

RENDERED: April 16, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001629-MR

JAMES KOPP

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 98-CR-00095

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

TACKETT, JUDGE: James Kopp appeals from a judgment and sentence on a plea of guilty whereby he was sentenced to two years' imprisonment after allegedly failing to abide by the conditions of a deferred sentencing agreement. The Commonwealth moved to impose sentence on Kopp due to his alleged commission of a new alcohol related offense. No hearing was held to establish whether there was probable cause to believe Kopp had committed another offense. In light of the trial court's failure to comply with the provisions of Kentucky Revised Statute (KRS)

533.050, we vacate and remand this matter for a hearing to determine whether, in fact, Kopp was in violation of his deferred sentencing agreement.

Kopp, a resident of Illinois, was involved in a single car accident on an exit ramp from the Purchase Parkway onto I-24 in Marshall County, on March 22, 1998. Investigating officers detected a strong smell of alcohol, and Kopp failed a series of field sobriety tests. In addition, Kopp falsely identified himself to police officers as Ricky Kopp and he had a driver's license and a signed rental agreement for the car he was driving in that name. He was arrested and charged with criminal possession of a forged instrument, first offense DUI, possession of marijuana, refusal to take a blood alcohol test, presenting another person's license, giving officers a false name, and driving under the influence on a suspended license. An additional count of first-degree bail jumping was added to these charges at the time of indictment.

On December 12, 1998, Kopp entered guilty pleas on all of the charges. The trial court deferred accepting his plea for a period of two years on the condition that Kopp fulfill a list of several conditions. Upon successful completion of the two-year period, the charges against Kopp would be dismissed. Less than one year later, the Commonwealth filed a motion asking the trial court to set aside the deferred sentencing agreement on

the grounds that Kopp had allegedly been charged with DUI. A copy of the motion was sent, regular mail, to an invalid address in Michigan, and Kopp claims he had no notice that the Commonwealth was seeking to have him sentenced. The trial court revoked Kopp's deferred sentence and issued a bench warrant for Kopp on September 7, 1999, when he failed to appear at a hearing regarding the allegation of a new criminal offense. Kopp was eventually arrested and spent over fifty days in jail before his first court appearance on April 15, 2002. On May 28, 2002, the trial court entered an order which stated its belief that KRS 533.050 did not apply and scheduled Kopp for final sentencing on July 1, 2002. Kopp was sentenced to two years' imprisonment, and this appeal followed.

Kopp first argues that the trial court had lost jurisdiction, pursuant to KRS 533.020, to sentence him to imprisonment. The language of the statute specifically provides that a defendant who completes his period of probation or conditional discharge shall be discharged from the trial court's supervision "provided no warrant issued by the court is pending against him." Kopp pled guilty in December 1998 and his deferral period was two years. The trial court issued a bench warrant for his failure to appear at a hearing to determine whether he had violated the terms of his deferred sentencing agreement in September 1999. Consequently, when Kopp's deferred

sentencing agreement expired in December 2000, there was already a warrant for his arrest pending, and the trial court still had jurisdiction to impose sentence on him.

Kopp next argued that the trial court improperly issued a bench warrant for him without following the conditions set forth in KRS 533.050 which states as follows:

- (1) At any time before the discharge of the defendant or the termination of the sentence of probation or conditional discharge:
 - (a) The court may summon the defendant to appear before it or may issue a warrant for his arrest upon a finding of probable cause to believe that he has failed to comply with a condition of the sentence, or
 - (b) A probation officer or peace officer acting at the direction of the probation officer, who sees the defendant violate the terms of his probation or conditional discharge may arrest the defendant without a warrant. . . .

Kopp contends that the trial court had no notice of the allegations against him and that testimony of a law enforcement officer who witnessed him violating the conditions of his deferred sentencing agreement was necessary prior to issuing a bench warrant. On August 19, 1999, the Commonwealth tendered a motion alleging that Kopp had been arrested in Michigan and charged with felony DUI. This allegation, if true, would support revocation of his deferred sentence and imposition of a

sentence of imprisonment. The motion was set for hearing on September 7, 1999, and when Kopp failed to appear at the hearing, a bench warrant was issued to compel his attendance before the trial court. Contrary to Kopp's assertion, the trial court had notice of the allegation against him; namely, that he had committed another DUI. Moreover, the statute does not require testimony from a law enforcement officer prior to issuing a bench warrant for an alleged violation. Consequently, the trial court acted properly to secure Kopp's appearance in order to address the allegation that he had violated his deferred sentencing agreement.

Finally, Kopp argues that the trial court violated his due process right by failing to inform him of the nature of the allegation against him and failing to hold an evidentiary hearing prior to sentencing him. In order to satisfactorily address this issue, we must first consider the nature of Kopp's sentence. There is no provision in the felony sentencing statute for a deferred sentence; thus, we must examine the trial court's December 1998 order to determine how it intended to dispose of Kopp's charges. Kopp argues that he received a conditionally discharged sentence. KRS 533.050(2) specifically states as follows:

The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing

with defendant represented by counsel and following a written notice of the grounds for revocation or modification.

Consequently, if Kopp's sentence was conditionally discharged, the trial court was required to hold a hearing to prior to imposing sentence on him.

The Commonwealth, on the other hand, refers to Kopp's sentence as a pretrial diversion. KRS 533.250, which was enacted on July 15, 1998, established the pretrial diversion program. Pretrial diversion was available to persons charged with a Class D felony who would also qualify for probation or conditional discharge. In order to participate in pretrial diversion, a defendant must enter a guilty plea or an Alford plea to the offenses charged. KRS 533.258(1) states that when a defendant "successfully completes the provisions of a pretrial diversion agreement, the charges against the defendant shall be listed as 'dismissed-diverted' and shall not constitute a criminal conviction."

The order of deferred sentencing entered by the trial court on December 9, 1998, states that the court rejects Kopp's plea of guilty to the charged offenses. It then goes on to provide a list of conditions which Kopp is required to comply with for a period of two years. This includes the requirement that Kopp commit no new offenses. If Kopp satisfactorily abides by all of the conditions in the agreement during the two-year

period, the charges against him will be dismissed. If he fails to do so, then the trial court will accept his guilty pleas to all charges and impose a sentence of imprisonment. Although Kopp, through his counsel, requested a hearing on the Commonwealth's motion to revoke his diversion agreement, the trial court denied Kopp's request. In an order setting Kopp's case for final sentencing on July 1, 2002, the trial court stated its belief that the revocation hearing provisions of KRS 533.050, which deals with probated and conditionally discharged sentences, did not apply to Kopp's case.

However, in the section of KRS 533 dealing with diversion there is a provision, KRS 533.256, outlining the procedure for sentencing defendants who fail to complete their pretrial diversion agreements. Subsection (1) allows the Commonwealth to request a hearing in the trial court to determine whether a defendant has failed to complete diversion and to impose sentence if the court determines that such a failure has occurred. Subsection (2) states as follows:

In making a determination as to whether or not a pretrial diversion agreement should be voided, the court shall use the same criteria as for the revocation of probation, and the defendant shall have the same rights he or she would if probation revocation was sought.

Therefore, regardless of whether Kopp's sentence should be characterized as a conditional discharge or a pretrial

diversion, Kopp was entitled to have the court follow the procedures in KRS 533.050. Subsection (2) specifically entitled Kopp to a hearing prior to revocation of his deferred sentence. Thus, the trial court's belief that KRS 533.050 did not apply was erroneous, and the trial court was required to hold a hearing prior to revoking Kopp's deferred sentence.

For the forgoing reasons, the judgment of the circuit court accepting Kopp's guilty plea and sentencing him to two years' imprisonment is vacated and this case is remanded for a hearing, in accordance with KRS 533.050, to determine whether Kopp failed to comply with the provisions of his diversion agreement.

ALL CONCUR.

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