

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000455-MR

MATTHEW ALLEN MEYER

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 08-CR-00237

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND MOORE, JUDGES, AND ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: Matthew Allen Meyer appeals the judgment of the Greenup Circuit Court convicting him of two counts of third-degree assault, third-degree criminal mischief, resisting arrest, and operating a motor vehicle under the influence (DUI). Meyer was sentenced to a term of four years of imprisonment,

¹ Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

but the circuit court ultimately placed Meyer on supervised probation for five years in lieu of the four-year term of imprisonment. After a careful review of the record, we affirm because Meyer's claims are waived.

I. FACTUAL AND PROCEDURAL BACKGROUND

Meyer was indicted on two counts of third-degree assault, third-degree criminal mischief, resisting arrest, and DUI. In May 2009, he entered guilty pleas to all of the charges except the DUI charge.² That same day, he moved for pretrial diversion.

Meyer's sentencing was originally scheduled for June 25, 2009, but Meyer requested and obtained two continuances of his sentencing. On August 27, 2009, the Greenup Circuit Court entered an order granting pretrial diversion for four years for the assault charges; ordering Meyer to pay restitution of \$15,500.00 to the police officer whose leg he had broken; ordering Meyer not to "commit another offense during the period of the Pretrial Diversion"; and ordering him to "remain drug and alcohol free and be subject to random testing." The same day, Meyers entered a guilty plea to the DUI charge. The court entered its judgment that day sentencing Meyer to twelve months, conditionally discharged, for the third-degree criminal mischief, resisting arrest, and DUI convictions; and reiterated

² We note that the record before us includes a typed list of the questions the court asked Meyer during the plea colloquy, as well as his answers to those questions which were handwritten after each question by a court reporter/deputy clerk in open court. Additionally, at the end of this transcription, it states that the transcription was certified by the court reporter/deputy clerk, followed by her signature, and that the transcription was "[e]xamined and approved by the Court and filed on this same date," followed by the signatures of the defendant, defense counsel, and the circuit court judge. We only note the existence of this transcription in the record to state that we appreciate it for the purpose of judicial economy, and to commend the trial court for this practice, which we wish other trial courts would adopt.

that Meyer had received a sentence of diversion for his two third-degree assault convictions, per a separate order.

On July 26, 2009, in another county, Meyer committed a second DUI offense.³ He entered a guilty plea to that offense in Boyd District Court on October 21, 2009. On November 10, 2009, the Commonwealth in the present case moved to void Meyer's diversion agreement and his diverted sentence of four years because the sentence had been conditioned on Meyer remaining drug and alcohol free and on Meyer not violating any other laws.

A hearing was held on January 21, 2010, concerning the Commonwealth's motion to void the diversion agreement. During that hearing, defense counsel did not challenge the Commonwealth's motion to void Meyer's participation in pretrial diversion. Rather, defense counsel merely asked the court to sentence Meyer to supervised probation, as opposed to a term of imprisonment.

The Greenup Circuit Court entered an order voiding Meyer's pretrial diversion, finding as follows:

1. On May 28, 2009, defendant freely, knowingly, voluntarily and intelligently entered a plea of guilty to two counts of assault, 3rd degree, both Class D Felonies. On June 12, 2008,^[4] at defendant's request, defendant was placed on Pretrial Diversion for a period of five years.

³ The uniform citation for this offense stated that a breathalyzer revealed Meyer's blood alcohol content was 0.203, *i.e.*, more than two and a half times the legal limit.

⁴ On appeal, Meyer contends, and the Commonwealth admits, that this date is incorrect because there is nothing in the record reflecting that anything occurred on that date. Rather, as we previously discussed, the order granting pretrial diversion was entered on August 27, 2009.

2. The Commonwealth moved this Court to void defendant's participation in said Pretrial Diversion, because defendant failed to abide by the terms imposed upon him by this Court.

3. The defendant has violated the terms and conditions of his Pretrial Diversion imposed by this Court by committing the offense of driving under the influence of alcohol, 2nd offense, after he had been placed on diversion.

Thus, Meyer's diversion was voided.

Thereafter, Meyer moved to vacate and set aside the court's order voiding pretrial diversion. Meyer argued

that the DUI referred to in paragraph 3 mentions that the pre-trial diversion was entered on August 27, 2009. The violation that the Commonwealth is requesting that the Court use occurred on July 26, 2009, prior to the entry of the pre-trial diversion order. As such, there has not been any violation by the Defendant since the entry of the pre-trial diversion order of August 27, 2009.

The circuit court denied Meyer's motion. The court noted that the "delay in sentencing was due to [Meyer's] own requests."

Meyer was then sentenced to a term of four years of imprisonment. The circuit court, however, ultimately placed Meyer on supervised probation for five years in lieu of the four-year term of imprisonment. Meyer now appeals the trial court's decision.

II. ANALYSIS

Meyer alleges that the circuit court erred in voiding his pretrial diversion by relying on factual mistakes, and that the order voiding his pretrial

diversion should have been vacated or amended because he did not commit an offense during the time that the diversion agreement was in effect.

Meyer contends that the circuit court's "order voiding the diversion order contains a key factual error which renders the order void *ab initio*." Meyer reasons that because the circuit court's order voiding diversion mistakenly stated that defendant was placed on diversion on June 12, 2008, and that date was used "as the operative date" for determining whether Meyer had violated his diversion, the court should have granted his motion to vacate and set aside the order voiding diversion.

However, in the circuit court, Meyer never raised this claim that the order voiding diversion was incorrectly based on a date of June 12, 2008. In fact, he never informed the court that there was nothing in the record reflecting a date of June 12, 2008. Meyer also never asserted in his motion to vacate and set aside the order, nor in the hearing on his motion, that the order voiding diversion was incorrectly based on the June 12, 2008 date. Rather, he only argued that the order should be vacated or set aside because he committed his second DUI offense before the court had sentenced him to diversion in the present case. Therefore, because he never alleged in the circuit court that the order was void *ab initio* due to the incorrect date of June 12, 2008, we will not review that claim on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.").

We next note that during the hearing on whether the diversion agreement should be voided, defense counsel did not challenge the Commonwealth's motion to void diversion. Rather, counsel merely requested that Meyer receive a sentence of supervised probation as opposed to imprisonment. Meyer received exactly what he requested, *i.e.*, supervised probation. Subsequently, Meyer moved to set aside the order voiding his diversion on the basis that he had committed the second DUI before the court sentenced him to diversion and therefore, he did not violate his diversion conditions.

Because Meyer did not challenge the Commonwealth's motion to void diversion during the hearing on the motion, the matter is waived. Additionally, it is waived because Meyer received exactly what he requested, *i.e.*, supervised probation, rather than imprisonment. Meyer cannot complain now on appeal that the circuit court gave him the relief he requested.

Regardless, even if the claim was not waived, it lacks merit. Pursuant to RCr⁵ 8.04(4)(b):

The [trial] court may order the [diversion] agreement terminated and the prosecution resumed if, prior to completion of the agreement by the defendant, the court finds at a hearing the existence of one of the following:

- (i) Either party misrepresented material facts affecting the agreement;
- (ii) The defendant has committed a material violation of the agreement or has failed to complete the terms of the agreement.

⁵ Kentucky Rule of Criminal Procedure.

The diversion agreement between Meyer and the Commonwealth was signed May 28, 2009. It stated, in pertinent part, as follows:

3. The Commonwealth has recommended my case be diverted on the following conditions:

f. As required by KRS 533.030(1), Defendant shall not commit another offense during the period of the diversion. Specifically, the defendant shall not violate the Penal Code or the Controlled Substances Act.

g. Defendant shall remain drug and alcohol free and be subject to random testing.

Approximately two months after entering into this agreement, but before the circuit court sentenced Meyer to diversion, Meyer committed a second DUI offense in another county. He then entered a guilty plea to that offense approximately two months after the circuit court sentenced Meyer to diversion in the present case. Meyer contends that because the second DUI offense was committed before the circuit court sentenced him to diversion, his diversion could not have been breached by his commission of the second DUI offense.

However, Meyer fails to note that his diversion agreement, which was signed by himself, his attorney, and the Commonwealth before Meyer committed the second DUI offense, explicitly stated that the agreement was conditioned on Meyer remaining “drug and alcohol free.” It is noteworthy that the agreement did not specify it was conditioned solely on Meyer remaining “drug and alcohol free” *during the period of diversion*, as the agreement stated regarding the condition that

Meyer should “not commit another offense during the period of the diversion.”

Rather, the agreement merely provided that it was conditioned on Meyer remaining “drug and alcohol free.” Therefore, this provision became effective immediately upon the parties’ signing the agreement and filing it with the court on May 28, 2009. Therefore, when Meyer committed the second DUI offense, for which he pleaded guilty, he violated the agreement. It was not relevant whether the court had sentenced him to diversion at that point or not for the purpose of determining whether he had violated that particular provision of the agreement.

Consequently, because Meyer violated the diversion agreement, pursuant to RCr 8.04(4)(b)(ii), his diversion was properly voided by the circuit court.

Accordingly, the judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR

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