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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001552-MR

SEAN JOHNSON — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 11-CR-00251

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Sean Johnson appeals from a Judgment and Sentence on Plea of Guilty entered by the Campbell Circuit Court on August 15, 2011. He alleges the trial court erred in rejecting the Commonwealth's recommendation that his

sentence be diverted.[1] Having reviewed the record, the briefs and the law, we affirm.

Johnson was charged with a single count of flagrant non-support.[2] On July 11, 2011, he executed a motion to enter guilty plea. In return, the Commonwealth recommended: (1) his sentence be diverted under KRS 533.250; and (2) he be required to pay a child support arrearage of $12,160.25 during the period of diversion. The trial court accepted the guilty plea, confirmed with Johnson that he was acting freely and knew the court was not required to grant diversion, and withheld entry of judgment until receipt of a pre-sentence investigation (PSI) report.

Johnson next appeared before the trial court for final sentencing on August 9, 2011. With counsel at his side, Johnson proposed no corrections to the PSI. He admitted being convicted of a felony—carrying a concealed deadly weapon—in 1998 in Ohio, although he stated it was an "attempt" because the weapon was in the bed of his truck. The Commonwealth stated its information showed the charge but no resolution and suggested the crime may have been a misdemeanor based on Johnson's statement that it was an attempt. The court responded it was unsure, but in the PSI, the probation and parole officer had

[1] Diversion is an alternative to prosecution "intended to augment the criminal justice system where prosecution would be counterproductive, ineffective, or unwarranted." 4 A.L.R.4th 147, § 2[b], *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative,* by Debra T. Landis, J.D.

[2] Kentucky Revised Statutes (KRS) 530.050, a Class D felony.

indicated the punishment for the crime had been two years community control and listed it as a felony.[3] The court twice asked Johnson if he had been convicted of a felony and twice Johnson said he had and was sure it was a felony.

The trial court stated it believed diversion was designed to help people avoid receiving a felony conviction, and that purpose would not be achieved by granting diversion to a convicted felon. Therefore, she did not consider Johnson a good candidate for diversion. When Johnson learned the Commonwealth's recommendation would be rejected, the trial court gave him the option of withdrawing his guilty plea. To give counsel an opportunity to fully discuss the matter with Johnson, the court redocketed the case later in the day.

When the case was recalled, defense counsel argued the legislature's intent in authorizing a felony diversion program was not solely to prevent a defendant's first felony conviction. He pointed out that otherwise, KRS 533.250 would not allow defendants with felony convictions more than ten years old[4] to be considered for diversion. Counsel also noted the 1998 conviction was more than a decade old so Johnson was still eligible for diversion. Finally, counsel explained Johnson was attempting to secure custody of his daughter[5] and a felony conviction

[3] Carrying a concealed weapon in Ohio is punishable as a misdemeanor or a felony. Baldwin's Ohio Revised Code Annotated (R.C.) § 2923.12 (F)(1).

[4] A defendant charged with a Class D felony is eligible for felony diversion if he/she has not within ten years of the current offense, committed a felony, been on probation or parole, or been released from serving a felony sentence. Eligible candidates must also not be charged with an offense for which probation, parole or conditional discharge is prohibited under KRS 532.045 or have received a diverted sentence within the last five years.

[5] According to defense counsel, the child is in foster care and the child's mother is "no longer in the picture."

would hinder his ability to receive custody and provide for his child. Counsel then asked the court to "consider making an exception" for Johnson and order diversion. The Commonwealth responded it still favored diversion, but if the trial court did not, the Commonwealth would recommend a sentence of three years *probated* for a period of five years.

Thereafter, the court read aloud Johnson's criminal record which contained numerous charges. While charges for disorderly conduct, misdemeanor drug abuse, possession of marijuana, drug trafficking, and two instances of domestic violence had all been dismissed, the court was nonetheless concerned that Johnson had engaged in a troubling pattern of conduct. The court then reiterated its belief that felony diversion is for people who need a first or second chance which Johnson had already received. Upon repeating her view that Johnson was not a good fit for diversion, she posited he might be a good candidate for probation, allowed him to withdraw his plea and offered him additional time to make his decision.

After conferring with counsel, Johnson chose to go forward with a new guilty plea. Thereafter, the trial court engaged Johnson in a second plea colloquy and sentenced him in conformity with the Commonwealth's oral recommendation, imposing a sentence of three years but probating it for five years; ordering Johnson to pay an arrearage of $15,100.01 during the period of probation and to remain on probation until it was paid in full; and to pay court costs and a public advocate fee. Judgment was entered August 15, 2011. Johnson filed a

timely notice of appeal. We now affirm.

ANALYSIS

We begin by establishing our standard of review. Johnson argues the trial court abused its discretion in rejecting his request for diversion. He claims this argument is preserved "because the issue was before the trial court when the Commonwealth's (sic) recommended Diversion and Mr. Johnson requested Diversion." Alternatively, Johnson requests palpable error review pursuant to RCr[6] 10.26.

The mere fact that a topic was discussed in the trial court does not mean the precise issue raised on appeal has been preserved for our review. While Johnson requested diversion, and the Commonwealth recommended diversion, Johnson never argued the trial court would be committing error by not diverting him. In fact, counsel asked the trial court to consider "making an exception" for Johnson, thereby at least tacitly indicating the trial court was fully authorized to reject the recommended diversion. An appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Having failed to argue to the trial court the argument he now raises on appeal, this issue is not preserved for our review.

Our inquiry is not concluded, however. Under RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered . . .

[6] Kentucky Rules of Criminal Procedure.

by an appellate court on appeal, even though insufficiently raised or preserved for review and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." An error is palpable only if it is easily perceptible, plain, obvious, and readily noticeable. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). It "must involve prejudice more egregious than that occurring in reversible error." *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). It must be so grave that if left uncorrected, it would seriously affect the fairness of the proceedings. To reverse a case for palpable error, we must be convinced there is a "substantial possibility" the result would have been different but for the alleged error. *Brewer*, 206 S.W.3d at 349.

First, KRS 533.250(6) specifically authorizes a trial court to "approve or disapprove" a diversion. Thus, it is not a given, as Johnson's brief suggests, that rejecting the Commonwealth's recommendation of diversion is error. *Flynt v. Commonwealth*, 105 S.W.3d 415, 424 (Ky. 2003) made clear that "the prosecution of crime is an executive function" carried out by prosecutors and "disposition of a criminal matter is exclusively a judicial function" carried out by the courts. In *Flynt,* our Supreme Court held a circuit court may "approve or disapprove an application for pretrial diversion only when the Commonwealth has recommended that the court approve the application." *Id.* at 426. It necessarily follows that once the Commonwealth recommends diversion, the trial court has discretion to grant or deny diversion—requiring anything else would turn the court into a rubber stamp and prohibit the court from performing its judicial function. We will not so hold.

Now that we have determined the trial court was authorized to reject Johnson's request for diversion, we consider whether denial constituted an abuse of discretion such that reversal is necessary. Twice, Johnson admitted having been convicted of a felony in Ohio. While the twelve-year-old felony did not make him ineligible for diversion under our statutory framework, the trial court did not consider him to be a good candidate for the program which she saw as a means of helping someone avoid a felony conviction. There is support for her view. KRS 533.258 specifies that at the end of a successful diversion, the charge does not constitute a criminal conviction, it does not have to be listed on a job or license application, and records pertaining to the diversion cannot be entered in a court proceeding without the defendant's consent. Thus, as expressed in *Flynt,* 105 S.W.3d at 424, "admission into a diversion program permits a defendant who successfully completes diversion to avoid a felony conviction entirely."

While the prior felony alone would have been sufficient reason to deny diversion, the trial court also read from the PSI a long list of dismissed criminal charges indicating a course of conduct. The content of the PSI is specified in KRS 532.050(2) which directs:

> The report shall be prepared and presented by a probation officer and shall include:
>
> (a) The results of the defendant's risk and needs assessment;
>
> (b) An **analysis of the defendant's history of delinquency or criminality**, physical and mental

> condition, family situation and background, economic status, education, occupation, **and personal habits**;
>
> (c) A preliminary calculation of the credit allowed the defendant for time spent in custody prior to the commencement of a sentence under KRS 532.120; and
>
> (d) Any other matters that the court directs to be included.

(Emphasis added). We see no error in the trial court considering Johnson's criminal history which necessarily includes dismissed charges. *See Schooler v. Commonwealth,* 628 S.W.2d 885, 886 (Ky. App. 1981). Thus, we cannot say the trial court's denial of diversion to a convicted felon with a history of contacts with law enforcement rises to the level of error, let alone palpable error.

We commend the trial court for her patience and exactitude in weighing all the relevant factors in this case and her willingness to give Johnson additional time to make a decision that was in his best interest. For the reasons expressed, the Judgment and Sentence on Plea of Guilty entered by the Campbell Circuit Court on August 15, 2011, is affirmed.

ALL CONCUR.

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