

RENDERED: JULY 26, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001180-MR

KENNETH BROWN

APPELLANT

v.

APPEAL FROM OLDMHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 17-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: Kenneth Brown appeals from an order of the
Oldham Circuit Court denying his motion to withdraw his guilty plea pursuant to
Kentucky Rules of Criminal Procedure (RCr) 8.10. Brown alleges he was denied
his right to effective assistance of counsel. We affirm.

— Appendix A

Kenneth Brown is currently serving a 24-year sentence from an earlier conviction for murder, wanton endangerment, and tampering with physical evidence in Jefferson Circuit Court. On January 13, 2017, Brown was indicted for intimidating a participant in the legal process during a pretrial hearing in Oldham Circuit Court on three charges of solicitation to murder and being a second-degree persistent felony offender (PFO). The indictment arose from an alleged threat to kill a prosecutor during the aforementioned pretrial hearing in Oldham Circuit Court.

Brown pled not guilty to the two-count indictment and the action proceeded to trial on December 1, 2017. The jury found Brown guilty of intimidating a participant in the legal process. Brown, prior to the penalty phase of his trial, entered a motion to enter guilty plea regarding the second-degree PFO charge. In exchange for Brown's guilty plea, the Commonwealth recommended Brown serve five years for intimidating a participant in the legal process, enhanced with an additional two years by the second-degree PFO charge. The agreement also stipulated that Brown relinquish his right to all appeals associated with the case, and Brown agreed.

During the colloquy preceding the trial court's acceptance of the guilty plea, there was confusion about how the plea would affect Brown's parole eligibility date. Defense counsel advised Brown that his parole eligibility date

would not change from its current status of twenty years as a result of the guilty plea. Brown also asked the trial court if the plea would affect his parole eligibility date and the court did not directly answer the question. Defense counsel allegedly assured Brown that he would ask someone before sentencing.

In response to the trial court's questioning, Brown stated he was not suffering from a mental disease or illness, he was not ill or under the influence of drugs or alcohol, and acknowledged that he had consulted with his attorney about the plea and was satisfied with counsel's advice. The trial court reviewed Brown's constitutional rights with him and informed him that, by pleading guilty, he was waiving those rights. Brown affirmed that he understood his sentence would be seven years and admitted that he committed the underlying crimes. He also affirmed that no threats or promises had been made to him or that he had been pressured to plead guilty. Thus, after finding the plea was knowing, intelligent and voluntary, the trial court accepted the plea.

On January 26, 2018, Brown wrote a letter to the court requesting to withdraw his guilty plea prior to being sentenced. He alleged his counsel was ineffective for failing to explain how the plea agreement would affect his parole hearing eligibility date. According to Brown, his parole eligibility date would not remain at twenty years as he previously believed. The trial court treated the letter as a motion to set aside the guilty plea pursuant to RCr 8.10 and, following a

hearing, denied the motion. Final judgment was rendered on July 5, 2018, in accordance with the terms of the plea agreement. Brown appeals.

The trial court found that Brown received incorrect legal advice from his defense counsel about the effect the plea deal would have on his parole eligibility, but concluded that any error was not so gross nor were the consequences so dire so as to amount to ineffective assistance of counsel.

Under our criminal rules of procedure, a court may permit a defendant to withdraw a guilty plea “[a]t any time before judgment.” RCr. 8.10. As stated in *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004), “[i]f the plea was involuntary, the motion to withdraw it must be granted.” “Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires ‘a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered.’” *Id.* (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 489 (Ky. 2001) (Cooper, J. concurring)). A plea is involuntary if the facts alleged, if true, “would render the plea involuntary under the Fourteenth Amendment’s Due Process Clause, would render the plea so tainted by counsel’s ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid.” *Commonwealth v. Pridham*, 394 S.W.3d 867, 874 (Ky. 2012) (citations omitted).

“[T]he validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken.” *Bronk*, 58 S.W.3d at 487. The trial court is required to examine the voluntariness of the plea based on the “totality of circumstances surrounding the plea.” *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990).

A successful petition for relief under RCr 8.10 for ineffective assistance of counsel must survive the twin prongs of “performance” and “prejudice” set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* at 687, 104 S.Ct. at 2064.

The “performance” prong requires that the Appellant show “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment, or that counsel’s representation fell below an objective standard of reasonableness.” *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (internal quotation marks and citations omitted). The Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2063. There is a “strong presumption that counsel’s conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689, 104 S.Ct. at 2065 (internal quotation marks omitted).

The prejudice prong requires that the movant “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Parrish*, 272 S.W.3d at 169 (internal quotation marks and citation omitted). In the context of a guilty plea, the prejudice prong requires the movant to “demonstrate ‘a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *Premo v. Moore*, 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). In *Premo*, the Supreme Court observed that the burden to establish prejudice is substantial when a guilty plea is challenged based on ineffective assistance of counsel. *Id.*, 562 U.S. at 132, 131 S.Ct. at 746.

“[T]he decision whether to grant a request to withdraw a voluntary guilty plea rests in the discretion of the trial court[.]” *Commonwealth v. Tigue*, 459 S.W.3d 372, 387 (Ky. 2015) (citing *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002)). “A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the

Commonwealth or the trial court.” *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006). *Id.* (citing *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970)). “Matters outside the trial court’s sentencing authority, everything from parole eligibility to deportation to the loss of the rights to vote and to possess firearms, have been deemed ‘indirect’ or ‘collateral’ consequences of the plea[.]” *Pridham*, 394 S.W.3d at 877.

“‘Direct’ consequences of a guilty plea, those consequences of which the defendant must be aware for his plea to be deemed voluntary as a matter of due process, [are] the waiver of the defendant’s trial-related constitutional rights and the potential penalties to which he was subjecting himself by confessing or acquiescing to the state’s charges and those to which he would be subjected if he lost at trial[.]” *Id.* There is no evidence from the record that indicates Brown was unaware of the direct consequences of the guilty plea or entered into the plea involuntarily. Brown was made aware of the rights that he gave up during the colloquy and further affirmed his acceptance of the guilty plea when he signed the plea form. Brown contends his attorney incorrectly advised him he would become parole eligible after serving twenty years, versus under 501 Kentucky Administrative Regulations (KAR) 1:030, which stipulates that he will become parole eligible after twenty-one years and five months served.

In regards to the performance of the defense counsel, the trial court concluded that any errors by defense counsel were not so gross nor were the consequences so dire as to amount to ineffective assistance of counsel. We agree with the trial court in this regard and believe the trial court did not abuse its discretion in reaching its conclusion. Brown's contention that the incorrect legal advice from his attorney led him to believe that he would be eligible for parole for both the case at bar and his twenty-four-year sentence for murder from Jefferson County after a total of twenty years is in dispute. Brown claims, on the first occasion, that he asked his attorney if the guilty plea would affect his parole hearing date and was told that it would not. On the second occasion, Brown allegedly asked the trial court before final sentencing, "Is there any way we can find out for sure if it affects my parole eligibility date or not?" Counsel allegedly advised that they would ask someone before sentencing.

The Commonwealth maintains that it is unclear that advice of counsel was incorrect relying on *Hughes* and 501 KAR 1:030 Section 3(4). Violent offenders sentenced to a term of years are eligible for parole after serving either 85% of the sentence imposed or 20 years, whichever is less. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002). Comparatively, KAR 1:030 Section 3(4) reads: "If an inmate commits a crime while confined in an institution or while on an escape and receives a concurrent or consecutive sentence for this crime,

eligibility time towards parole consideration on the latter sentence shall not begin to accrue until he becomes eligible for parole on his original sentence. This shall include a life sentence.” The Commonwealth also argues that due to the fact that there was confusion from the reading of KRS 439.3401, that Brown didn’t receive any misadvice. The Commonwealth’s contention is erroneous because Brown did not receive the correct answer from his counsel.

While defense counsel erred in stating the parole eligibility date would not be affected, we now must analyze whether the error was “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment, or that counsel’s representation fell below an objective standard of reasonableness.” *Parrish*, 272 S.W.3d at 168 (internal quotation marks and citations omitted). “The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges . . . in cases where witnesses and evidence were not presented in the first place.” *Pridham*, 394 S.W.3d at 876 (quoting *Premo*, 562 U.S. at 132, 131 S.Ct. at 745-46). “Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party

alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance.” *Id.*

In the case at hand, Brown was serving a twenty-four-year murder sentence and was facing up to ten years for the second-degree PFO charge had he proceeded to trial. “To establish *Strickland* prejudice, the claimant must initially allege and ultimately show that absent counsel’s error a meaningfully different result was a substantial likelihood, more likely than not or very nearly so.” *Id.* at 880. “To obtain relief on an ineffective assistance claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)). *See also Williams v. Commonwealth*, 336 S.W.3d 42, 48 (Ky. 2011). Considering the aggravating factors that plague Brown (*i.e.* prior convictions), there is no definitive way to ascertain that the mistakes made by defense counsel were so gross as to impact Brown’s parole hearing date in such a way that would violate the Sixth Amendment.

Comparatively, in *Pridham*, Cox pled guilty to two counts of sex abuse for a total sentence of ten years running concurrent with another case from Jefferson County with a ten-year sentence. Cox would become eligible for parole when he had served two years (20%) of his ten-year sentence from Jefferson

County. Cox's counsel did not specifically state that parole eligibility would not be considered prior to completion of the sex offender treatment plan, nor did the attorney advise that admission into the sex offender treatment plan would be delayed. The lower courts "accepted Cox's claim that the possibility of a somewhat longer period of parole ineligibility would have caused him to reject the plea bargain, but they both denied Cox relief because in their views counsel's alleged misadvice did not amount to a *Strickland* violation." 394 S.W.3d at 881. The court further states "[t]hat deferral, moreover, unlike the sharp increase in parole ineligibility worked by the violent offender statute, cannot be characterized as severe. It . . . will generally add, if anything, not more than a year or two to their initial period of parole eligibility." *Id.* at 882.

While having to wait an additional one year and five months to receive a parole hearing may seem unfair to Brown, this Court cannot conclude that the trial court abused its discretion when denying Brown's motion to withdraw his plea agreement because it was made voluntarily. A parole hearing date, as discussed earlier, is collateral in nature and parole is not guaranteed. Facing the prospect of potentially receiving one year by proceeding to trial, as opposed to the additional two years agreed to in the voluntary guilty plea, does not rise to the standard of not "being 'rational under the circumstances'" for the trial court to reject the plea bargain.

For the reasons stated, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven Nathan Goens
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

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Rev. 6-17
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Commonwealth of Kentucky
Court of Justice www.courts.ky.gov



**JUDGMENT AND SENTENCE
ON PLEA OF GUILTY**

Case No. 17-CR-00014
Court Circuit
County Oldham
Division I

COMMONWEALTH OF KENTUCKY
VS.

Kenneth Brown

PLAINTIFF

DEFENDANT

Date of Birth	SSN	For Youthful Offender: Provide school name and address.
10-12-1982	378-96-0766	

Defendant appeared in open court on Dec 1, 2017 without counsel with counsel, Honorable Michael Goodwin. By agreement with the attorney for the Commonwealth, Defendant withdrew his/her plea of not guilty and entered a plea of GUILTY to the following charges contained in the indictment(s) AND/OR amended charges:

(1) PFO 2nd

were committed on or about _____, which offenses were committed on or about _____ when Defendant was _____ years old;

(2) _____, which offenses were committed on or about _____ when Defendant was _____ years old;

(3) _____, which offenses were committed on or about _____ when Defendant was _____ years old;

ADDITIONAL CHARGES CONTAINED IN THE INDICTMENT LOCATED ON PAGE 4 OF 4.

Finding Defendant understands the nature of the charges against him/her including potential penalties, the Court finds: Defendant knowingly and voluntarily waives his/her right to plead not guilty, to be tried by a jury, to compel attendance of witnesses in his/her behalf, to confront and cross-examine witnesses and to appeal his/her case to a higher court. The Court further finds Defendant understands and voluntarily waives his/her right not to incriminate himself/herself, the right to be represented by an attorney at each stage of the proceedings against him/her (if appearing without counsel) and, if necessary, to have an attorney appointed to represent him/her. Finding the guilty plea is made voluntarily, knowingly and intelligently, the Court accepts Defendant's guilty plea to the charges to which Defendant entered a guilty plea.

For the purpose of sentencing, Defendant appeared in open court on 6/29, 2018, Honorable Nathan Goodwin. The Court inquired of Defendant (and counsel, if any) whether there was any legal cause why judgment should not be pronounced, and afforded Defendant (and counsel, if any) the opportunity to make statements in Defendant's behalf and to present any information in mitigation of punishment. The Court informed Defendant (and counsel, if any) of the factual contents and conclusions contained in the written Presentence Investigation Report (PSI) prepared by the Division of Probation and Parole and provided Defendant's attorney (if any) with a copy of the PSI although not the sources of confidential information. Defendant agreed with the factual contents of the PSI. was granted a hearing to controvert factual contents of the PSI. Having given due consideration to the PSI prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, as well as the history, character and condition of Defendant, and any matters presented to the Court by the Defendant (or counsel, if any), the Court finds:

- the Victim suffered death or serious physical injury;
- Imprisonment is necessary for protection of the public because:
 - there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge, Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony;

ENTERED

JUL 05 2018

OLDHAM CIRCUIT COURT
BY *[Signature]* D.C.

A-2018-1-A

Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;

probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;

Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401, or KRS 533.060;

Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafter ordered on AOC-445.

Insufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that Defendant is GUILTY of the following charge(s) (include applicable UOR Code):

Count 2 PFO 2d (based upon plea offer dated 12/1/17)

A. Defendant is sentenced to:

1. Court Costs, Restitution, Fees, and Fines

Defendant is ORDERED to pay:

Court Costs of \$ _____ Restitution in the amount of \$ _____
 Fees in the amount of \$ _____ Fine(s) in the amount of \$ _____

2. Method of Payment

Court Costs are WAIVED due to Defendant having been found to be a "poor person" under KRS 453.190(2).
 At time of SENTENCING, all Court Costs, Restitution, Fees, and Fines shall be paid in full.
 Payment is DEFERRED. All amounts shall be PAID IN FULL by _____, 20_____.
 An INSTALLMENT SCHEDULE IS ESTABLISHED. Beginning _____, 20_____.
Defendant is ORDERED to pay \$ _____ weekly every other week monthly
 other _____ until paid in full. If Defendant fails to pay by said date he/she shall appear to SHOW CAUSE pursuant to KRS 534.020.

3. Directions for Payment of Restitution

As specified in KRS 532.032 and KRS 532.033, Defendant shall pay restitution pursuant to these conditions:

Restitution shall be paid through the

Circuit Court Clerk with a 5% service fee;
 County Attorney; OR
 Commonwealth's Attorney,

for the benefit of (name of specific person or organization and address) _____

4. Imprisonment

In addition to any monetary amount specified above, Defendant is sentenced to:

imprisonment for a maximum term of _____ probated probated with an alternative sentence as stated in the attached Order of Probation, for _____ (No fine imposed on KRS Chapter 31 Indigent defendant).
 imprisonment for a maximum term of _____ conditionally discharged as stated in the attached Order of Conditional Discharge. (No fine imposed on KRS Chapter 31 Indigent defendant).
 imprisonment for a maximum term of _____ in _____ (institution) to run _____
 concurrently consecutively with a sentence previously imposed on _____

Def. sentenced on Sep. sentencing Order

B. It is ORDERED that Defendant's bond:

be released. If bond was posted by Defendant, bond shall be shall not be applied to payment of remaining fines and costs; other _____

is not released until further order of the Court payment of all fines and costs

other _____

C. It is further ORDERED that:

upon release from incarceration or parole, Defendant, being found guilty of a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, or 531.320, is subject to a five (5) year period of postincarceration supervision, KRS 532.043

pursuant to KRS 532.400 Defendant is subject to a one (1) year period of postincarceration supervision.

pursuant to KRS 17.510(2) Defendant has been convicted of a sex crime or a crime against a minor, or has been committed as a sexually violent predator, and has been informed of the duty to register with the appropriate local Probation and Parole Office.

Defendant shall not be released from probation supervision until restitution has been paid in full and all other aspects of probation have been successfully completed.

by a preponderance of evidence, the Court finds hate was a primary factor in the commission of the crime by the Defendant, KRS 532.031(2)

being sentenced to a term of incarceration for a nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony, Defendant is ordered to pay costs of incarceration in the amount of \$ _____ as allowed by KRS 532.352. Said costs shall be reimbursed to (specify state or local government)

Defendant shall be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

pursuant to KRS 17.170, Defendant, convicted of a felony offense under the Kentucky Revised Statutes, shall have a DNA sample collected by authorized personnel.

Defendant is hereby credited with time spent in custody prior to sentencing, pursuant to KRS 532.120(3) towards service of the maximum term of imprisonment; or pursuant to RCr 4.58 toward payment of a fine at the rate of \$5.00 per day; namely _____ days as certified by the jailer of _____

Date

6/28/08

Judge's Signature

Copies to: Defendant / Attorney; Prosecutor; Probation & Parole; Sheriff (2 certified copies if Defendant sentenced to death or confinement); Principal, _____ School
(If Defendant is youthful offender)

SHERIFF'S RETURN

Served on Defendant named herein on _____, 2 _____

Not served because: _____

Date: _____, 2 _____ Officer: _____

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Commonwealth of Kentucky
Court of Justice www.courts.ky.gov



JUDGMENT & SENTENCE
ON PLEAS OF NOT GUILTY
(JURY TRIAL)

Case No. 17-CR-00014
Court Circuit
County Oldham
Division I

COMMONWEALTH OF KENTUCKY

v.

Kenneth Brown
ADDRESS: Luther Lickett Correctional Complex

PLAINTIFF

DEFENDANT

Costs Waived Due to Indigence

Installment/Deferred Payments (see page 3 for greater detail)

Sex	Race	Date of Birth	Height	Weight	Eyes	Hair	Social Security #	Drivers License #	State
M	B	10-12-1982	5'7	140	BN	BK	378-96-0766		

FOR YOUTHFUL OFFENDER provide School Name and Address:

ENTERED

JUL 05 2018

OLDHAM CIRC/DIST. COURT
BY 220 D.C.

Defendant appeared in open court on March 23 2017, without counsel OR with counsel,
Honorable Michael Goodwin By agreement with the attorney for the
Commonwealth, Defendant entered a plea of NOT GUILTY to the following charges contained in the Indictment:

(1) Count I: Intimidating A Participant in a Legal Process

committed on or about _____ when Defendant was _____ years old;

(2) Count II: Persistent Felony Offender 2nd degree

committed on or about _____ when Defendant was _____ years old;

(3) _____

committed on or about _____ when Defendant was _____ years old;

(4) _____

committed on or about _____ when Defendant was _____ years old;

(5) _____

committed on or about _____ when Defendant was _____ years old;

(6) _____

committed on or about _____ when Defendant was _____ years old;

On December 1, 2017, the case was tried before a jury which returned the following verdict:

<u>Charge</u>	<u>Sentence</u>
(1) <u>Intimidating a Participant in the legal process</u>	<u>5 yrs</u>
(2)	<u>(7 years as determined by Commonwealth's offer after verdict) - enhanced by PRO 2d</u>
(3)	
(4)	
(5)	
(6) <u>Ct 2 PRO 2d ision seq Judgment Sentg Order - Def signed plea offer</u>	

For the purpose of sentencing, Defendant appeared in open court on 6/28/018 following jury

without counsel with counsel, Honorable Nathan Goodrich Verdict on Count 1.

The Court inquired of Defendant (and counsel, if any) whether there was any legal cause why judgment should not be pronounced, and afforded Defendant (and counsel, if any) the opportunity to make statements in Defendant's behalf and to present any information in mitigation of punishment. The Court informed Defendant (and counsel, if any) of the factual contents and conclusions contained in the written Presentence Investigation Report (PSI) prepared by the Division of Probation and Parole and provided Defendant's attorney (if any) with a copy of the PSI although not the sources of confidential information. Defendant agreed with the factual contents of the PSI OR was granted a hearing to controvert factual contents of the PSI. Having given due consideration to the PSI prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, as well as the history, character and condition of Defendant, and any matters presented to the Court by the Defendant (or counsel, if any) the Court finds:

- the Victim suffered death or serious physical injury;
- imprisonment is necessary for protection of the public because:
 - there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony;
 - Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;
 - probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;
 - Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401, or KRS 533.060;
- Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafter ordered on AOC-455.

Insufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that Defendant is **GUILTY** of the following charge(s):

- (1) Intimidating a participant in the legal process
- (2) _____
- (3) _____
- (4) _____

(5) _____

(6) _____

A. Defendant is sentenced to: *7 years (6 yrs enhanced to 7 by PFO 2d)*

1. **Court Costs, Restitution, Fees, and Fines**

Defendant is ORDERED to pay:

Court Costs of \$ _____
 Restitution in the amount of \$ _____
 Fees in the amount of \$ _____
 Fine(s) in the amount of \$ _____

2. **Method of Payment**

Court Costs are WAIVED due to Defendant having been found to be a "poor person" under KRS 453.190(2).

At time of SENTENCING, all Court Costs, Restitution, Fees, and Fines shall be paid in full.

Payment is DEFERRED. All amounts shall be PAID IN FULL by _____, 20_____.
 An INSTALLMENT SCHEDULE IS ESTABLISHED. Beginning _____, 20_____.
Defendant is ORDERED to pay \$ _____ weekly every other week monthly

other _____ until paid in full. If Defendant fails to pay by said date he/she shall appear to SHOW CAUSE pursuant to KRS 534.020.

3. **Directions for Payment of Restitution**

As specified in KRS 532.032 and 532.033, Defendant shall pay restitution pursuant to these conditions:

Restitution shall be paid through the

Circuit Court Clerk with a 5% service fee;
 County Attorney; OR
 Commonwealth's Attorney

for the benefit of (name of specific person or organization) _____

4. **Imprisonment**

In addition to any monetary amount specified above, Defendant is sentenced to:

imprisonment for a maximum term of _____ probated OR probated with an alternative sentence as stated in the attached Order of Probation, for _____ (No fine imposed on KRS Chapter 31 indigent defendant).

imprisonment for a maximum term of _____ conditionally discharged as stated in the attached Order of Conditional Discharge. (No fine imposed on KRS Chapter 31 Indigent defendant).

imprisonment for a maximum term of *7 years* in *DOD* (institution) to run concurrently

consecutively with a sentence previously imposed on *Jefferson Co. 10CR302631* (Ky.)

B. It is ORDERED that Defendant's bond:

be released. If bond was posted by Defendant, bond shall be shall not be applied to payment of remaining fines and costs; other _____

is not released until further order of the court; payment of all fines and costs; other _____

C. It is further ORDERED that:

upon release from incarceration or parole, Defendant, being found guilty of a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310; or 531.320, is subject to a five (5) year period of postincarceration supervision: KRS 532.043.

pursuant to KRS 532.400 Defendant is subject to a one (1) year period of postincarceration supervision.

pursuant to KRS 17.510(2) Defendant has been convicted of a sex crime or a crime against a minor, or has been committed as a sexually violent predator, and has been informed of the duty to register with the appropriate local Probation and Parole Office.

Defendant shall not be released from probation supervision until restitution has been paid in full and all other aspects of probation have been successfully completed.

by a preponderance of evidence, the Court finds hate was a primary factor in the commission of the crime by the Defendant. KRS 532.031(2).

being sentenced to a term of incarceration for a nonstatus Juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony, Defendant is ordered to pay costs of incarceration in the amount of \$ _____ as allowed by KRS 532.352. Said costs shall be reimbursed to (specify state or local government)

Defendant shall be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

pursuant to KRS 17.170, Defendant, convicted of a felony offense under the Kentucky Revised Statutes, shall have a DNA sample collected by authorized personnel.

Defendant is hereby credited with time spent in custody prior to sentencing, pursuant to KRS 532.120(3) towards service of the maximum term of imprisonment, or pursuant to RCr 4.58 toward payment of a fine at the rate of \$5.00 per day; namely _____ days as certified by the Jailer of _____

Date: 6/28/2018

John Cerven

Judge

Distribution: Defendant / Attorney Sheriff (2 Certified copies if Defendant sentenced to death or confinement)

Principal, _____ School (If Defendant is youthful offender) _____

SHERIFF'S RETURN

Served on Defendant named herein this _____ day of _____, 20____

Not served because: _____

Officer _____

Supreme Court of Kentucky

2019-SC-000444-D
(2018-CA-001180)

KENNETH WILBERT BROWN

MOVANT

V.

OLDHAM CIRCUIT COURT
2017-CR-00014

COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED: February 12, 2020.

John Ellsworth
CHIEF JUSTICE

— Appendix C