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OPINION OF APRIL 8, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001175-MR

JACKIE RAY PRYOR APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NO. 10-CR-00021

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: Jackie Ray Pryor appeals from the Henderson Circuit Court's judgment sentencing him to fifteen-years' imprisonment for flagrant non-support

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

as a first-degree persistent felony offender. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2005, Pryor was charged with flagrant non-support, pursuant to KRS[2] 530.050(2), for failure to support his minor child.[3] He was sentenced to seven-years' imprisonment but was released in January of 2008. On February 9, 2010, Pryor was again indicted for flagrant non-support. A jury convicted Pryor of flagrant non-support as a first-degree persistent felony offender pursuant to KRS 532.080(3) based upon the jury instructions indicating that he had been convicted of trafficking in a controlled substance within 1000 yards of a school in April of 2004 and his conviction for non-support in September of 2005. At the close of the evidence, Pryor moved for a directed verdict on the basis that the Commonwealth had not met its burden of proof. The trial court denied his motion and sentenced him to fifteen-years' imprisonment.

Pryor now appeals, arguing that 1) his conviction violated double jeopardy because the jury instructions did not delineate a time period within which the jury could determine that he had failed to pay support, separate from his failure to pay prior to his September 2005 conviction for non-support; 2) the court violated his due process rights by imputing income to him while he was incarcerated; and 3) the court incorrectly denied his motion for directed verdict.

[2] Kentucky Revised Statute.

[3] Once paternity was established, Pryor consented to an agreed order to pay $61.40 per week in child support, starting August 15, 2003.

II. ANALYSIS

A. DOUBLE JEOPARDY ISSUES

Pryor concedes that this issue is unpreserved. However, RCr[4] 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered … by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon determination that manifest injustice has resulted from the error."

> [T]he requirements of "manifest injustice" as used in RCr 10.26… mean[s] that the error must have prejudiced the substantial rights of the defendant, … *i.e.*, a substantial possibility exists that the result of the trial would have been different….
>
> [The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Pryor argues that double jeopardy attaches because the Commonwealth presented evidence to the jury of the total arrearage accrued from the date of the initial order to pay child support in 2003. He contends that in doing so, the Commonwealth included evidence of the same arrearages used to convict him of non-support in 2005, rather than just presenting evidence of the post-2005 arrearage. Also, Pryor contends that the Commonwealth did not submit any dates within which the jury could determine whether he had not paid his child support.

[4] Kentucky Rule of Criminal Procedure.

Therefore, he argues that both the jury and grand jury were allowed to consider the time period prior to 2005; *i.e.* the time period used for Pryor's first conviction of non-support. He further contends that he was subjected to double jeopardy because the Commonwealth presented evidence of his first flagrant non-support conviction as a basis for charging him as a persistent felony offender.

Several rules of law govern the analysis of this case.[5] First, double jeopardy will attach when "[t]he offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process…." KRS 505.020(1)(c). Double jeopardy does not attach to a continuous course of conduct where it has been interrupted by legal process, which includes an "arrest warrant, an indictment, or an arraignment." *Fulcher v. Commonwealth*, 149 S.W.3d 363, 377 (Ky. 2004). Also, "conviction as a persistent felony offender is not a charge of an independent criminal offense but rather a particular criminal status. Consequently, double jeopardy does not attach." *White v. Commonwealth*, 770 S.W.2d 222, 224 (Ky. 1989).

Second, KRS 530.050(2) states that:

> A person is guilty of flagrant non-support when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor child… and the failure results in: (a) An arrearage of not less than one thousand dollars ($1,000.00); or (b) Six (6) consecutive months without payment of support….

[5] Pryor also cites to unpublished cases in his brief, but they do not comply with the requirements set forth in Kentucky Rule of Civil Procedure 76.28 (4)(c) for citation.

Pryor concedes that under Kentucky's case law double jeopardy would not apply to the second flagrant non-support conviction where his continual failure to pay child support was interrupted by the 2005 flagrant non-support conviction. *See Fulcher*, 149 S.W.3d at 377. While Pryor cannot be charged twice for failure to pay the same obligation, he may be convicted for his failure to pay any arrearage that accrued after his first conviction for non-support. *See id*. Similarly, Pryor's argument that he was subjected to double jeopardy when the Commonwealth used his first flagrant non-support charge as a basis for a persistent felony offense is incorrect. Double jeopardy is not at issue when a previous conviction is being used to convict a defendant of a persistent felony offense. *White,* 770 S.W.2d at 224.

Further, Pryor does not present any evidence to indicate that his post-September 2005 arrearage did not provide a basis for a separate charge of non-support. Pryor acknowledges in his brief that had he not made any payments after he was charged with the 2005 flagrant non-support conviction, he would have owed a substantial amount of child support. Even when crediting Pryor for all of the payments he claims to have made after his September 2005 conviction,[6] without calculating interest and *assuming* that the unemployment insurance commission made the full monthly payment of $61.40 from February of 2009 to

[6] In his brief, Pryor claims to have made the following payments: $100 in October 2005; $61.40 on November 10, 2005; $61.40 on November 17, 2005; $100 on March 18, 2006; and "at least some payment" every month from March to December, 2008, including $61.50 in May of 2008 and $61.40 in November of 2008.

July of 2009,[7] Pryor would have been in arrears well in excess of $1000 for payments due after his September 2005 conviction. An arrearage in excess of $1000 is sufficient for a felony flagrant non-support conviction. KRS 530.050 (2)(a). Furthermore, Pryor does not even contest the Commonwealth's argument that he was in arrears in excess of $9,845 since September of 2005. Therefore, there was ample evidence for a jury to find that Pryor had flagrantly failed to pay support and was in arrears of $1000 or more, pursuant to KRS 530.050 (2)(a), without having to consider any evidence of arrearages prior to September of 2005.

Pryor's argument that imputing income to him during his incarceration violated his due process also lacks merit. The law is well settled on the issue that "incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed, parents owing support." *Commonwealth v. Marshall*, 15 S.W.3d 396, 402 (Ky. App. 2000). Therefore, the court did not err by imputing income to Pryor for his period of incarceration.

Given the foregoing, particularly under a palpable error review, reversal is not warranted. We conclude that there is not a substantial possibility that the result at trial would have been different.

B. MOTION FOR DIRECTED VERDICT

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only

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[7] Pryor also claims that the unemployment commission deducted an unknown amount from his check for child support and that he should have been credited for these payments.

then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

At the close of the evidence, Pryor informed the court that he would "like to make a motion of directed verdict that the State has not met their burden." Pryor asserts that two separate bases for a directed verdict can be derived from this general motion: 1) the Commonwealth did not inform the jury of the date of indictment, and 2) the Commonwealth failed to meet its burden of proof.

Generally, a generic motion for directed verdict will not sustain more specific claims made on appeal.

> CR 50.01 states that '[a] motion for a directed verdict shall state the specific grounds therefor.'… In the absence of a statement of the specific grounds for a motion for a directed verdict, this Court normally will not consider the question of the *denial* of the motion. Clay, CR 50.01; 5 Moore's Federal Practice, Par. 50.04 (2nd Ed.1951).

Carr v. Kentucky Utilities Co., 301 S.W.2d 894, 897 (Ky.1957); *see also Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005); *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004) (applying CR 50.01 to criminal cases). Furthermore, a general motion for directed verdict cannot be used to preserve an issue on appeal with respect to a jury instruction. *Hicks v. Commonwealth*, 805 S.W.2d 144, 148 (Ky. App. 1990) (citing *Anastasi v. Commonwealth*, 754 S.W2d 860 (Ky. 1988); *McDonald v. Commonwealth*, 554 S.W.2d 84 (Ky. 1977)). RCr 9.54 provides that "no party may adequately assign as error the giving or the failure to give an instruction unless… the party makes objection before the court

instructs the jury, stating specifically the matter to which the party objects and the grounds of the objection." Therefore, this issue is not preserved for review. Accordingly, we affirm.

ISAAC, SENIOR JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: I was a member of the panel that decided *Commonwealth v. Marshall*, 15 S.W.3d 392, 402 (Ky. App. 2000), and I concurred reluctantly in its holding that "incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed, parents owing support." On numerous occasions over the intervening years, I have regretted that vote after seeing the glaring injustice inherent in the rule of the *Marshall* case. *Marshall* is a prime example of the victory of theory over common sense, of academic opining over the dictates of reality, and of form over substance.

The theory is that those who are incarcerated continue to accrue arrearages in child support not only in spite of -- but also because of -- the fact of their incarceration. No doubt the deliberate failure of a parent to support a dependent child is intolerable. However, in reality, it makes no sense to charge a prisoner with constantly accruing new arrearages when he is in no position to work to obtain income either to meet or to offset child support that is owed and becomes owing. We have in effect created a legal nightmare of *No Exit*[8] in which arrearages

[8] The title of a play by Jean-Paul Sartre in which the incarcerated characters are dealing with hopelessness in the venue of Hell.

continue to accrue and to constitute new felonies without **any** possibility on the part of the incarcerated to mitigate or to avoid the felonies of which he/she becomes instantly guilty. In effect, we are imputing criminal *mens rea*, a *per se* violation of due process on the part of the legal establishment.

I do not know the solution to this social conundrum, but I am convinced as a matter of law, public policy, and conscience that it needs to be addressed by the legislature – perhaps as a continuation of its heroic overhaul of the penal system.

There is no beneficiary under the current state of the law. Even those intended to be protected -- namely, the dependent children – are further victimized by suffering continued and often permanent non-support because the parent who is incarcerated likely will never be able – **even if willing** – to address and meet his or her growing arrearage and future child support obligations.

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