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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001272-MR

MARCUS BUFORD

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 00-CR-00292

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND
REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

THOMPSON, JUDGE: Marcus Buford appeals from an order of the McCracken
Circuit Court denying his motion for specific performance of his plea agreement

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

or, alternatively, to withdraw his guilty plea. Because Buford pled guilty due to the trial court's misinterpretation of a statute, which constituted a material element of his plea agreement, we reverse and remand.

On December 22, 2000, Buford was indicted on two counts of first-degree sexual abuse. The indictment was based on allegations that he had molested two minor girls who were members of a church youth group. The two alleged incidents of molestation occurred when Buford chaperoned the youth group overnight on two separate occasions. During the relevant period, Buford served as the youth minister with the responsibility of supervising the youth group.

During his trial, in addition to evidence relating to the two minors, substantial testimony was introduced regarding an earlier allegation of sexual abuse against Buford by his niece. However, significant issues of reliability surrounded this testimony, including the fact that his niece could not remember her alleged sexual abuse and believed that she may have been told to make up the allegation by someone else due to a bitter custody dispute.

Following his jury trial, Buford was found guilty and sentenced to ten-years' imprisonment. On discretionary review, the Kentucky Supreme Court reversed Buford's conviction in *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky. 2006). The Court held that the "prior bad act" evidence regarding Buford's niece was improperly admitted because the record failed to demonstrate "the requisite

striking similarity between the incident involving [the niece] and that involving [the two girls].” *Id.* at 71. The case was remanded for further proceedings.

On March 9, 2007, Buford entered a guilty plea to two counts of sexual abuse in the first degree in open court. At this plea hearing, the prosecutor, defense counsel, and trial court engaged in a lengthy discussion regarding the statutory period of Buford’s registration as a sex offender. At the conclusion of this discussion, the parties agreed that Buford was subject to the ten-year registration requirement, not the lifetime requirement. After placing Buford under oath, the trial court engaged in a plea colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

During the plea colloquy, Buford’s counsel interjected when the issue of the required registration period was discussed. Defense counsel stated that he wanted to make the record clear that Buford would be subject to the ten-year registration rather than the lifetime registration pursuant to statute. Before the hearing concluded, defense counsel again discussed his concern regarding the application of the registration laws to his client which the parties resolved.

On May 1, 2007, the trial court issued its final judgment sentencing Buford to two concurrent sentences of five-years’ imprisonment. After receiving credit for his presentence confinement, the trial court probated the remaining time on his sentence for five years. Buford was further ordered to register as a sex offender for a ten-year period.

After the judgment was entered, the Secretary of the Justice and Public Safety Cabinet notified the parties that Buford was required to be a lifetime sex offender registrant. Buford then filed a motion requesting the trial court to limit his registration period to ten years as provided in his plea agreement. When the Commonwealth did not contest, the trial court issued an order limiting Buford's registration to the ten-year reporting requirement.

When the Cabinet reaffirmed its position not to modify Buford's registration requirement, he filed another motion seeking to change his registration. The trial court then ruled that Kentucky law, pursuant to KRS 17.520(2)(a)(4), mandated Buford's lifetime registration.² Buford then moved to withdraw his plea. After the trial court found that Buford's plea was not constitutionally defective and denied his motion, this appeal followed.

Buford argues that the trial court was required to enforce the Commonwealth's contractual obligation by strictly enforcing the plea agreement. He contends that the prosecutor, acting as the Commonwealth's agent, bound the Commonwealth and its agencies to honor his plea agreement. Therefore, even if it had to use its contempt powers, he contends that the trial court was required to limit his sex offender registration to ten years. We disagree.

Notwithstanding Buford's contentions, our courts cannot ignore the plain mandate of the statutory language used by the legislature. *Kirby v.*

² Buford and the Commonwealth agree that Buford is subject to lifetime registration as a sex offender as a result of his plea agreement. However, at the time of his plea, both parties and the trial court believed he was subject to the ten-year registration period.

Commonwealth, 132 S.W.3d 233, 237 (Ky.App. 2004). Under KRS 17.520(2)(a)(4), “[l]ifetime registration is required for . . . [a]ny person who has been convicted of two (2) or more felony criminal offenses against a victim who is a minor[.]” Therefore, because the legislature has directed that lifetime registration is mandatory for conviction for two felony crimes against a minor, neither the trial court nor the Commonwealth can provide any lesser requirement. *Carpenter v. Commonwealth*, 231 S.W.3d 134, 137 (Ky.App. 2007).

Buford next argues that the trial court erred when it denied his motion to withdraw his guilty plea. Contending that the parties entered into the plea agreement by mutual mistake, he argues that he should have been permitted to withdraw his guilty plea. Because fundamental fairness requires that Buford be permitted to withdraw his plea, we agree.

“A plea of guilty constitutes a waiver of several fundamental constitutional rights.” *Haight v. Commonwealth*, 760 S.W.2d 84, 87 (Ky. 1988). Because of this significant fact, plea agreements implicate a defendant’s due process rights. *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky.App. 2007). Consequently, if a material element of a plea agreement cannot be complied with by operation of law, fundamental fairness requires that a defendant be provided the opportunity to withdraw his plea if he desires to do so. *Commonwealth v. Martin*, 777 S.W.2d 236, 238 (Ky.App. 1989).

At his plea hearing, the prosecutor, defense counsel, and trial court engaged in a discussion regarding the length of Buford’s sex offender registration.

The prosecutor and defense counsel believed that he was subject to the ten-year registration requirement, not the lifetime registration requirement. The trial court agreed and issued its judgment reflecting this consensus. However, this ruling constituted a misinterpretation of the sex offender registration laws, which was later identified by the Cabinet, resulting in a detriment to Buford.

While the trial court found that the registration laws were collateral to his plea and did not constitute punishment, this matter was extensively discussed during the plea hearing and, thus, was an obviously significant concern to Buford. The record is clear that Buford's period of registration was the central issue during his plea proceedings, and he was misinformed on the law by all. Therefore, unlike in other sex offender registration cases, the trial court "had reason to know [the registration period] was an essential element of [Buford's] agreement to plead guilty." *Carpenter*, 231 S.W.3d at 136. Accordingly, based on these facts, fundamental fairness requires that Buford be permitted to withdraw his guilty plea and proceed to trial. *Martin*, 777 S.W.2d at 238.

For the foregoing reasons, the McCracken Circuit Court's order is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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