

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

NO. 2008-CA-000710-MR

WILLIAM JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A.C. MCCAY CHAUVIN, JUDGE  
ACTION NO. 06-CR-002463

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND REMANDING

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BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: William Jones appeals from an order of the Jefferson Circuit Court convicting him of various crimes and of being a persistent felony offender (“PFO”) in the first degree and sentencing him to twelve years’

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<sup>1</sup> 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.

imprisonment. We vacate Jones's PFO conviction and remand to the trial court for further proceedings, but we affirm Jones's convictions and sentences on the remaining counts.

Jones was arrested and charged with one count of second-degree robbery, one count of first-degree wanton endangerment, three counts of third-degree terroristic threatening, and one count of fourth-degree assault in connection with an altercation with his then-girlfriend. Jones was later charged with being a PFO in the first degree, and this charge was consolidated with his other charges.

The Commonwealth subsequently made a written offer to Jones upon a plea of guilty, which he accepted. The Commonwealth recommended a five-year sentence, with Jones being ineligible for probation. The Commonwealth did not oppose Jones being released on the home incarceration program ("HIP") pending final sentencing. If Jones violated the terms of the HIP, picked up any new arrests, contacted the victim, failed to complete the pre-sentence investigation report, or failed to appear for sentencing, the offer stated that Jones agreed "to amend [the] guilty plea to include a plea on [the] PFO I [charge]," which would enhance his prison term to fifteen years. On the plea offer document, the Commonwealth had written "dismissed" next to the PFO I charge. Jones also reserved the right to appeal under the plea offer.

Jones thereafter appeared in court on the motion to enter a guilty plea. The court asked Jones how he pled to the charge of one count of second-degree robbery, one count of first-degree wanton endangerment, three counts of third-

degree terroristic threatening, and one count of fourth-degree assault. Jones responded that he was guilty.

The court next questioned Jones concerning the PFO charge, asking Jones the following:

Mr. Jones, do you acknowledge that you . . . do *qualify to be prosecuted* as a persistent felony offender in the first degree, as set out in the indictment.

(Emphasis added). Jones responded in the affirmative. The court stated in its discussion with Jones that Jones was “technically” pleading guilty on that day to “everything” and that, at the time of sentencing, the Commonwealth “would move to dismiss the PFO I [charge] at that point,” so long as Jones complied with the conditions of his release and the terms of the plea agreement. Jones agreed that this was the deal that he had made with the Commonwealth.

The court found that Jones was making the guilty plea voluntarily, and it accepted his pleas. Thereafter, the court entered a written judgment on the guilty pleas stating that Jones had entered pleas of guilty and was adjudged guilty of one count of second-degree robbery, one count of first-degree wanton endangerment, three counts of third-degree terroristic threatening, and one count of fourth-degree assault. The judgment also stated, however, that the PFO charge had been dismissed.<sup>2</sup> Entry of the judgment imposing Jones’s sentence was postponed pending the final sentencing hearing.

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<sup>2</sup> The order of commitment entered when Jones entered the guilty pleas also stated that the PFO charge had been dismissed.

Jones subsequently failed to appear at the final sentencing hearing.

The court issued an arrest warrant, and Jones was thereafter arrested.<sup>3</sup> When Jones was brought to the courthouse for final sentencing, he was initially placed in a holding cell. After conferring with his attorney, he refused to come into the courtroom to be sentenced. The court then sentenced Jones in *absentia* to twelve years' imprisonment.<sup>4</sup>

The court later entered a judgment of conviction and sentence. In this judgment, the court stated that Jones had pled guilty to the PFO charge, although in both the Commonwealth's offer on a plea of guilty and in the court's written judgment on the guilty plea, it was stated that the PFO charge had been dismissed. The court adjudged Jones guilty of all charges, including the PFO charge, and sentenced Jones to an enhanced term of twelve years. Jones thereafter filed this appeal.

Jones first argues that the trial court's judgment sentencing him on the PFO charge violated state and federal due process because Jones never pled guilty to, nor was he found guilty of, being a PFO. One's ability to attack an unauthorized sentence is never relinquished or forfeited by a failure to object at the trial court level, and the imposition of an unauthorized sentence is an error correctable by appeal. *Myers v. Commonwealth*, 42 S.W.3d 594, 596 (Ky. 2001),

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<sup>3</sup> Both the bench warrant as well as the arrest citation listed Jones's charges, but failed to include any mention of the PFO offense.

<sup>4</sup> The plea agreement provided that the sentence would be enhanced to fifteen years, but the court reduced it to twelve years.

overruled on other grounds by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010); *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985).

Jones argues that his case is “nearly identical” to *O’Neil v. Commonwealth*, 114 S.W.3d 860 (Ky. App. 2003). O’Neil was charged with burglary in the second degree, possession of a handgun by a convicted felon, and being a PFO in the second degree. He pled guilty to the first two charges and agreed to assist authorities in retrieving the stolen property. In return, the Commonwealth agreed to recommend dismissal of the PFO charge at the time of sentencing. If O’Neil failed to cooperate or appear for sentencing, the Commonwealth would object to probation and O’Neil would plead guilty to the PFO charge. In effect, the PFO charge was held in abeyance pending O’Neil’s sentencing. O’Neil failed to appear for sentencing, and when he was finally brought before the court, he acknowledged that he had pled guilty to the two charges but refused to plead guilty to the PFO charge, claiming that he thought the charge had been dismissed.

A panel of this Court determined that although the trial court had engaged in a *Boykin* colloquy concerning the two charges to which O’Neil initially pled guilty, the trial court never engaged in a similar discussion concerning the PFO charge. The Court, in particular, stated:

Upon appellant’s motion to plead guilty to burglary and handgun possession, the trial court held a hearing where it engaged in a thorough *Boykin* colloquy with appellant concerning these two charges. However, the record further reveals that at no time did the trial court ever

engage in a similar discussion concerning the PFO. Instead, the court entered a guilty plea to this charge in spite of appellant's refusal to do so himself.

....

By entering a judgment summarily convicting and sentencing appellant as a PFO, the trial court denied appellant the right to exercise "the full panoply of the relevant protections which due process guarantees in state criminal proceedings." *Specht v. Patterson*, 386 U.S. 605, 609, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326, 330 (1967) (citation omitted).

*O'Neil*, 114 S.W.3d at 863. Therefore, the Court vacated O'Neil's PFO conviction because O'Neil never pled guilty to that charge. *Id.*

Here, both the written and videotaped record are not entirely clear as to whether Jones pled guilty to the PFO charge on the date of the plea hearing, whether the PFO charge was dismissed on the date of the plea hearing, or whether the PFO charge was to be held in abeyance until Jones's sentencing hearing and then dismissed at that time if Jones met all the conditions imposed by the court. At one point during the videotape of the plea hearing, the trial court states that the Commonwealth was moving to dismiss the PFO charge, while at another time the trial court states that Jones was pleading guilty to "everything" that day and that the PFO charge would be held in abeyance and dismissed at the final sentencing hearing if Jones had met all the required conditions.

However, the latter statement is not what appears to have occurred. While the court asked Jones if he pled guilty to the underlying charges, the court never asked him how he pled to the PFO charge, asking only if he acknowledged

that he qualified to be prosecuted as a first degree PFO as set out in the indictment. As in *O'Neil*, nowhere in the colloquy did Jones state that he pled guilty to the PFO charge. An acknowledgement that you can be prosecuted for an offense is not a plea of guilt to that offense.

Additionally, almost every written record of the proceedings indicates that the PFO charge was dismissed on the day that Jones pled guilty to the other charges. Once Jones failed to appear at sentencing, the charge was somehow reinstated, and Jones was found guilty of the charge without having pled guilty to or having been convicted of the charge.

The Commonwealth argues that the discrepancies are the result of a clerical error. As a general rule, an oral pronouncement is not a judgment until it is reduced to writing. *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994). When there is a conflict between oral pronouncements and a written order, the written order controls. *Id.* As already discussed, multiple writings state that the PFO charge was dismissed, and the trial court never specifically asked Jones how he pled with regard to that charge. Without more support from the record, this Court cannot find with full certainty that any discrepancies between the trial court's discussions with Jones and its written judgments were due to clerical error.

Although Jones was incorrectly convicted by the trial court of being a PFO, the fact remains that Jones violated the plea agreement by failing to appear for his sentencing. Consequently, Jones is not entitled to enforce the plea agreement. “[I]f a defendant materially breaches his plea agreement, the

prosecution is released from its obligations under that agreement and may bring a new indictment on previously dismissed charges.” *O’Neil*, 114 S.W.3d at 863 (citing *Hentz v. Hargett*, 71 F.3d 1169, 1176 (5<sup>th</sup> Cir. 1996); *see also United States v. Wells*, 211 F.3d 988, 995 (6<sup>th</sup> Cir. 2000) (“a defendant who breaches a plea agreement forfeits any right to its enforcement”). As stated in *O’Neil*:

[W]e conclude that when a defendant breaches a plea agreement, the Commonwealth has the option of withdrawing its offer and proceeding upon the charges in the original indictment, or it may reindict if those charges have already been dismissed in connection with the plea agreement.

*O’Neil*, 114 S.W.3d at 864.

Jones further argues that all of his sentences should be vacated because he was sentenced *in absentia*. Under Kentucky Rules of Criminal Procedure (RCr) 8.28(1), upon a hearing and finding by the trial court that a defendant intentionally refuses to appear for any proceeding, such refusal shall be deemed a waiver of the defendant’s right to appear at that proceeding.

The trial court did not err when it found that Jones had voluntarily absented himself from the sentencing hearing. Jones refused to appear in the courtroom when directed to do so, was disruptive in the holdover room, and stated that he had flushed the PSI down the toilet. Defense counsel talked to Jones more than once on the morning of the sentencing to discuss the legal issues and to encourage Jones to appear for sentencing. Moreover, the trial court directed defense counsel to explain to Jones that it would be a good idea for Jones to be



present in the courtroom. Based on the totality of the circumstances, the trial court made a finding that Jones voluntarily refused to appear; thus, Jones's refusal to appear is deemed a waiver of his right to appear.

Jones further argues that the right to be in attendance at all critical proceedings cannot be knowingly, intelligently, and voluntarily waived by someone who is incompetent at the time. However, although Jones was diagnosed with bipolar disorder, nothing in the record suggests that Jones ever had difficulty perceiving reality or that he had a mental illness which prevented him from comprehending the nature of the charges against him, his particular legal situation, and legal issues in general. In fact, a review of the record shows that Jones was interested in his case moving forward as expeditiously as possible with a trial date.

Accordingly, we vacate Jones's PFO conviction and remand to the Jefferson Circuit Court for further proceedings. We affirm Jones's convictions on the remaining counts.

ALL CONCUR.

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