

RENDERED: DECEMBER 4, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000752-MR

JANIE SULLIVAN

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NOS. 07-CR-00222 AND 07-CR-00379

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: FORMTEXT LAMBERT AND TAYLOR, JUDGES; HENRY,  
SENIOR JUDGE.

TAYLOR, JUDGE: Janie Sullivan brings this appeal from a March 11, 2008,  
judgment of the Pulaski Circuit Court sentencing her to fifteen-years' in prison.  
This appeal involves unique circumstances where Sullivan, after entering into a  
plea agreement with the Commonwealth, committed additional criminal acts prior

to her sentencing. The issue looks to the effect of Sullivan's actions upon her final sentence. For the reasons stated, we affirm.

On August 23, 2007, Sullivan was indicted by a Pulaski County Grand Jury upon the offenses of complicity to commit criminal possession of a forged instrument in the second degree and promoting contraband in the first degree (07-CR-00222). At Sullivan's arraignment, the Commonwealth agreed to Sullivan being released on an ROR (release on own recognizance) bond. The circuit court released Sullivan on the bond.

On October 25, 2007, the court ordered a routine drug test of Sullivan. Sullivan tested positive for methamphetamine and for amphetamine. Sullivan was retested on October 30, 2007. Sullivan again tested positive for methamphetamine. The test also revealed that Sullivan had diluted her urine specimen. Sullivan was tested a third time and, once again, tested positive for amphetamine. By order entered November 9, 2007, the circuit court found that Sullivan violated the conditions of the bond by using controlled substances and revoked Sullivan's bond.

On December 21, 2007, Sullivan was indicted by a Pulaski County Grand Jury upon the additional offenses of wanton endangerment in the first degree, fleeing or evading in the first degree, and with being a persistent felony offender (PFO) in the first degree (07-CR-00379).

Thereafter, the Commonwealth and Sullivan reached a plea agreement as to both actions (07-CR-00222 and 07-CR-00379). Pursuant to the plea

agreement, on January 3, 2008, Sullivan entered a guilty plea to possession of a forged instrument, promoting contraband, wanton endangerment and fleeing or evading. Sullivan was again released on an ROR bond pending final sentencing.

On January 7, 2008, the Commonwealth filed a motion to revoke Sullivan's bond and attached thereto a police report wherein an arrestee stated that he witnessed Sullivan purchase and smoke methamphetamine the previous day. Thereupon, the circuit court issued a bench warrant for Sullivan's arrest. After Sullivan's arrest, she was again tested for drugs, which again yielded a positive result. Apparently, she admitted to illegal drug use at sometime after entering into the plea agreement and prior to her final sentencing hearing.

Sullivan filed motions to suppress the results of her last drug test and her admission of illegal drug use. The court denied both motions. Sullivan then filed a motion to enforce the plea agreement and to sentence her to ten-year's imprisonment probated for a period of five years. The court denied the motion. By a March 11, 2008, judgment, the circuit court sentenced Sullivan to fifteen-year's imprisonment. This appeal follows.

Sullivan contends that the circuit court erred by not enforcing the plea agreement or, in the alternative, by not allowing Sullivan to withdraw her guilty plea. Specifically, Sullivan alleges that the Commonwealth breached the plea agreement by recommending a twenty-year sentence of imprisonment and that the circuit court effectively rejected the plea agreement by sentencing her to fifteen-years' imprisonment. Sullivan argues that under the plea agreement, the

Commonwealth was bound to recommend a ten-year sentence probated for a term of five years.

At the guilty plea colloquy on January 3, 2008, the circuit court stated the terms of the plea agreement very clearly to Sullivan. Under the plea agreement, Sullivan would enter a guilty plea to possession of a forged instrument (second degree), promoting contraband (first degree), wanton endangerment (first degree), and fleeing or evading (first degree). The Commonwealth would dismiss the PFO charge and recommend a sentence of ten-years' imprisonment probated for a term of five years. However, the court plainly informed Sullivan that if she "tested positive" while released pending sentencing, the Commonwealth would not be bound to recommend a probated sentence but would be free to recommend the full twenty-year sentence. The court told Sullivan that her good behavior and abstinence from drugs were material terms of the plea agreement. Sullivan stated she understood and agreed to these terms.

Because Sullivan used illegal drugs while released awaiting sentencing, the Commonwealth recommended a twenty-year sentence of imprisonment per the terms of the plea agreement. *See Jones v. Com.*, 995 S.W.2d 363 (Ky. 1999). The Commonwealth did not breach the plea agreement by recommending a twenty-year sentence of imprisonment; rather, the Commonwealth abided by the terms of the agreement in so doing. And, the circuit court did not reject the plea agreement by sentencing Sullivan to fifteen-years' imprisonment. In fact, Sullivan received a lighter sentence by the circuit court than

possibly provided under the terms of the plea agreement. For this reason, we also conclude that no basis exists to permit Sullivan to withdraw her guilty plea under Kentucky Rules of Criminal Procedure (RCr) 8.10. Simply stated, the terms of the plea agreement were followed by the Commonwealth and by the circuit court. It was Sullivan's own use of illegal drugs that triggered the increased sentence of imprisonment under the plea agreement. As such, we believe Sullivan's contention that the plea agreement was breached to be meritless.

Sullivan next contends that the circuit court erred by denying her motions to suppress the results of her last drug test and her admission of illegal drug use. In support thereof, Sullivan argues that RCr 4.14 requires the court to issue a statement of all nonfinancial conditions imposed upon a defendant for her release upon bond in a written order. Sullivan argues that there existed no written condition in an order requiring her to abstain from use of illegal drugs. Thus, Sullivan asserts that abstaining from use of illegal drugs was not a condition of her release upon bond. Consequently, her use of illegal drugs could not support the issuance of a bench warrant. Sullivan also believes the bench warrant was invalid because it was issued without a supporting affidavit. For these reasons, Sullivan maintains that the circuit court erred by denying her motions to suppress.

Regardless of whether Sullivan's use of illegal drugs violated a written nonfinancial condition of her release upon bond, it is clear that use of illegal drugs was prohibited under the terms of the plea agreement. When the police obtained information indicating that Sullivan had used illegal drugs, the

Commonwealth was certainly empowered to determine if Sullivan had done so.

This would, of course, include testing Sullivan for illegal drug use. Consequently, we view any error harmless. *See Jones v. Com.*, 239 S.W.3d 575 (Ky. 2007).

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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