

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002096-MR

ANDRE LYDIAN

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 04-CR-00301

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REMANDING WITH SPECIFIC DIRECTION

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

COMBS, CHIEF JUDGE: Andre Lydian appeals from a jury verdict and judgment of the Nelson Circuit Court finding him guilty of trafficking in a controlled substance and sentencing him to eight-years' imprisonment. After our review, we remand for further proceedings consistent with this opinion.

On March 18, 2004, Bardstown Police Detective Tom Roby, a member of the Greater Hardin County Narcotics Task Force, contacted a confidential informant, Michael White, to arrange a controlled drug buy in which White would purchase cocaine

from Lydian. Roby met White at the Nelson County Fairgrounds and gave him \$500.00 with which to purchase one-half ounce of crack cocaine from Lydian. White was also outfitted with a micro-cassette recorder. White remained at the Fairgrounds with Detective Doug Clark, another member of the Task Force, while Roby left to set up a video camera at the location of the controlled buy – the parking lot of the Parkway Baptist Church in Bardstown. White and Clark left the Fairgrounds a few minutes later.

White met Lydian in the church parking lot. According to White, he got into Lydian's Oldsmobile and completed a drug buy with Lydian. White then exited the vehicle and drove back to the Fairgrounds, where he gave the cocaine that he had allegedly purchased from Lydian to the officers waiting there. After the transaction was completed, Deputy Dennis Wells of the Nelson County Sheriff's Department received a radio call from Roby about Lydian and was told that an active indictment warrant for Lydian's arrest had been issued by the Nelson Circuit Court. Wells later stopped Lydian's vehicle on the Bluegrass Parkway; he arrested Lydian and transported him to the Bardstown Police Department, where he transferred custody of Lydian to Roby.

On August 4, 2004, the Nelson County Grand Jury indicted Lydian on a charge of first-degree trafficking in a controlled substance, a Class C felony pursuant to Kentucky Revised Statutes (KRS) 218A.1412, for selling cocaine to a confidential informant. Lydian appeared in open court with counsel on August 19, 2004, and entered a plea of not guilty to the charge. Lydian was tried before a jury in July 2005. The jury found Lydian guilty of the trafficking charge and recommended a sentence of eight-

years' imprisonment. On September 9, 2005, the trial court entered a judgment and sentence consistent with the jury's recommendations. Lydian's subsequent post-trial motions were denied. This appeal followed.

On appeal, Lydian raises the following arguments: (1) that the trial court erred by failing to allow him to fully cross-examine White as to White's alleged motives of bias against him; (2) that the trial court erred in failing to grant his motion for a directed verdict; (3) that the trial court erred in failing to order a new penalty phase at trial after the court clerk testified that Lydian had been charged with felony non-support when he had been convicted only of a misdemeanor; and (4) that the trial court erred in failing to grant a mistrial when the Commonwealth presented evidence of uncharged bad acts without providing proper notice as required by Kentucky Rules of Evidence (KRE) 404(c).

Before we can consider these arguments, however, we must first address the Commonwealth's contention that this appeal should be dismissed because Lydian entered into a plea bargain agreement with the Commonwealth on April 10, 2006, as to five (5) other indictments and agreed to withdraw this appeal as part of that agreement. "Courts have recognized that accepted plea bargains are binding contracts between the government and defendants." *Hensley v. Commonwealth*, 217 S.W.3d 885, 887 (Ky.App. 2007). Accordingly, plea agreements must be interpreted according to ordinary contract principles. *O'Neil v. Commonwealth*, 114 S.W.3d 860, 863 (Ky.App. 2003), quoting *United States v. Ramunno*, 133 F.3d 476, 484 (7th Cir. 1998). Our Supreme Court has

recognized that “[a]ny right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily.” *Johnson v. Commonwealth*, 120 S.W.3d 704, 706 (Ky. 2003), quoting *United States v. Ashe*, 47 F.3d 770, 775-776 (6th Cir. 1995). Accordingly, the defendant’s right to an appeal also can be waived pursuant to a valid plea agreement, and any such waiver is binding on the defendant. *Id.*; see also *Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004). Thus, we must determine whether Lydian waived his right to bring this appeal by entering into a valid plea agreement with the Commonwealth.

In considering this issue, we are guided by our Supreme Court in *Johnson, supra*, in which the Court considered whether the appellant had knowingly waived his right to appeal his conviction for manufacturing methamphetamine in exchange for the reduction of a persistent felony offender charge. *Johnson*, 120 S.W.3d at 705. The Supreme Court found it necessary to remand the matter to the circuit court. It directed the circuit court to make factual findings and to enter an order addressing this very same issue in order to create an adequate record for review. *Id.* On remand, the circuit court concluded that the appellant had indeed waived his right to an appeal during a plea colloquy that took place prior to sentencing; the Supreme Court agreed with this conclusion and dismissed the appeal pursuant to the finding of the appellant’s waiver. *Id.* at 706.

In the case before us, we are presented with a record suggesting that Lydian may have waived his right to the current appeal. However, under the precedent of

Johnson, we find it necessary and appropriate to remand the matter to the Nelson Circuit Court for the limited purpose of determining whether Lydian knowingly and voluntarily waived his right to an appeal of the conviction at issue. As part of its determination, the court should enter specific and appropriate findings on the record as to whether any such waiver occurred. In so doing, the court will need to give particular consideration to “the record made at entry of the plea”; *i.e.*, any plea colloquy conducted by the court as to Lydian’s plea bargain agreement. *Id.* at 705.

Accordingly, this matter is remanded to the Nelson Circuit Court so that findings may be made consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Morehead
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky