perhaps it was because that part of the agreement had no effect until 120 days after sentencing and was conditioned on Hooper's compliance with its stated requirements. It does seem that the better practice is to file the complete agreement so the trial court is aware of all the facts surrounding the plea.³ However, because Hooper violated the terms of the agreement by failing to appear at his sentencing, we find any error harmless.

The Commonwealth is not bound by the conditions in a plea agreement after it is breached by the defendant.⁴ Hooper failed to appear for sentencing, thus the Commonwealth was no longer bound to its promise to recommend shock probation; therefore, whether the court was aware of the existence of the conditional plea bargain agreement is a moot point. Hooper received exactly the sentence he bargained for with the Commonwealth and, by violating the terms of the unfilled agreement, negated its existence. There was no basis asserted which required the trial court to allow Hooper to withdraw his guilty plea. RCr 8.10.⁵

The judgment is affirmed.

³ Kennedy v. Commonwealth, 962 S.W.2d 880 (Ky.App. 1997).

⁴ Jones v. Commonwealth, 995 S.W.2d 363 (Ky. 1999).

⁵ Kentucky Rules of Criminal Procedure.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib, Jr.
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky