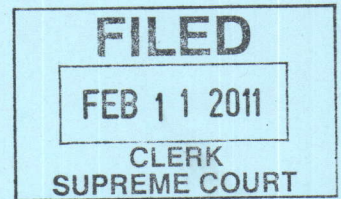


**Commonwealth of Kentucky
Supreme Court of Kentucky**

File No. 2009-SC-115



JAMES JACKSON

APPELLANT

v.

Appeal from McCracken Circuit Court
Hon. Craig Zeiss Clymer, Judge
Indictment No. 2005-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by:

JACK CONWAY

Attorney General of Kentucky

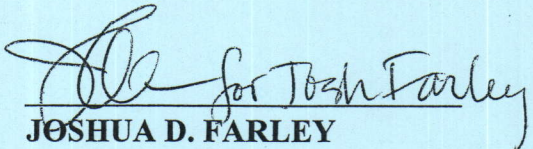
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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 11th day February, 2011, to: Hon. Craig Zeiss Clymer, Judge, McCracken Circuit Court, McCracken County Courthouse, 301 South 6th St., Paducah, KY 42003-1794; to: Hon. Rebecca Hobbs, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY. 40601; via electronic Mail to: Hon. Tim Kaltenbach, Commonwealth's Attorney, McCracken County Courthouse, 301 South 6th St., Paducah, Ky. 42003-1794. I further certify that the record on appeal was returned to the Clerk of this Court, this 11th day of February, 2011.


JOSHUA D. FARLEY

Assistant Attorney General

INTRODUCTION

This is a criminal case in which Appellant claims he was improperly transferred, tried, and convicted as a Youthful Offender in McCracken Circuit Court.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

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COUNTERSTATEMENT OF THE CASE

On October 15, 2004, Appellant was arrested and charged with First Degree Trafficking in a Controlled Substance, Cocaine, Possession of Marijuana, Use/Possession of Drug Paraphernalia, and Possession, Manufacture, Transportation of a Handgun by a Minor (TR Supp. 6)¹. Appellant appeared for a detention hearing on October 19, 2004, at which time the Commonwealth discussed having the Appellant certified as an adult due to firearm enhancements and transferring him to Circuit Court to be tried as a Youthful Offender (TE Audio Supp. I). A transfer hearing was then set for November 10, 2004 (Id.). At Appellant's transfer hearing on November 10, 2004, the court found it necessary after reviewing the Appellant's record with the court and the factors set forth in KRS 640.010, to transfer the Appellant to the Circuit Court to be tried as a Youthful Offender (TE Audio Supp. II, TR Supp. 14).

Appellant was indicted on January 14, 2005, by a McCracken County Grand Jury on one (1) count of "Enhanced" First Degree Trafficking in a Controlled Substance, Cocaine, one (1) count of Possession of Marijuana, one (1) count of Use/Possession of Drug Paraphernalia, and one (1) count of Possession, Manufacture, Transportation of a Handgun by a Minor (TR 1 - 3). Appellant entered a guilty plea on March 4, 2005, accepting an offer from the Commonwealth for a Youthful Offender conviction and a

¹ For purposes of identification, "TR Supp." shall refer to the written juvenile court record in Juvenile Case No. 00-J-00370=011 certified as part of the Supplemental Record in this case. "TE Audio Supp. I" shall refer to the audiotape containing the recording of the detention hearing conducted on October 19, 2004 and labeled 04-J-58, and "TE Audio Supp. II" shall refer to audiotapes labeled 04-J-62 and 04-J-63, which contain the recording of the transfer hearing held on November 10, 2004.

total of ten (10) years to serve on all four charges (Id. at 26 - 31). Appellant appeared again in court on April 25, 2005, for sentencing as a Youthful Offender and received the recommended ten (10) year sentence as offered by the Commonwealth on a plea of guilty (Id. at 37 - 39).

Appellant filed a "Motion to Vacate Final Judgment/Sentence of Imprisonment" on November 20, 2006 (Id. at 51 - 67). The Commonwealth filed a Response to this motion on December 11, 2006 (Id. at 73 - 75) and a reply was filed by the Appellant on December 14, 2006 (Id. at 76 - 81). The Circuit Court denied the Appellant's motion on December 21, 2006, and entered an order imposing final judgment/sentence of imprisonment, remanding the Appellant to the Department of Corrections (Id. at 87 - 91).

Appellant appealed from the Circuit Court's denial of his motion to vacate to the Kentucky Court of Appeals. The Kentucky Court of Appeals held:

"Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52] at 56 [(1985)] citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The voluntariness of an unconditional guilty plea is important and competent advice from counsel is necessary for a defendant to enter such a plea because the entry of such a plea waives almost all of a defendant's rights.

In dismissing Jackson's motion, the trial court failed to undertake an analysis as to whether the guilty plea entered by Jackson was voluntary. This Court must refrain from a *de novo* determination that the plea was entered voluntarily. *Lynch v. Commonwealth*, 610 S.W.2d 902 (Ky.App. 1980). To further confuse matters, the record neither indicates if

the standard adopted in *Sparks* [*v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986)] was ever argued to the trial court, nor whether the trial court applied it as the proper standard.

Accordingly, we remand back to the trial court to determine if Jackson's guilty plea was voluntary. Upon remand, the trial court will need to determine if a hearing is required under *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), or if the record conclusively resolves the issues. Whether or not a hearing is necessary, the *Strickland* standard as refined by *Hill* and adopted in *Sparks* must be applied to determine whether Jackson's guilty plea was entered voluntarily.

Slip Op. at 5-6. The Court of Appeals went on to disagree with the Appellant's contentions that the McCracken Circuit Court lacked jurisdiction in his case and held that his unconditional guilty plea prevented review of such an issue.

Nevertheless, evidentiary challenges to the basis for certification should have been raised on direct appeal, especially since Jackson may no longer benefit from an adjudication in a juvenile proceeding. Any evidentiary error that counsel failed to bring to the attention of the district court is not now a due process issue but instead an ineffective assistance of counsel issue. The unconditional guilty plea entered by Jackson complicated the review of his dilemma, as it served to waive his evidentiary defenses and subsequent claims of error. Accordingly, we do not believe that the judgment is void or that the evidentiary error rises to the level of a due process violation.

Slip Op. at 7-8. The Court of Appeals vacated and remanded the Appellant's case to the trial court to determine whether his plea was entered voluntarily. *Id.* at 8.

After petitioning for a rehearing at the Court of Appeals, Appellant moved for discretionary review with this Court, which granted discretionary review.

ARGUMENT

I.

APPELLANT SHOULD NOT BE ALLOWED TO DENIGRATE THE PLEA PROCESS BY REAPING A DOUBLE BENEFIT FROM A PLEA BARGAIN BY RECEIVING A LESSER SENTENCE AND ALSO CHALLENGING HIS TRANSFER AS A YOUTHFUL OFFENDER.

Appellant contends that he should not have been transferred and tried as a Youthful Offender; however, Appellant has waived this argument by pleading guilty. It is a well-settled rule that an unconditional guilty plea waives all defenses except that the indictment does not charge a public offense. Thompson v. Commonwealth, 147 S.W.3d 22, 39 (Ky. 2004); Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003); Toppas v. Commonwealth, 805 S.W.3d 795 (Ky. App. 2002); Hughes v. Commonwealth, 875 S.W.2d 99 (Ky. 1994); Quarles v. Commonwealth, 456 S.W.2d 693 (Ky. 1970); Thomas v. Commonwealth, 459 S.W.2d 72 (Ky. 1970) (where the court held “[p]retrial irregularities . . . cannot be raised after voluntarily entering a plea of guilty.” 459 S.W.2d at 72.) Centers v. Commonwealth, 799 S.W.2d 51 (Ky. App. 1990) (where the court noted, “[a] guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.” 799 S.W.2d at 55.) *Accord*: White v. Sowders, 644 F.2d 1177 (6th Cir. 1980).

The indictment against Appellant did in fact charge a public offense - - one (1) count of “Enhanced” First Degree Trafficking in a Controlled Substance, Cocaine,

one (1) count of Possession of Marijuana, one (1) count of Use/Possession of Drug Paraphernalia, and one (1) count of Possession, Manufacture, Transportation of a Handgun by a Minor (TR 1 - 3).

Appellant's plea in the instant case was not a conditional guilty plea. The record is void of any reference to Appellant's guilty plea being conditional. RCr 8.09 states:

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.

(Emphasis added.)

The record does not contain any document, as required by RCr 8.09, where Appellant reserved in writing the right to appeal any issues. The Commonwealth's offer on a plea of guilty makes no mention whatsoever of any appeal (TR 28 - 29). The Motion to Enter Guilty Plea makes no mention of a conditional plea (Id. at 26 - 27). The Order and Judgment on Guilty Plea does not mention a conditional plea (Id. at 30 - 31).

The fact that Appellant's guilty plea was not meant to be a conditional guilty plea is illustrated by the Motion to Enter Guilty Plea signed by Appellant. In the Motion, it is stated:

5. I further understand the Constitution guarantees to me the following rights:
 - (a) The right not to testify against myself;
 - (b) The right to a speedy and public trial by jury at which I would be represented by counsel

and the Commonwealth would have to prove my guilt beyond a reasonable doubt;

- (c) The right to confront and cross-examine all witnesses called to testify against me;
- (d) The right to produce any evidence, including attendance of witnesses, in my favor;
- (e) **The right to appeal my case to a higher court.**

I understand that if I plead "Guilty," I waive these rights.

(Id. At 26). (Emphasis added.)

Further, Appellant's counsel stated in the Certificate of Counsel that counsel had "fully explained the defendant's constitutional rights to him/her, and I believe that he/she understands them." (Id. at 27). In none of these instances was a conditional guilty plea mentioned.

The record does demonstrate that Appellant's guilty plea was voluntary, knowing and intelligent. In the Motion to Enter Guilty Plea, Appellant acknowledged his judgment was not impaired by drugs, alcohol or medication. Appellant stated he understood the charge against him and fully discussed the facts and any possible defenses to the charge with his attorney. As noted above, he affirmatively stated he understood his Constitutional rights and that he was waiving these rights by pleading guilty. Appellant also set forth that he had not been coerced, influenced or induced in any way into changing his previously entered not guilty plea. Most importantly, Appellant admitted he was guilty and that he "make[s] no claim of innocence" (Id. at 26 - 27).

In Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990), this Court held that the signing of these documents was procedurally sufficient to satisfy the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed2d 274 (1969) for a valid guilty plea. Id. See also: Kiser v. Commonwealth, 829 S.W.2d 432, 433 (Ky. App. 1992). The same rationale applies to Appellant's case.

An appeal from a guilty plea is proper in very limited circumstances. See Hughes, 875 S.W.2d at 100 (where the court allowed an appeal pertaining to a sentencing issue) and Centers, 799 S.W.2d at 55 (where the court allowed an appeal pertaining to ineffective assistance of counsel during the guilty plea.) However, the issue raised by Appellant does not fit these narrow exceptions. Appellant's issue is one usually raised in an appeal from a jury verdict and judgment. As show above, the law is very clear that issues usually raised via a jury verdict appeal are proper in an appeal from a guilty plea **only** when that plea is a conditional guilty plea.

As demonstrated above, the record in the instant case is void of any evidence that Appellant's guilty plea was meant to be a conditional guilty plea. RCr 8.09 is very specific in its requirements for a conditional guilty plea. These requirements were not met in the instant case and Appellant's appeal is not proper.

In Weatherford v. Commonwealth, 703 S.W.2d 882, 883 (Ky. 1986), this Court cited the United States Supreme Court's decision of Bordenkircher v. Hayes, 434 U.S. 357, 361-362, 98 S.Ct. 663, 667, 54 L.Ed 2d 604, 609-610 (1978) in recognizing that plea bargains are "important components of this country's criminal justice system." In this vein, plea bargaining encourages prompt and final disposition of cases and

presents one of the few effective tools now available to courts and prosecutors faced with unmanageable criminal dockets.

In the present case, Appellant was facing the possibility of twenty (20) years imprisonment. As a result of a plea bargain, Appellant was able to broker a deal where he would serve only ten (10) years - - a distinct benefit to Appellant. The Commonwealth, and additionally, the court system, also received a benefit - - finality of a case without the burden of proceeding to trial.

However, by filing the instant appeal, Appellant has reaped a **double** benefit from this process. Not only has Appellant received a lesser sentence, Appellant is now attempting to denigrate the plea process by also challenging his transfer to the very court in which he plead guilty. If this Court reviews the merits of Appellant's appeal, the Commonwealth - - and again, the court system - - will have achieved nothing as a result of the plea bargain. Appellant will have his reduced sentence and also be allowed to renege on his transfer - - from which he received this benefit. Such a result sends a message to prosecutors not to engage in plea bargains since the Commonwealth will receive nothing in return.

As set forth above, the law is very clear as to what limited circumstances a defendant may appeal from a guilty plea. These conditions were not met in the instant case and Appellant's appeal should be dismissed.

II.

APPELLANT'S VOLUNTARY GUILTY PLEA WAIVED ANY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant claims ineffective assistance of counsel (Br. Aplt. at 13-17).

However, Appellant's claims are refuted by his knowing, intelligent and voluntary guilty plea. If a guilty plea is constitutionally "voluntary" under Boykin, *supra*, a claim of ineffective assistance of counsel should be considered waived. In Quarles v.

Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970), this Court held that a defendant's

uncoerced (i.e., voluntary) guilty plea precludes him from claiming ineffective assistance of counsel:

Since [Appellant's] allegation that his plea of guilty was coerced is thus disproved, his allegation that he was deprived of his right to effective counsel is of no avail. Lawson v. Commonwealth, Ky., 386 S.W.2d 734 (1965). In fact, the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense. Commonwealth v. Watkins, Ky., 398 S.W.2d 698 (1966) *cert denied*, Watkins v. Kentucky, 384 U.S. 965, 86 S.Ct. 1596, 16 L.Ed.2d 677 (1966).

Quarles, at 694.

In the present case, conclusive proof exists in the record to illustrate Appellant's guilty plea was knowing, intelligent and voluntary. *See* Argument I, *supra*.

Appellant claims his guilty plea was not voluntary and knowing. Sparks v.

Commonwealth, 721 S.W.2d 726, 727 (Ky. App. 1986), contains the standard for determining the validity of a guilty plea:

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978), (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

This standard was reiterated by the Courts in Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001) and O'Neil v. Commonwealth, 114 S.W.3d 860 (Ky. App. 2003). The record demonstrates this standard was satisfied in the instant case.

In Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990), the defendant pled guilty by signing a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty", while having his attorney sign a "Certificate of Counsel" to show that he had advised the defendant of his rights. This Court held that the signing of the documents was procedurally sufficient to satisfy the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), in waiving Appellant's constitutional rights. Id. See also Kiser v. Commonwealth, 829 S.W.2d 432, 433 (Ky. App. 1992). In the present case, Appellant signed a Motion to Enter Guilty Plea acknowledging that he understood his constitutional rights (TR 26 - 27). In this document, Appellant stated that his attorney "fully explained" Appellant's case and that Appellant understood "the charges" and any possible "defenses to them." Appellant also stated that he was not

under the influence of any controlled substances or medication at the time of the plea. The document also fully reiterated that Appellant understood he was waiving his right to testify; his right to a speedy trial; his right to confront and cross-examine witnesses; his right to produce evidence and the right to an appeal. (Id.). Also, trial counsel signed a "Certificate of Counsel" acknowledging that they and Appellant had discussed the present case and that Appellant understood Appellant's constitutional rights. Counsel also stated it was their belief that Appellant's guilty plea was being made "freely, knowingly, intelligently, and voluntarily." (Id.).

Moreover, the trial court asked the Appellant if he understood his motion to enter a guilty plea and the rights he was waiving contained within the motion. The court also discussed the rights that Appellant would be waiving in open court and Appellant stated that he understood what he was doing and had no questions (VR I; 3/04/05; 13:47:41 - 13:48:02). Specifically, Appellant stated that he had plenty of time to discuss the charges against him with his attorney and mother. (Id. at 13:49:40). Appellant was satisfied with his attorney's advice and did not need anymore time to discuss the case with him (Id. at 13:53:58). Appellant stated that he had discussed the motion to enter a guilty plea with his attorney, was competent, nothing was affecting his judgment, and prepared to enter his plea (Id. at 13:51:30 - 13:53:00). Appellant stated that he understood that by pleading guilty he could be spending ten (10) years in prison, with the first two years in juvenile detention (Id. at 13:48:40 - 13:49:13).

The record thus demonstrates Appellant's guilty plea was knowingly, intelligently and voluntarily entered. Appellant signed a waiver in which he

acknowledged to the trial court that he was fully informed of all his applicable rights and that he understood these rights. Having been fully informed, Appellant chose to plead guilty. As such, Appellant's argument must fail as the record illustrates Appellant's plea of guilty was made in a knowing, intelligent and voluntary manner. Sparks, 721 S.W.2d at 727; *et al., supra*. As this case is analogous to Quarles, *supra*, Appellant cannot claim he was deprived of effective assistance of counsel. In essence, his voluntary guilty plea waived all defenses, including ineffective assistance of counsel. As such, Appellant's argument must fail.

III.

THE COURT OF APPEALS' DECISION TO REMAND FOR REVIEW OF APPELLANT'S GUILTY PLEA, IS THE PROPER OUTCOME OF THIS CASE

The Commonwealth concedes that there is some evidence that the Appellant's juvenile transfer was improper; however his later unconditional guilty plea waived all defenses and subsequent claims of error. Quarles v. Commonwealth, 456 S.W.2d 693 (Ky. 1970). Appellant's contention that this is now a due process issue is without merit. The Court of Appeals properly found that the issue was one of ineffective assistance of counsel. "Any evidentiary error that counsel failed to bring to the attention of the district court is not now a due process issue but instead an ineffective assistance of counsel issue." Slip Op. at 7. The Court of Appeals properly remanded the case for a determination regarding whether, based upon counsel's advice to plead guilty, taking the possibility of an improper juvenile transfer into account, Appellant's guilty plea was

voluntary. If upon remand the trial court concludes that a competent counsel would not have advised the Appellant to plead guilty, due to an improper juvenile transfer, Appellant will be able to withdraw his guilty plea and then challenge his juvenile transfer directly. Any ruling by this Court that Appellant should not have been transferred to Circuit Court while an unconditional guilty plea remains in place would necessarily be a determination about Appellant's trial counsel's effectiveness. This is the determination that the Court of Appeals has remanded to the Circuit Court to conduct. Only after this determination has been made, can Appellant properly challenge his juvenile transfer. This Court should not conduct both a collateral and direct review simultaneously, without first allowing the trial court to make those determinations on appeal. There is no need for this Court to alter the rules applicable to guilty pleas when involving juveniles, as Appellant asks this Court to do, when the proper and most direct remedy has already been implemented by the Court of Appeals.

CONCLUSION

For the above-stated reasons, the judgment of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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