

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000504-MR

SHAUN HENRY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 06-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from the Muhlenberg Circuit Court's denial of Shaun Henry's (Appellant) motion to withdraw his guilty plea to first-degree possession of a controlled substance and second-degree persistent felony offender. Appellant argues that his plea was not made knowingly and intelligently, therefore, he should be allowed to revoke it. We disagree and affirm the lower court's denial of Appellant's motion.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A discussion of the facts surrounding Appellant's criminal offense are not relevant to the issue at hand. What is at issue is a recommendation in the Commonwealth's offer on a guilty plea. The recommendation was that if Appellant was accepted into Muhlenberg/McLean Drug Court after the service of six months in prison, the Commonwealth would not oppose probation. Additionally, the recommendation stated that "Defendant acknowledges no guarantee or assurance of acceptance into Drug Court." Subsequently, when Appellant's case came up for review by the drug court panel, he was denied entry to the program. It appears as though he was denied access to the drug court program because he was a parole violator and the drug court has had problems with them in the past. Appellant claims that because he was denied entry into the drug court program without being fully evaluated, he did not get any benefit from the Commonwealth's drug court recommendation. Additionally, because he was not informed that the local drug court routinely denies entry to parole violators, his plea was not knowing and intelligent. Appellant also argues that if the Commonwealth Attorney knew parole violators were likely to get rejected by the drug court at the time he entered into the plea agreement, this could constitute fraudulent inducement.

While these arguments have some merit, the record reflects that Appellant got just what he bargained for. There is no evidence to suggest the Commonwealth Attorney knew Appellant would be rejected by the drug court at the time he entered into the plea agreement. In fact, neither Appellant nor his counsel requested an evidentiary

hearing to present evidence in support of his motion. Because this issue was not first presented to the lower court, it has not been preserved for review by this Court.

Further, Appellant was not guaranteed entry into the drug court program. As noted above, the plea agreement specifically stated “Defendant acknowledges no guarantee or assurance of acceptance into Drug Court.” When Appellant entered the guilty plea, he was asked by the trial court if he knew what was contained in the plea agreement and if he was satisfied by its terms. Appellant responded in the affirmative and the court found he was making a knowing, intelligent, and voluntary plea. The language in the agreement put Appellant at the mercy of the drug court’s selection process and he cannot now withdraw his plea due to an unfavorable result.

Additionally, the trial judge who heard Appellant’s motion to withdraw his guilty plea was also a member of the drug court panel. During the hearing on Appellant’s motion, the judge said that Appellant was considered for the program, but rejected. Appellant had no expectation of being guaranteed entry into the drug court. At most, the language in the plea agreement guaranteed that Appellant would be considered for the program, which he was. The drug court administrators determine whether an applicant is appropriate for the program and has wide discretion in its admission policies. There is no evidence to suggest that all parole violators were, are, or forever will be rejected by the drug court. It is just one factor, albeit a major one, that the drug court acceptance panel took into consideration. The Commonwealth and lower court fulfilled the terms of the plea agreement and nothing in the record reflects otherwise.

Because Appellant was considered for the program, but rejected, we find that the terms of the plea agreement were followed. Appellant had no guarantee of being accepted into the drug court program and it was his status as a parole violator that caused him to be turned down, not an act of the Commonwealth. For these reasons, we affirm the Muhlenberg Circuit Court's denial of Appellant's motion to withdraw his guilty plea.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky