

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-000048-MR

CHRISTOPHER SEIVERS

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 05-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.<sup>1</sup>

KNOPF, SENIOR JUDGE: Appellant, Christopher Seivers, pled guilty to three counts of theft by deception over \$300.00, one count of obtaining or attempting to obtain controlled substances by fraud, and one count of giving a false name for an identification card. The Owen Circuit Court accepted his guilty plea and entered judgment in accordance with the agreement. Seivers received four years' imprisonment, a \$1,000.00 fine, and was ordered to pay \$1,200.00 in restitution. This appeal follows.

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<sup>1</sup> Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Seivers argues that the portion of the judgment imposing the fine should be vacated. He does not challenge the voluntariness of his plea, rather that the imposition of the fine is inappropriate because he is an indigent person. He relies on KRS 534.040 and *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994), in support of his argument. We disagree.

As a preliminary matter, Seivers argues that his guilty plea was conditional upon the appeal of the imposition of the fine. In support of this assertion, Seivers points to remarks his defense counsel made during the plea and sentencing colloquies that informed the court of the issue. Be that as it may, we find no indication in the record that a conditional plea was entered in accordance with RCr 8.09, which provides:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

Neither the written offer on a plea of guilty nor the motion to enter a guilty plea contained any language referring to a conditional plea. Similarly, neither the documents styled “Judgment of Guilt on Guilty Plea” nor the “Final Judgment and Sentence of Imprisonment” contained any reference to a conditional plea. Despite our reservations as to the proper preservation of this issue, we will consider the merits.

KRS 534.030(4) states:

Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.

In *Simpson, supra*, the Kentucky Supreme Court stated:

Pursuant to the statute, the judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the judge must also consider whether the appellant is indigent. In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent. For this reason, imposition of any fine was inappropriate, and accordingly, we vacate such portions of the sentence as pertain thereof.

Neither KRS 534.030(4) nor *Simpson* is applicable to the present case because Seivers entered into a valid plea agreement. *Simpson* is clearly distinguishable because in that case the fine was imposed by the court following a jury trial. Here, Seivers voluntarily entered into the agreement and received a lesser prison sentence than he may have received had he gone to trial. Seivers also argues that the agreement did not constitute a waiver because he reserved the right to appeal the imposition of the fine. Nevertheless, Seivers still agreed to and benefited from the plea agreement. A defendant may voluntarily waive a sentencing limitation and accept an otherwise unauthorized sentence. *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky. 2001). As stated above, the imposition of the fine was a valid exchange for a lesser prison sentence. Therefore, Seivers' acceptance of the terms of the plea agreement constituted a waiver of the protection afforded by KRS 534.030(4). The fine was clearly indicated on the written offer on a plea of guilty that Seivers signed and understood. Defendants may not pick and choose the portions of a plea agreement which they want to abide by and those which they want to appeal. *O'Neil v. Commonwealth*, 114 S.W.3d 860, 863 (Ky.App. 2003).

Accordingly, the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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