

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000950-MR

RICHARD BOHN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 04-CR-00718

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

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

NICKELL, JUDGE: Richard Gregory Bohn (hereinafter “Bohn”) appeals from the Kenton Circuit Court's denial of his motion to withdraw guilty plea and subsequent sentencing order entered on March 8, 2006. For the following reasons, we affirm.

On December 10, 2004, a Kenton County grand jury returned an indictment against Bohn for one count of sexual abuse in the first degree, a violation of Kentucky Revised Statutes (KRS) 510.110,¹ for acts which occurred on or about March 18, 2003.

¹ Bohn was charged with a Class D felony pursuant to KRS 510.110 although it appears from the record the victim was less than twelve years old at the time of the offense, presumably making this offense a Class C felony. The record is silent as to why Bohn was charged with the

The facts are simple and not in dispute. Bohn had been babysitting two young girls when he allowed them to watch a pornographic video, asked them to pose like the women in the video, and inappropriately touched the oldest child.²

Following arraignment, Bohn's counsel made a motion for a competency evaluation, which the trial court granted. On September 1, 2005, Bohn entered the Kentucky Correctional Psychiatric Center (KCPC) for evaluation. After an extended evaluation period, a competency hearing was held on January 27, 2006, wherein Bohn was found to be competent to stand trial. Following this decision, Bohn indicated his desire to enter a guilty plea to the pending charge. On January 31, 2006, Bohn tendered a motion to enter guilty plea in open court. The plea was unconditional and there was no written offer on sentencing by the Commonwealth. The trial court engaged in a detailed plea colloquy with Bohn, covering, *inter alia*, the nature and circumstances surrounding the crime for which he stood charged, the penalty range provided by law for the crime, and the constitutional rights he would be giving up by pleading guilty. Bohn persisted in his desire to enter the guilty plea, and the trial court ultimately accepted the plea. Formal sentencing was set for March 6, 2006.

At the sentencing hearing, Bohn's counsel argued he should receive a probated sentence. The Commonwealth asked the court to impose a sentence of five years, with one year to serve in prison and the balance being probated for a period of five

lesser offense and there is no argument on appeal regarding this issue. Therefore, we must assume the charging instrument was correct.

² The child was five years old at the time of the offense.

years. Sentencing was then postponed until March 26, 2006, in order for the parties to prepare arguments regarding whether Bohn was in a position of trust when the offense was committed thus foreclosing the possibility of a probated sentence, as well as issues surrounding Bohn's prior criminal record. After hearing arguments, reviewing the Presentence Investigation Report, and taking into consideration all other aspects of the crime, the trial court imposed a sentence of five years' imprisonment and ordered Bohn to complete the Sex Offender Treatment Program (SOTP). Bohn objected to the sentence and made an oral motion to withdraw his guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10, arguing the trial court had rejected the plea agreement by not following the Commonwealth's oral sentencing recommendation. The trial court indicated there was no agreement to reject and thus he was not required to allow the withdrawal of the plea. Judgment was entered accordingly and this appeal followed.

Bohn's sole contention on appeal is the trial court abused its discretion in failing to allow him to withdraw his guilty plea. We disagree.

RCr 8.10 allows a criminal defendant to withdraw his guilty plea at any time before judgment. The well-settled law of the Commonwealth is that decisions on motions to withdraw guilty pleas are committed to the sound discretion of the trial court. *See Hurt v. Commonwealth*, 333 S.W.2d 951 (Ky. 1960); and *Anderson v. Commonwealth*, 507 S.W.2d 187 (Ky. 1974). If a plea is involuntarily given, withdrawal must be allowed; if it is voluntarily given, the trial court has discretion to grant or deny the motion. *Rigdon v. Commonwealth*, 144 S.W.3d 283 (Ky.App. 2004); *Elkins v.*

Commonwealth, 154 S.W.3d 298 (Ky.App. 2004). A criminal defendant is entitled to a hearing on his motion to withdraw his guilty plea whenever it is alleged that such plea was involuntary. *Edmonds v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006). A trial court commits an abuse of discretion when a decision is rendered which is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Id.* Whether a plea was voluntarily entered is necessarily fact-specific and must be determined under the totality of the circumstances surrounding its entry, a determination the trial court is in the best position to make. *Rigdon, supra*. We review such determinations under the clearly erroneous standard. *Edmonds, supra*. Thus, we must first examine the voluntariness of Bohn's plea before determining whether the trial court abused its discretion in denying the motion to withdraw such plea.

In the case *sub judice*, Bohn never contended his plea was involuntarily made. Thus, pursuant to the holding in *Edmonds*, the trial court was not required to hold a hearing on his motion. The trial court had previously found Bohn's plea to have been knowingly, intelligently and voluntarily given. The decision was supported by substantial evidence after a lengthy plea colloquy, thus it was not clearly erroneous. Nothing in the record contradicts this finding, and it will not be disturbed on appeal.

We therefore turn to a determination as to whether the trial court abused its discretion in failing to allow withdrawal of the guilty plea. We hold that it did not. The sole basis for Bohn's assignment of error is the trial court's failure to agree with the Commonwealth's oral recommendation at final sentencing. However, when he entered

his guilty plea, Bohn was fully informed that he was entering such plea without the benefit of a formal sentencing recommendation from the Commonwealth. No conditions were placed upon the plea. When accepting his plea, the trial court specifically informed Bohn of the penalty range applicable to the crime to which he was pleading guilty. Furthermore, the motion to enter guilty plea form, signed by Bohn and his counsel, affirmatively stated the trial court “may impose any punishment within the range provided by law. If, at sentencing the Commonwealth makes a recommendation of a sentence to the Court, I [Bohn] understand that the Court is not bound by it.” That form further states Bohn's understanding that even if the Commonwealth were to recommend a sentence, not only would the trial court not be bound by the terms of such recommendation, but the rejection by the trial court of any such recommendation would not be a valid basis for withdrawal of the guilty plea.

Upon a careful review of the entire record before us, we find no abuse of discretion by the trial court in its decision to deny Bohn's motion. Bohn has failed to show any mistaken beliefs about the possible penalty for his actions, and the record does not reflect anything less than honesty and fair play on the part of the court. *Kennedy v. Commonwealth*, 962 S.W.2d 880 (Ky.App. 1997). Bohn has presented no reason why we should find the trial court's decision to be arbitrary, unreasonable, unfair, or unsupported by legal principles. Thus we find the trial court did not abuse its discretion in denying Bohn's motion to withdraw his guilty plea.

For the foregoing reasons, the decision of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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