

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002374-MR

CLYDE TURNER

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 96-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Clyde Turner has appealed from the final judgment of the Whitley Circuit Court entered on September 10, 1998, which pursuant to a plea agreement convicted him of various offenses, and which denied his request for probation and sentenced him to prison for thirteen years. Since we conclude that the trial court complied with the mandate of KRS¹ 533.010 to consider Turner for probation, we affirm.

On the evening of June 22, 1996, Turner was extremely impaired by the effects of alcohol when he committed the criminal

¹Kentucky Revised Statutes.

act of driving his automobile on the wrong side of Interstate 75, without his headlights being on, and caused serious physical injury to three people and endangered the lives of three other persons. Turner himself was seriously injured in the car wreck and is now confined to a wheelchair; he has no memory of the incident.

On July 8, 1996, Turner was indicted on three counts of assault in the second degree², three counts of wanton endangerment in the first degree³, and driving a motor vehicle while under the influence of alcohol, first offense.⁴ On July 16, 1998, Turner entered an Alford⁵ plea to the assault and wanton endangerment charges. The DUI charge was dismissed. The Commonwealth recommended a total sentence of thirteen years--ten years on each assault charge to run concurrently with each other, and three years on each of the wanton endangerment charges to run concurrently with each other, but consecutively with the assault sentences. The Commonwealth took no position on the issue of probation.

Prior to sentencing, the Department of Public Advocacy developed an alternative sentencing plan on Turner's behalf for the trial court's consideration.⁶ At Turner's sentencing

²KRS 508.020.

³KRS 508.060.

⁴KRS 189A.010.

⁵North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 152 (1970).

⁶The plan called for the 13-year sentence to be probated,
(continued...)

hearing, his attorney urged the trial court to accept the plan and to place Turner, a forty-year-old father of four children with no prior criminal history, on probation. However, under the circumstances, the trial court refused to grant probation. After giving Turner a chance to refute any information contained in the presentence investigation report, and after discussing the alternative sentencing plan, the trial court stated:

All I know is, is a fellow got drunk, went down driving on the interstate on the wrong side of the road and destroyed a family.⁷ And he got hurt too, grant you. And I can't weigh in a balance of what it is. But, actually, we had a plea agreement and I intend to follow it just exactly the way you all agreed to unless [there is] something else that I don't know about. That's all I can do. And I know he has been hurt and I know he has gone through a lot too, but I just can't help--and I can't have that much sympathy because it was useless to the other people. . . . And now then, I am supposed to say, well, since you got hurt we are going to send you to all the state expenses for rehabilitation, which he says he doesn't need and so forth. And, in the meantime--I know you can't pay back and revenge belongs to the Lord and not me anyway. But under our laws he entered into a plea bargain agreement, and he agreed to be--to take this, what is, and these--everybody seemed to agree to that.

. . .

⁶(...continued)

that Turner be supervised for five years, that he obtain outpatient alcohol counseling from the Comprehensive Care Center at Corbin, that he obtain a GED, that he perform community service, including working with the DARE program and speaking publicly at local area high schools about his criminal behavior and the consequences of drinking and driving, and that he refrain from the use of alcohol.

⁷This is a reference to the fact that one of the crime victims, who was in her seventh month of pregnancy, lost her unborn child as a result of her injuries.

[The trial court imposed the 13-year sentence.]

And the reason for the sentence, which is stated in the statute is, is that, in my opinion, to probate or go along with this Alternative Sentencing Plan would unduly depreciate the seriousness of the crime which he committed. I don't know of any more serious crime that you can have. And it[']s for pure punishment in addition to whatever punishment he's already suffered because of his own injury. So I will sentence you to the Department of Corrections. You will be remanded to the Whitley County Jail until such time as they shall designate the institution in this state in which you are to serve your sentence.

In the written Judgment and Sentence on Plea of Guilty entered on September 10, 1998, two days after the sentencing hearing, the trial court included two additional reasons for rejecting the alternative sentencing plan, that is the "likelihood" that Turner would commit a felony during the period of probation and that he needed "correctional treatment." It is the addition of these two statutory factors that forms the basis for this appeal.

KRS 533.010, the statute governing Turner's sentencing, provides in pertinent part:

(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter.

(2) Before imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, after due

consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

(3) In the event the court determines that probation is not appropriate after due consideration of the nature and circumstances of the crime, and the history, character, and condition of the defendant, probation with an alternative sentencing plan shall be granted unless the court is of the opinion that imprisonment is necessary for the protection of the public because:

(a) There is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge the defendant will commit a Class D or Class C felony or a substantial risk that the defendant will commit a Class B or Class A felony;

(b) The defendant is in need of correctional treatment that can be provided most effectively by commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

The gist of Turner's appeal is that his sentencing hearing was "tainted" by the inclusion of statutory factors within the written judgment and sentence which were neither raised nor addressed by the trial court at the sentencing hearing. Turner insists that he should have been "advised at the

sentencing hearing of [all] the specific statutory grounds" on which the trial court intended to rely for its denial of probation. Having reviewed the entire sentencing hearing, we agree with Turner's claim that the trial judge gave no hint that he considered Turner to pose a risk of recidivism, or that he believed Turner needed to be incarcerated for "correctional treatment." The only justification alluded to by the trial court at the hearing concerned the seriousness of the crime and its belief that anything less than a sentence of imprisonment would unduly depreciate the seriousness of Turner's crimes. Further, the final judgment does not contain any findings to support the additional factors used to reject the alternative sentencing plan.

We understand Turner's arguments with respect to the justifications that the trial court added to the final judgment after the hearing. From Turner's physical condition, it may very well be unlikely that he would drive again, and thus it may be unlikely that he would physically be able to again harm another person while operating a motor vehicle under the influence of alcohol or any other intoxicant. Thus, since Turner has no other criminal history, we can find no support in the record for the trial court's determination that Turner is likely to be a recidivist. Further, we do not know what information the trial court used to conclude that Turner needed "correctional treatment" at a "correctional institution," nor does the Commonwealth suggest what that "treatment" would be. Without any discussion of these factors at the hearing, and without any

findings in support of their inclusion in the final judgment, this Court is unable to determine what consideration the trial court gave to these statutory factors.

Nevertheless, we agree with the Commonwealth that the error is harmless.⁸ The decision to grant probation, or probation with an alternative sentencing plan, is one in which the trial court has "substantial discretion."⁹ While the trial court is statutorily required to "consider" probation, or probation with an alternative sentencing plan, the record amply demonstrates that the trial court complied with that provision of KRS 533.010. In its consideration of the appropriate sanction to impose on Turner, the trial court reviewed the presentence investigation report and the alternative sentencing plan, and it listened to the arguments of Turner's counsel and allowed Turner to make a personal statement. The trial court specifically addressed the nature and circumstances of the crime, and elaborated on the seriousness of the crime.

The Commonwealth correctly argues that KRS 533.010 allows a trial court to deny probation, or probation with an alternative sentencing plan, if it finds that imprisonment is

⁸See Kentucky Rules of Criminal Procedure 9.24; and Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969) ("if upon consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial").

⁹Turner v. Commonwealth, Ky., 914 S.W.2d 343, 348 (1996), (citing the commentary to KRS 533.010). See also, Johnson v. Commonwealth, Ky., 967 S.W.2d 12, 15-16 (1998).

necessary for any one of the statutory factors.¹⁰ Significantly, Turner does not argue that the trial court abused its discretion in finding that probation would "unduly depreciate the seriousness of [his] crime." Thus, it is readily apparent that had the trial court addressed the two additional factors at the sentencing hearing, the result would not have been any different, and the re-sentencing that Turner has requested would be a useless exercise.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wettle
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Matthew D. Nelson
Asst. Attorney General
Frankfort, KY

¹⁰Johnson, supra at 15.