

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002490-MR

GREGORY ALLEN JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CR-003511

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Gregory Allen Jones appeals from a final judgment and sentence of the Jefferson Circuit Court adjudging him guilty of three counts of obtaining or attempting to obtain a controlled substance by fraud or deceit and sentencing him to 5 years on each count, to run consecutively, for a total of 15

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(b) of the Kentucky Constitution and KRS 21.580.

years to serve. Jones contends that the trial court failed to independently exercise its discretion in enforcing the sentencing enhancement clause (commonly called a “hammer clause”) contained in his plea agreement under which the sentences would run concurrently if he complied with the terms of the clause, but would run consecutively if he violated them. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2006, Jones was indicted upon three counts of obtaining or attempting to obtain a controlled substance by fraud or deceit, a Class D felony. Kentucky Revised Statutes (KRS) 218A.140. The charges resulted from three episodes of “doctor shopping” whereby Jones obtained prescriptions for Hydrocodone (2 occasions) and OxyCodone (1 occasion), Schedule II narcotics, without informing the prescribing physicians about previous narcotic prescriptions he had obtained.

On July 17, 2007, Jones entered into a plea agreement with the Commonwealth. Pursuant to the agreement Jones would plead guilty to the three charges, receive a five-year sentence for each charge, and the sentences would run concurrently. The agreement also contained a sentencing enhancement clause under which the Commonwealth agreed that Jones would be released prior to sentencing. The agreement provided that the sentences would run concurrently unless Jones violated certain provisions of the agreement, in which case the sentences would run consecutively. The clause stated as follows:

The Comm would agree to the defendant[’s] release prior to sentencing. If the defendant fails to appear, fails to cooperate w/ the PSI, gets arrested, or generates any new charges, the Def. will agree to serve the sentences consecutive for 15 years.

The plea agreement was accepted by the trial court. It is clear from the plea agreement hearing that the sentencing enhancement clause was thoroughly explained to Jones and that he understood it. The trial court went to great lengths to explain and emphasize the clause and the ramifications of failing to comply with its terms. Jones does not allege that he did not understand the provision. Nevertheless, Jones failed to appear for sentencing on August 29, 2007. The Commonwealth also alleged that Jones failed to cooperate with the completion of the presentencing investigation (PSI) by failing to appear for a PSI interview.

Upon Jones’s failure to appear for sentencing, a bench warrant was issued. Jones was eventually apprehended and final sentencing was held on October 29, 2007. At the hearing defense counsel argued in opposition to application of the enhancement clause. He argued that Jones had missed his PSI interview because he had been incarcerated in Scott County, and had missed the original sentencing hearing because he had been unable to secure transportation from his home in Jessamine County to Jefferson County.

After hearing arguments upon application of the clause, the trial court indicated that it could not find any extenuating circumstances to prevent triggering the clause, and sentenced Jones to 5 years on each of the three counts, to run

consecutively. The trial court additionally denied Jones' request for probation.

This appeal followed.

DISCUSSION

Before us, Jones contends that “[t]he trial judge erred by imposing the higher (15 year) sentence without an independent exercise of discretion. She was not bound to choose between the two terms of years mentioned in the agreement.” He additionally notes that KRS 532.110(1) provides that “[w]hen multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence[.]” (Emphasis added).

As noted by the parties, *Jones v. Commonwealth*, 995 S.W.2d 363 (Ky. 1999) condones a sentencing enhancement clause, such as the one at issue, as a component of a plea agreement. In that case,

Jones was indicted for six counts of fraud in violation of the Charitable and Civic Solicitations Act, six counts of theft by deception over \$300 and two counts of violating the registration and disclosure requirement of the Charitable and Civic Solicitations Act. . . .

Jones entered into a plea agreement in which the Commonwealth recommended a sentence of three years on each count of fraud contained in counts one through five of the indictment, with count six being reduced to criminal facilitation to commit fraud, counts seven through twelve were reduced to criminal facilitation to commit theft by deception over \$300, and counts thirteen

and fifteen were amended to criminal conspiracy to violate the Charitable and Civic Solicitation Act. . . . In addition, the Commonwealth recommended a twelve-month sentence for each remaining count and also recommended that all sentences, except those under counts one and two, run concurrently, for a total of six years.

As part of the plea bargain, the Commonwealth agreed to Jones's release on an unsecured bond of \$50,000, with the understanding that the recommended 6-year sentence was contingent upon three conditions: 1) that Jones give a statement of his illegal activities; 2) that he meet with a member of the Attorney General's office on a set date and give a full and complete statement; and 3) that he reappear in court for final sentencing. If Jones complied with these provisions, the Commonwealth agreed not to oppose parole in his case, and to advise the parole board of his cooperation. If he did not comply with these conditions, the Commonwealth would recommend a maximum sentence of twenty years instead of six years.

After conducting a guilty plea colloquy, the circuit court accepted Jones's guilty plea and released him on the unsecured \$50,000 bond pending his date of sentencing. Inexplicably, he did not appear on the scheduled date for sentencing and a bench warrant was issued for his arrest. Following his arrest several months later, Jones was sentenced to twenty years in prison in accordance with the plea agreement.

Id. at 365.

On appeal, Jones argued that the imposition of the twenty year sentence was improper. Citing *United States v. David*, 58 F.3d 113 (4th Cir.1995); *United States v. Rivera*, 954 F.2d 122 (2nd Cir.1992); and *United States v. Garcia-Velilla*, 122 F.3d 1 (1st Cir.1997), the Supreme Court stated as follows:

The circuit court correctly imposed sentence according to the Commonwealth's recommendation under the plea

agreement. Jones pled guilty and agreed to abide by the terms of the plea bargain including the requirement that he appear in court on the date assigned for sentencing. He acknowledged his understanding of the possible sentencing consequences should he fail to appear. Therefore, because Jones failed to appear for sentencing the recommended sentence was correctly imposed under the terms of the plea agreement.

Id.

Thus it is clear that a sentence enhancement clause such as the one at issue herein is a proper term for inclusion in a plea agreement. While the case does address the issue of the trial court's discretion in enforcement of such a term, in *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989), the Supreme Court recognized that plea agreements are "constitutional contracts" which are binding and enforceable once an accused enters his plea or takes action to his detriment in reliance upon the offer. Accordingly, plea agreements are interpreted according to ordinary contract principles. *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky.App. 2007) (citing *O'Neil v. Commonwealth*, 114 S.W.3d 860, 863 (Ky.App. 2003)). Thus, Jones, like the Commonwealth, was contractually bound by the terms of the plea agreement, including the sentencing enhancement clause.

Because of the contractual nature of the sentencing enhancement clause, we disagree with Jones's argument that the trial court had essentially unfettered discretion in whether to enforce the provision. The Commonwealth, too, was entitled to the benefit of its bargain under the plea agreement. Rather, assuming that the provision was knowingly, willingly, and voluntarily entered into

(as here), we believe that avoidance must be grounded within the normal defenses for avoidance of a contract, which in an agreement of this type will usually involve unconscionability or impossibility of performance.

In the usual case of failing to appear for a sentencing hearing avoidance will involve such situations as illness of the defendant, illness of an immediate family member, or unavoidable detainment which would excuse compliance with the terms of the sentencing enhancement clause. In such cases it is the trial court's obligation to weigh the merits of the excuse and exercise its discretion in determining whether to enforce the clause. On the other hand, absent any excuse, or a patently unreasonable excuse, it would be incumbent upon the court to enforce the clause; unfettered discretion under such circumstances would undermine the principle that plea agreements are to be enforced pursuant to ordinary contract principles.²

In opposition to enforcement of the clause, Jones essentially argued impossibility of performance. He contended that it was impossible for him to cooperate with the PSI investigation because he was incarcerated in Scott County during the relevant time, and that it was impossible for him to attend the original sentencing hearing because he could not secure transportation from Jessamine County to Jefferson County.

² Similarly, a zone of discretion (but not unfettered) would apply in the case of a "to commit no other offenses" term. Under normal circumstances the commission of a felony would require the application of the clause. Broad discretion would remain, however, in the case of violations and misdemeanors. Enhancement could be unconscionable in the case of, for instance, a minor traffic violation, whereas the commission of a serious misdemeanor such as fourth degree-assault would usually require enforcement of the clause.

As previously noted, the trial court heard Jones's arguments concerning why he was unable to comply with the terms of the sentencing enhancement clause. Ultimately, it determined that it could not find any extenuating circumstances to prevent the triggering of the clause. Further, the trial court indicated that if the reason for failure to comply "was not of [Jones's] doing" then the outcome might be different. Implicit in the trial court's statements was that it considered Jones's arguments for avoidance, and found them to be lacking. This is indicative of the exercise of independent discretion. Thus, contrary to Jones's contention, the record discloses that the trial court did consider the possibility of avoidance of the provision and did exercise independent judgment in so doing, but found the grounds proffered by Jones to be insufficient.

Moreover, the trial court's decision to enforce the clause was a reasonable exercise of its discretion. There is no evidence or claim that upon missing (or prior to missing) the original sentencing hearing that Jones sought to contact the court to inform it of his circumstances.³ To the contrary, following the missed hearing, he apparently took no action until arrested on the failure to appear warrant. Similarly, though he may have been incarcerated in Scott County for a portion of the relevant period, there is no indication in the record that Jones sought to notify the PSI officer to reschedule his interview, or took any other action to comply with his duty to cooperate with the preparation of the PSI report.

Moreover, Jones stated that he was released 10 days prior to the originally

³ It appears that Jones did notify trial counsel the day before the originally scheduled August 29, 2007, sentencing hearing and trial counsel notified the trial court of the circumstances.

scheduled sentencing hearing, and so the excuse would not even be applicable to this period.

In summary, the record reflects that the trial court did weigh the merits of Jones's proffered excuses for failing to comply with his obligations under the sentencing enhancement clause, and found them lacking. This determination is supported by the record. As such, we are constrained to conclude that the trial court did not abuse its discretion in enforcing the clause.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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