

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001013-MR

SHERRILL WOOSLEY

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Sherrill Woosley appeals from a judgment of the Grayson Circuit Court wherein he was sentenced to three years in prison for the felony offense of flagrant nonsupport. We affirm.

A Grayson County grand jury returned a felony indictment against Woosley on August 6, 2002, charging him with flagrant nonsupport. He entered into a plea agreement with the Commonwealth whereby he would plead guilty to the offense and would be sentenced to three years in prison, which sentence

would be diverted for a five-year period on various conditions, including that he not commit another offense during the period of the diversion and that he not violate the Kentucky Penal Code or the Controlled Substances Act. The proceedings occurred before the circuit court on November 19, 2002.

In March 2003 the Commonwealth filed a motion requesting the court to require Woosley to show cause why his diversion should not be revoked on the ground that he was found to be in possession of methamphetamine. The court conducted an evidentiary hearing, and the only witness was a detective from the Leitchfield Police Department who testified that he found three baggies of methamphetamine in Woosley's pocket. The court determined that Woosley had been in possession of the substance and, therefore, was in violation of a condition of his diversion. On April 2, 2003, the court entered an order revoking Woosley's diversion, and he was formally sentenced to three years in prison on April 15, 2003. Woosley now appeals from the final judgment and sentence.

Woosley's first argument is that the trial court erred in revoking his diversion based only on the allegation that he had committed an offense. He maintains that he should have been presumed innocent until proven guilty and that the mere fact he was charged with an offense was not sufficient to revoke his

diversion in the absence of his being convicted of the offense. We disagree.

A condition of Woosley's diversion was that he not commit another offense during the period of the diversion and that he not violate the Kentucky Penal Code or the Controlled Substances Act. In order to be in violation of the terms of the diversion, it was not necessary that he be convicted of the offense. The court only had to find that he committed an offense, and the unrebutted testimony of the officer clearly proved that fact. The court properly exercised its discretion in revoking his diversion and sentencing him to prison.

Woosley's second argument is that the court erred in requiring him to execute a waiver of his state and federal constitutional rights to remain silent and to be free from unreasonable searches and seizures as a condition of his bond on appeal. The court set Woosley's bail on appeal at \$10,000 cash. Several conditions of release were imposed, including that he waive his right to remain silent and right to be free from unreasonable searches and seizures. Woosley objected to the aforementioned condition on his bond, but he was thereafter released from custody upon the posting of the bond and his agreeing to the conditions of release.

RCr¹ 12.78(1) provides that "bail may be allowed by the trial judge pending appeal notwithstanding that service of the sentence has commenced, except when the defendant has been sentenced to death or life imprisonment." Further, "[t]he applicable provisions governing bail shall apply to bail on appeal." RCr 12.78(3). "If a defendant's promise to appear or his or her execution of an unsecured bail bond alone is not deemed sufficient to insure his or her appearance when required, the court shall impose the least onerous conditions reasonably likely to insure the defendant's appearance as required." RCr 4.12. Also, "[t]he court shall cause the issuance of an order containing a statement of any conditions imposed upon the defendant for his or her release." RCr 4.14.

Because bail on appeal is not an absolute right, the court was free to deny Woosley bail pending appeal in this case. See Commonwealth v. Peacock, Ky., 701 S.W.2d 397, 398 (1985). However, once the court set bail on appeal, the applicable provisions in the criminal rules governing bail applied. See RCr 12.78(3). Nevertheless, because Woosley did not appeal from the order allowing bail on appeal, the issue is not properly before us for our review.²

¹ Kentucky Rules of Criminal Procedure.

² Woosley filed his notice of appeal on May 6, 2003, and the court entered the Order Setting Bail on Appeal on May 8, 2003.

The judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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