

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001191-MR

MICHAEL W. ASHER

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 14-CR-00057

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT,
JUDGES.

KRAMER, CHIEF JUDGE: Michael W. Asher appeals from a final judgment of the Grant Circuit Court entered after his motion to withdraw his guilty plea was denied.

According to the police report in the record, Asher was under the influence of drugs when the vehicle he was driving struck another vehicle. The

three occupants of the other vehicle were seriously injured; they included a three-year-old child who suffered a spinal cord injury that left him a paraplegic. Asher was indicted on three counts of first-degree assault; one count of first-degree criminal mischief; one count of operating a motor vehicle under the influence, second offense within a five-year period, aggravating circumstance; one count of operating a motor vehicle while license suspended; and for being a first-degree persistent felony offender.

Asher pleaded guilty to all the charges except the persistent felony offender count, which was dismissed. Under the terms of his plea agreement, the Commonwealth recommended a total sentence of fifteen years, a fine of \$1,000 and a DUI service fee. The Commonwealth further agreed that, prior to his incarceration, Asher could be released, continuously monitored with an ankle bracelet, to spend five days with his children in his parents' home or the immediate surrounding yard area.

On the day of sentencing, Asher's private counsel informed the court that Asher intended to withdraw his guilty plea. Counsel also stated that he could not continue ethically to represent him on the grounds of conflict of interest. After confirming with Asher that he intended to move to withdraw his plea, the trial court permitted private counsel to withdraw. The trial court then determined that Asher was indigent, appointed the Department of Public Advocacy to represent him, and delayed the sentencing hearing.

Asher thereafter filed a motion to withdraw his guilty plea, claiming:

(1) that he was under mental duress at the time he entered the plea due to his feelings of guilt about the large sums of money his family had already expended on his legal defense and would be required to spend on his upcoming trial; and (2) that the Commonwealth had violated its promise to allow him to play with his children in the yard area of his parents' house during his five days of monitored release.

After holding a brief hearing, the trial court denied the motion and proceeded to sentence Asher in accordance with the terms of his plea agreement.

This appeal followed.

To be valid, a plea must be knowing, intelligent and voluntary, *Haight v. Commonwealth*, 760 S.W.2d 84, 88 (Ky. 1988), and a trial court shall not accept a plea without first determining that it is made voluntarily with understanding of the nature of the charge. [Kentucky Rules of Criminal Procedure] RCr 8.08. RCr 8.10 provides that a guilty plea may be withdrawn with permission of the court before judgment. A motion to withdraw a plea of guilty under RCr 8.10 is generally addressed to the sound discretion of the court; however, where it is alleged that the plea was entered involuntarily the defendant is entitled to a hearing on the motion. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006). If the plea was involuntary, the motion to withdraw it must be granted; if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles. *Edmonds*, 189 S.W.3d at 570. The inquiry into the circumstances of the plea as it concerns voluntariness is inherently fact-sensitive. *Id.* at 566. Accordingly, the trial court's determination as to whether the plea was voluntarily

entered is reviewed under the clearly erroneous standard.
Id.

Williams v. Commonwealth, 229 S.W.3d 49, 50-51 (Ky. 2007).

Asher argues that the trial court (1) failed to hold a hearing to address his contention that his plea was involuntary, and (2) abused its discretion in refusing to allow him to withdraw the plea on the grounds that he was not allowed in the yard with his children during the five-day release period.

The record shows that a brief hearing on Asher's motion to withdraw his plea was held on July 22, 2015, prior to final sentencing. The trial court stated that it had reviewed Asher's guilty plea hearing and found the plea to be voluntarily entered. When asked whether there was "anything additional," Asher's attorney did not address the issue of the voluntariness of the plea, but stated instead that if it was going to be a "deciding factor," the defense was prepared to offer testimony regarding the dispute over whether Asher had been allowed to play with his children in his parents' yard. The trial court declined to hear the testimony, stating that it had reviewed the motion again, that it knew how much time Asher's attorney had spent putting the plea deal together, that Asher had never complained about the restrictions and that there was no need to have testimony.

Thus, the record shows that the trial court properly held a hearing, albeit a brief one, in accordance with *Edmonds*, and provided an opportunity for Asher to offer further arguments. As to the voluntariness of his plea, the trial court expressly indicated that it had reviewed the record and specifically recalled

Asher's voluntary plea affirmations. Asher did not attempt to offer any further evidence to support his contention that his plea was involuntarily entered under duress, nor does he identify any evidence he would have wished to offer in this regard. His allegation regarding his anxiety about the legal bills his family had incurred on his behalf does not rise to the level of invalidating his plea, especially in light of the fact that he was eligible for representation by a public defender if he so chose.

Furthermore, even if we accept as true his claim that he was not permitted to play with his children in the yard during his period of monitored release, it does not constitute a breach of the plea agreement severe enough to justify allowing him to withdraw his plea. There is absolutely no dispute that he was allowed to spend five days with his children at his parents' house. The trial court's denial of Asher's motion to withdraw the plea was reasonable, fair, and supported by sound legal principles.

Accordingly, the final judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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