

RENDERED: May 30, 1997; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 95-CA-1634-MR

CHRISTOPHER BEESON

APPELLANT

V. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE WILLIAM L. SHADOAN, JUDGE  
ACTION NO. 92-CR-0017

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**  
**REVERSING AND REMANDING**

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BEFORE: WILHOIT, Chief Judge; COMBS and GUIDUGLI, Judges.

COMBS, JUDGE. The appellant, Christopher Beeson, appeals from the November 4, 1994, order of the Fulton Circuit Court denying his motion to withdraw his guilty plea. He contends that the Commonwealth breached the plea agreement and that, therefore, the court should have permitted him to withdraw his guilty plea. We agree.

On October 16, 1991, the appellant was indicted for one count of first-degree burglary, one count of second-degree burglary, and two counts of theft. On November 22, 1991, he was

indicted for eight counts of third-degree burglary. Pursuant to a plea agreement with the Commonwealth, the appellant agreed to plead guilty to two counts of burglary in the second-degree and eight counts of third-degree burglary. In exchange for the appellant's plea, the Commonwealth agreed to reduce the first-degree burglary charge contained in the first indictment to second-degree burglary and to recommend the minimum sentence on all the charges against the appellant. Although the Commonwealth did not agree to recommend concurrent sentences, it did assure the appellant that it would not oppose the court's running the sentences concurrently. In a letter to the appellant dated September 8, 1992, the Commonwealth explained:

The Court has previously told us that he does not want the Commonwealth to recommend consecutive or concurrent sentences. Thus, Mr. Beeson should realize that it is possible under this for him to receive 18 years. I have no objection to the sentence being run so that his sentence is in fact 10 years and I will so inform the Court at such time that the Court asks me. However, Mr. Beeson should realize that this does not bind the Court and that there is nothing that you or I could do that would bind it. I have by this plea agreement reduced the most serious charge from a Class B felony to a Class C felony and I have recommended the minimum sentence on each of the remaining charges. . . .

(Emphasis added). Consequently, on October 27, 1992, the appellant pleaded guilty to ten counts of burglary.

On November 20, 1992, the appellant appeared before the court for sentencing. The court sentenced the appellant to one-year imprisonment on each count of the eight counts of third-

degree burglary and to five years' imprisonment on both counts of second-degree burglary. The court inquired as to whether there was an agreement between the parties regarding concurrent or consecutive sentences; the Commonwealth stated that it took no position on the issue. Consequently, appellant's counsel asked the court to run the sentences concurrently. At this point, the Commonwealth interjected that "the biggest problem the Commonwealth [had] with concurrent here is the man's record . . . burglaries in the state of Texas as well as the state of Tennessee . . . I was not aware of the Texas burglaries." The trial court ordered the sentences to run consecutively, totaling 18 years' imprisonment. The appellant immediately asked the Court to allow him to withdraw his guilty pleas; neither the appellant nor his attorney brought to the court's attention the Commonwealth's assurance that it would not object to concurrent sentences. The trial court refused to allow the appellant to withdraw his guilty pleas.

On November 30, 1992, the appellant filed a motion asking the court to reconsider its judgment on the grounds that the Commonwealth had breached its agreement not to object to concurrent sentences; the trial court never ruled on the motion. The appellant then appealed to this Court, arguing that he was denied due process when the court refused to permit him to withdraw his plea in light of the Commonwealth's breach. He sought specific performance of the agreement -- or, in the

alternative, the right to withdraw his plea and to proceed to trial.

This is the second time that this matter has come before this court. In a previous opinion rendered August 19, 1994, this Court vacated and remanded the judgment of the trial court with directions that it conduct an evidentiary hearing to determine what role -- if any -- the representation made by the Commonwealth not to oppose concurrent sentences played in the appellant's decision to plead guilty. More specifically, we also indicated that should there be finding that the Commonwealth's representation on this matter had indeed been a significant factor or basis for entry of the plea agreement, appellant must be permitted to withdraw his plea as a result of the Commonwealth's breach.

On October 21, 1994, the circuit court conducted an evidentiary hearing as ordered by this Court. In an order dated November 4, 1994, the court again denied the appellant's motion to withdraw his guilty plea. The court made no new findings but reiterated an apparent contradiction: (1) that the Commonwealth did not take a position on concurrent or consecutive sentences and (2) that the Commonwealth did not violate the plea agreement (when in fact it had acted wholly inconsistently with the terms set forth in the letter to the appellant). However, neither the appellant nor his attorney received the court's order or notice

of its entry<sup>1</sup>. On February 15, 1995, the court received a letter from the appellant inquiring as to whether the court had made a decision on his motion to withdraw his guilty plea. The record does not indicate any response to this inquiry. Next, on April 26, 1995, the appellant filed a motion requesting additional findings of fact. He asked the court to make additional findings to answer the directive of the Court of Appeals to ascertain whether his plea had been premised to a significant degree on the representation of the Commonwealth not to oppose concurrent sentences. The court held a hearing on the matter on April 27, 1995. Without making additional findings, the court indicated that it was satisfied that its order was sufficient and refused to enter another order or to amplify the original deficient order. The court intimated that appellant was attempting to circumvent the time restrictions for filing an appeal. Nonetheless, the court ultimately agreed to dictate an order; that order never materialized. This second appeal followed.

The appellant argues on appeal that he was denied due process of law by the court's refusal to allow him to withdraw his guilty plea in light of the Commonwealth's breach. He contends that the trial court failed upon remand to comply with this Court's directive that it assess the impact of the Commonwealth's agreement as to concurrent sentencing upon his initial decision to plead guilty. The appellant asserts that the

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<sup>1</sup>The face of the order does not contain a notation of notice of service by the clerk as required by RCr 12.06(1).

trial court's order of November 4, 1994, was not supported by the record and that it amounted to an abuse of discretion. He maintains, therefore, that he should be allowed to withdraw his guilty pleas. We agree.

In Santobello v. New York, 92 S.Ct. 495, 404 U.S. 257, 262, 30 L.Ed.2d 427, 433 (1971), the United States Supreme Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (Emphasis added.) Fundamental fairness requires that the Commonwealth live up to its end of the bargain. Two remedies are available to a defendant when the prosecution fails to fulfill the plea agreement: (1) specific performance of the original plea agreement or (2) the opportunity for the defendant to withdraw his guilty plea. Santobello, supra.

In the case sub judice, the Commonwealth stated its position on concurrent sentencing in a letter to appellant, assuring him it had no objections to concurrent sentences and that, if asked, it would inform the court that it was not opposed to concurrent sentencing in his case. This representation was unquestionably a factor in the plea agreement. The appellant testified that his decision to plead guilty was indeed influenced by this guarantee. His testimony is consistent with his numerous attempts to withdraw his plea at the sentencing hearing and thereafter. The Commonwealth has remained silent on the issue and has repeatedly failed to present any evidence that its

representation regarding concurrent sentences was not part of the plea agreement or that the appellant did not rely in any significant degree upon such a representation.

The unrefuted record reflects that the Commonwealth at first complied with the plea agreement, taking no position on the issue of concurrent or consecutive sentences at the appellant's sentencing hearing as it had promised. However, after appellant's counsel made a motion for concurrent sentences, the Commonwealth switched positions and stated that it had a "problem" with concurrent sentences -- indicating that the Commonwealth had not been aware of certain Texas burglaries on appellant's record at the time it made its agreement. The Commonwealth had a duty to investigate the appellant's record diligently before embarking upon plea negotiations. Misher v. Commonwealth, Ky. App., 576 238 (1978). It cannot avoid its concomitant good-faith duty to negotiate a plea by alleging as an excuse its own neglect to investigate the criminal case thoroughly and professionally. Shanklin v. Commonwealth, Ky. App., 730 S.W.2d 535 (1987). It cannot be permitted to assert a prerogative to breach a plea agreement based on a antecedent breach of a duty of due diligence. To allow such a compounding of errors would clearly constitute a violation of appellant's right to due process.

It is also irrelevant that the Commonwealth's objection was not binding on the court; the Commonwealth itself is obligated by the terms of the plea agreement. As we noted in our

earlier opinion, "The fact that the Commonwealth's recommendation [is] not binding on the circuit judge does not excuse the breach." Wilson v. Commonwealth, Ky., App., 839 S.W.2d 17, 20 (1992).

In summary, we find that the trial court's second set of findings in this matter -- such as they were -- to be contradictory, insufficient, and clearly erroneous. Therefore, we reverse and vacate the Fulton Circuit Court's judgment of November 4, 1994, and remand this case with directions that the appellant be permitted to withdraw his guilty plea and proceed on to trial on the original charges.

ALL CONCUR.

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