

RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000014-MR

MICHAEL TODD DIXON

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2002-SC-001061-DG

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 01-CR-00144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

*** * * * *

BEFORE: DYCHE and MINTON, Judges; EMBERTON, Senior Judge.¹

MINTON, Judge: Michael Todd Dixon pled guilty in the McCracken Circuit Court to two counts of first-degree possession of a controlled substance and one count of possession of drug

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

paraphernalia. The circuit court sentenced him in accordance with a plea bargain agreement to a maximum sentence of five years, which the court probated for three years and ordered Dixon to forfeit the cocaine, drug paraphernalia, and cash seized when he was arrested. Dixon appeals the circuit court's denial of a motion for pretrial diversion, arguing that the McCracken Commonwealth's Attorney refused to give Dixon's pretrial diversion motion good faith consideration as required by law.

A panel of this court in an opinion rendered November 15, 2002, vacated the judgment, concluding that "[t]he McCracken Commonwealth's Attorney failed to fulfill the duties required of his office by KRS 533.250(2) and KRS 533.252," and that he did so by "refusing to submit recommendations concerning Dixon's pretrial diversion application." This court's prior opinion further directed that on remand the circuit court give no credence to the section of the Second Judicial Circuit's pretrial diversion protocol that required the Commonwealth's consent for the grant of pretrial diversion. The Supreme Court of Kentucky, in an order entered December 11, 2003, vacated this Court's previous opinion and directed us to reconsider this appeal in the light of its decision in Flynt v. Commonwealth.²

² Ky., 105 S.W.3d 415 (2003).

Dixon was indicted by the McCracken County Grand Jury on June 9, 2001, on the charges of first-degree trafficking in a controlled substance,³ first-degree possession of a controlled substance,⁴ and possession of drug paraphernalia.⁵ The Commonwealth alleged that Dixon sold cocaine on March 22, 2001, to a confidential informant who was working for the Paducah Police Department. Dixon pled not guilty to these charges at arraignment on June 11, 2001.

On August 17, 2001, Dixon filed a motion for pretrial diversion and a separate motion to enter a plea of guilty, having reached a plea bargain agreement with the Commonwealth. The plea agreement states that the Commonwealth agreed to amend the trafficking charge to a lesser charge of possession. On a plea of guilty to all charges, as amended, the Commonwealth agreed further to recommend a maximum sentence of five years on the cocaine possession charges, to be served concurrently, and 12 months on the paraphernalia charge, also to run concurrently. The Commonwealth further insisted on forfeiture of all items seized at arrest. The plea agreement makes no mention of pretrial diversion. Dixon pled guilty on August 17, 2001; and

³ Kentucky Revised Statute (KRS) 218A.1412.

⁴ KRS 218A.1415.

⁵ KRS 218A.500(2).

the Court's order accepting the guilty plea makes no mention of pretrial diversion.⁶

When the case was called for sentencing on December 3, 2001, Dixon's counsel mentioned the pending pretrial diversion motion. Dixon's counsel observed, "It is my understanding that the Commonwealth will never recommend or participate in pretrial diversion." Without response to that statement from the Commonwealth's Attorney or further comment from the sentencing judge, the circuit court denied the motion and proceeded immediately to sentence Dixon in accordance with the plea agreement.

On appeal, Dixon argued that the Commonwealth's consent to a pretrial diversion is not necessary and that the Commonwealth had a blanket policy of refusing to consider pretrial diversion in certain categories of cases. After our Supreme Court's ruling in Flynt established that "KRS 533.250(2) authorizes circuit courts to grant applications for pretrial diversion only with the Commonwealth's agreement,"⁷ and the remand to this Court, we ordered supplemental briefs confined to the issue of "whether the McCracken Commonwealth's Attorney's policy of refusing to participate in any pretrial diversion program is a failure to perform the duties of office required by

⁶ The record on appeal does not contain a videotape of the guilty plea colloquy.

⁷ 105 S.W.3d at 424.

KRS 533.250(2) and KRS 533.252 with respect to Dixon's pending criminal case." The Commonwealth has consistently argued, both in its original brief and on supplemental brief, that neither the existence of this alleged blanket policy of nonparticipation in pretrial diversion nor the alleged failure of the McCracken Commonwealth's Attorney to respond to Dixon's pretrial diversion motion was raised in the circuit court. The Commonwealth posits that Dixon presented these arguments for the first time in his brief. Hence, the issue is not properly preserved for appeal. From our review of this record, the Commonwealth is correct.

"Ordinarily, a trial court cannot be held in error for having failed to do something it was not asked to do."⁸ A review of the record confirms that the Commonwealth's Attorney's participation in Dixon's pretrial diversion application was never mentioned to the trial court. There was nothing said about the existence of a blanket policy either. As stated in Turner v. Commonwealth,⁹ "The policy of [Kentucky Rule of Criminal Procedure] 9.22 and 10.12 is to require a defendant in a criminal case **to present to the trial court those questions of law which may become issues on appeal.** The appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision."

⁸ *Arnold v. Commonwealth*, Ky., 421 S.W. 2d 366, 367 (1967).

⁹ 460 S.W.2d 345, 346 (1970).

Therefore, we hold that Dixon has failed to preserve this issue for review.

The Commonwealth has also argued persuasively that Dixon's unconditional guilty plea to a valid criminal charge constitutes not only an admission of guilt but also a waiver of any defenses to the resulting conviction, such as a claim to entitlement to a pretrial diversion. Because we have affirmed on other grounds, it is not necessary for us to pursue this argument further.

For the reasons stated above, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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