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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001339-MR

ERIC THOMAS TAYLOR

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 02-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

TACKETT, JUDGE: Eric Taylor appeals from the decision of the Carter Circuit Court convicting him of one count of Sexual Abuse in the First Degree. The two issues before the court are whether the trial court abused its discretion in not awarding Taylor probation instead of incarceration and whether the trial court abused its discretion by not making statutorily required findings that imprisonment was necessary. We affirm.

Appellant Eric Taylor was indicted on July 3, 2002 of one count of Rape in the Second Degree for having sex with a minor. Following the appellant's initial not guilty plea, appellant and his counsel negotiated a plea agreement with the Commonwealth. Under the terms of the agreement, the appellant would plead guilty to Sexual Abuse in the First Degree with the Commonwealth recommending that the appellant be imprisoned for five (5) years, pending the presentence investigation and sex offender reports.

On March 16, 2004, appellant appeared before the trial court and tendered his motion to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), which allowed him to plead guilty without admitting to the elements of the offense. During the sentencing hearing on June 7, 2004, the defense, the Commonwealth, and the judge discussed the conflict created by the Alford plea and the requirement that a person convicted of a sex offense must admit guilt before entering the Sexual Offender Treatment Program (SOTP). The discussion focused on appellant's eligibility for probation, as completion of the SOTP was a requirement for completion of probation pursuant to Kentucky Revised Statute (KRS) 532.045. Due to his lack of an admission and his inability to complete the SOTP, the trial judge told appellant that he could not receive probation and offered him the chance

to change his mind. When the appellant did not do so, the trial judge remanded appellant to the Department of Corrections on June 8, 2004. However, appellant's attorney asked for a stay of execution in the sentence pending an appeal based on the denial of probation, and the judge allowed appellant to post bond pending the outcome of the appeal before us now. Appellant seeks to either have his sentence reversed and to be granted probation or to have the case remanded to the trial court for a new sentencing hearing with instructions that he be granted probation consistent with KRS 533.010.

Appellant's first argument is that the trial court abused its discretion when it denied appellant probation because probation is the statutory preference over imprisonment. To support this the appellant breaks his argument into three parts, with the first one being that KRS 533.010(2) says that a judge shall consider probation before a sentence of imprisonment. Next, appellant urges the court to rule that denying probation in part because of the appellant's failure to be able to complete the SOTP due to his Alford plea is an abuse of discretion in itself. The third part of appellant's argument is that in the past Kentucky courts have usually given imprisonment for more serious crimes than the one appellant committed. Appellant points out that in the case of Razor v. Commonwealth, Ky. App., 967 S.W.2d 472 (1997), the defendant was granted

probation even though he had committed numerous offenses of a supposed worse nature than those of the appellant here.

(Interestingly enough, the appellant chooses to downplay the fact that Razor's probation was revoked for not completing the SOTP because he would not admit guilt to all of the charges because of his Alford plea.) All three parts of this argument lack merit.

The decision to grant or deny probation is a discretionary one given to the trial court, and is not specifically mandated under KRS 533.010. As the Commonwealth correctly points out in its brief, whether probation is granted is a matter of grace and not a right. Aviles v. Commonwealth, Ky. App., 17 S.W.3d 534 (2000); Turner v. Commonwealth, Ky., 914 S.W.2d 343 (1996). In addition, as both the appellant and the Commonwealth noted, a ruling on probation is generally upheld unless there is a showing that the ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). Appellant fails to establish that the trial court's ruling met these standards for a reversal.

The Commonwealth correctly points out that the present case is better understood when compared to the holding in Bell v. Commonwealth, Ky. App., 566 S.W.2d 785 (1978). In Bell, the

court described the mandate regarding probation from KRS 533.010 as follows:

. . .we do conclude that the trial judge must comply with KRS 533.010 and give due consideration to the possibility of probation. . .the trial court must place in the record a statement sufficient to show that the necessary consideration has been given.

In Bell, the court found that a simple statement regarding a substantial risk that the defendant would commit another crime while on probation was enough. In the present case, the judge made an amply considered probation by both his evaluation of the presentence investigation and in allowing the appellant an opportunity to mitigate his punishment with statements on his behalf. Also, the trial court noted that similar to Razor, supra, the appellant was utilizing an Alford plea and with it came the impossibility of appellant completing the SOTP, which would lead to certain revocation of probation before it could be successfully completed. The trial court made it clear that this was also affecting the consideration of probation, though probation was in fact considered. The court made the implications of the Alford plea clear to the appellant, and the appellant stuck with his Alford plea fully knowing the implications of his actions. The appellant offers no evidence or proof from the record that the trial court abused its discretion in this regard.

Along the same lines, the appellant also is incorrect in stating that he should not have to admit his guilt to enter the SOTP because it would in essence contradict his Alford plea. Other courts have rejected a similar argument involving the ability of the court to revoke probation for an offender's refusal to acknowledge the commission of the offense as part of his sexual-offender treatment program in the past. State v. Faraday, Conn., 842 A.2d 567 (2004). "The entry of a guilty plea under the Alford doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." *Id* at 588.

We agree with the reasoning of Faraday and reject appellant's argument that forcing him to comply with the SOTP, and thus admitting guilt in so far as required to complete the SOTP, in order to be eligible for probation is an abuse of discretion. As seems to be the trend in the nation's courts, we feel "there is nothing inherent in the nature of an Alford plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction." State ex rel. Warren v. Schwarz, Wis. App., 566 N.W.2d 173, 177 (1997). See also People v. Birdsong, Colo., 958 P.2d 1124 (1998); State v. Jones, Idaho App., 926 P.2d 1318 (1996). While

the Alford plea allows the appellant to not admit his guilt for the conviction phase of the proceedings, it does not override the requirements of the SOTP.

Finally, the appellant's last part of his first argument also fails. While it may be true that punishments are not uniform in the Commonwealth, this is not sufficient reason for overturning the decisions of the trial court. Appellant does not cite any support for this claim and just says that it must be an abuse of discretion. This is not so. Absent some arbitrary or grossly unfair ruling or abuse of the discretion that the trial court is granted, the decision of that court will be left undisturbed. Aviles v. Commonwealth, Ky. App., 17 S.W.3d 534 (2000). Appellant simply disagreeing with this determination and finding one case where the outcome was different does not suffice.

With all of the appellant's first argument failing to have any merit, we now turn to his second argument. Somewhat similar to his earlier arguments, appellant argues that the trial court abused its discretion by denying appellant probation without making the statutorily required findings that imprisonment was necessary. Though this issue is not properly preserved for this court, appellant asks that we review the argument under Kentucky Rule of Criminal Procedure (RCr) 10.26 for palpable error.

In order for a claim to be successful under the palpable error rule, appellant must show that an error has occurred that resulted in a "manifest injustice" and that the "error must seriously affect the fairness, integrity or public reputation of judicial proceedings." Brock v. Commonwealth, Ky., 947 S.W.2d 24 (1997). There must be more than just a simple error in the proceedings by the trial court in order for it to be overturned. The appellant argues that failure to comply with KRS 533.010 is just such an error.

As the appellant points out, under KRS 533.010(2), in order for the appellant to be denied probation the trial judge must find one of the following:

- (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.

During the sentencing hearing of June 7, 2004, none of these factors appears to have been mentioned by the trial judge, nor was one marked on the document entitled "Judgment and Sentence on Plea of Guilty."

However, this statute does not seem to be quite as "mandatory" as the appellant wishes for it to be. Previous

cases have shown us that the courts will uphold a sentence of imprisonment even if the reasons provided under KRS 533.010 are not given, so long as the record indicates that the trial court at least considered the relevant factors and probation before sentencing took place. Turner, supra. In the present case, it seems that the trial court similarly considered the relevant factors before determining the punishment. The record shows that the trial judge considered the serious nature of the actions as well as the inability of the appellant to complete the SOTP due to his refusal to admit his guilt. While not specifically stated, these two things shown in the record appear to coincide with considerations consistent with KRS 533.010(2)(b-c). Like Turner, this would support upholding the ruling by the trial court and does not even rise to the level of a minor error, let alone palpable error.

Additionally, as the Commonwealth points out, KRS 532.045, which deals with sex offenders, takes precedence over KRS 533.010. The three most important parts of KRS 532.045 to this issue are:

- (4) If the court grants probation or conditional discharge, the offender shall be required, as a condition of probation or conditional discharge, to successfully complete a community-based sexual offender treatment program operated or approved by the Department of Corrections or the Sex

Offender Risk Assessment Advisory Board. . .

- (6) Failure to successfully complete the sexual offender treatment program constitutes grounds for revocation of probation or conditional discharge. . .
- (9) To the extent that this section conflicts with KRS 533.010, *this section shall take precedence.*
(emphasis added)

The trial court not only was aware of this statute and the requirements of the SOTP, but took the extra precaution to make sure that the appellant knew about the requirements before sentencing him. Appellant knowingly refused to comply with the program and knowingly negated his ability to be granted probation for his offense by refusing to admit his guilt, which as mentioned earlier, is not part of the Alford plea. Due to his inability to complete the SOTP and considering that KRS 532.045(9) expressly takes precedence over KRS 533.010, reliance on this statute to deny the appellant probation does not qualify as palpable error, but is in fact completely correct. Thus, this argument must also fail.

Based on the evidence and the foregoing reasons, the decision of the Carter Circuit Court is affirmed.

ALL CONCUR.

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