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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001613-MR

DAVID COUNCIL — APPELLANT

v. — APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 09-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: David Council appeals from a Final Judgment and Revocation of Probation rendered in Ballard Circuit Court. Council contends that the circuit court violated certain provisions of KRS Chapter 532 by bargaining with him to arbitrarily increase sentences recommended under a plea agreement, and that it

erred in revoking his probation. For the reasons stated below, we affirm the Judgment on appeal.

On October 8, 2009, Council accepted a plea offer and entered a guilty plea in Ballard Circuit Court to one count each of Possession of Drug Paraphernalia, second offense, and Possession of a Controlled Substance, first offense. The charges to which Council pled guilty arose from the execution of a search warrant which uncovered a smoking pipe containing methamphetamine in an unoccupied vehicle to which Council had access.

As part of the plea offer, the Commonwealth recommended one year in prison on the paraphernalia charge, and two years on the charge of possession of a controlled substance. The agreement did not address probation. Council appeared for sentencing in Ballard Circuit Court on November 6, 2009. Thereupon, Judge Timothy A. Langford gave Council the option of proceeding with the Commonwealth's recommended sentence and no probation, or accepting a 10-year sentence which would be immediately probated. After conferring with his attorney, Council chose the probated sentence, which was then accepted by the court. Council was then informed by the court that he could appeal the decision within 30 days. Council chose not to appeal.

On May 23, 2011, Council's probation officer sought the issuance of an arrest warrant for Council based on her determination that Council tested positive for methamphetamine and that he failed to pay his jail fee. The warrant was issued, and subsequently executed on June 23, 2011. A probation hearing was

conducted on August 5, 2011, where the probation officer testified that Council appeared nervous when he reported to her on May 11, 2011, for drug testing, and that the test came back positive for methamphetamine. Council testified that he had not used methamphetamine, and believes that the test came back positive because he had consumed an energy drink at a party which he believed someone had spiked or tampered with. Council's mother testified that she paid the balance of his jail fee.

After considering the proof, the court determined that though the jail fee had been paid, the court was revoking Council's probation based on the positive drug screening. That finding was memorialized by way of an order rendered on August 31, 2011, and this appeal followed.

Council now argues that the circuit court improperly violated the sentencing and probation procedure set out in KRS 532.030 and KRS 532.040 by bargaining with him and arbitrarily increasing the sentence in the plea agreement to the maximum of 10 years in exchange for granting probation. Council notes that Judge Langford did not reject the one and two year sentence recommendations as inappropriate for the charges. Rather, Judge Langford allegedly bargained with Council in a manner which persuaded him to accept a longer sentence in exchange for a probated sentence. Council directs our attention to *Commonwealth v. Tiryung*, 709 S.W.2d 454 (Ky. 1986), *Galusha v. Commonwealth*, 834 S.W.2d 696 (Ky. App. 1992), and *Stallworth v. Commonwealth*, 102 S.W.3d 918 (Ky. 2003), in support of his contention that the sentence was arbitrary, improper and not in

accordance with the statutory scheme. He seeks an order reversing the matter and remanding it for new sentencing in accordance with the plea agreement.

We must first note that we find as persuasive the Commonwealth's contention that Council's claim of improper sentencing is not preserved for appellate review. Council was sentenced on November 9, 2009. At the time of sentencing, he was apprised that he could withdraw his guilty plea, and could appeal the judgment and sentence within 30 days. Council prosecuted no appeal, and was released under the terms of the probated sentence. It was only some 18 months later, and after testing positive for methamphetamine, that Council sought to challenge the 2009 sentence. He maintains that even though he was sentenced in 2009, the time for prosecuting an appeal from that sentence began to run at such time when his probation was revoked. We do not find this argument persuasive. The timely filing of a notice of appeal in conformity with CR 73.02 is the means by which an appeal is initiated and the jurisdiction of the appellate court is invoked. *See Stewart v. Kentucky Lottery Corporation*, 986 S.W.2d 918 (Ky. App. 1998). We do not share Council's implicit belief that he is availed of the right to challenge his sentence at any time during the probationary period, even 10 years after the time of sentencing, and as such cannot conclude that this issue is preserved for appellate review. Additionally, we do not find it to constitute palpable error. RCr 10.26.

Arguendo, even if this matter were properly preserved for appellate review, we would find no error. Council, who was represented by an attorney throughout

the proceedings below, was availed of the opportunity to accept the Commonwealth's offer of one and two year terms of imprisonment, respectively, if he so chose. He declined to accept those terms, instead - and perhaps understandably - accepting the offer of a longer but probated sentence. *Tiryung*, *Galusha*, and *Stallworth*, upon which Council relies, are factually distinguishable from the matter at issue in that each addressed sentences which were imposed or amended long after the time of conviction.

Additionally, we find that the case of *Goldsmith v. Commonwealth*, 363 S.W.3d 330 (Ky. 2012), resolves the issue. In *Goldsmith*, the Kentucky Supreme Court decisively resolved the issue of whether a circuit court's bargaining with a defendant in a manner which persuaded the defendant to accept a longer sentence in exchange for a probated sentence resulted in reversible error. From *Goldsmith*, we quote at length:

> Appellant and the Commonwealth had reached a "package deal" plea agreement to resolve the charges in both counties. The agreement called for Appellant to enter a plea of guilty to the three Hickman County charges, for which the Commonwealth would recommend one year on each count to be served consecutively for a total of three years; a similar offer applied to the offenses in Carlisle County. The Carlisle County charges are not directly before the Court.
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> At sentencing in Hickman County on March 1, 2007, Appellant asked the trial court to grant probation rather than impose the recommended sentence. Although the Commonwealth opposed this, the trial court informed Appellant that immediate probation to a drug treatment program would be granted if he agreed to be sentenced to significantly more time than the Commonwealth had

recommended. Specifically, the judge indicated he would sentence Appellant to five years on each count, to be run consecutively in the event of probation revocation, for a total of 15 years, but that the sentence would be probated for five years on the condition that Appellant complete a local drug treatment program. Appellant agreed and was sentenced accordingly. Later that same day, he was sentenced to the same terms in the Carlisle County case.

Appellant was subsequently charged with probation violations in both counties for failing to complete his treatment program. . . .

. . . .

[On appeal,] Appellant also argues that what the trial court did amounts to imposing a "hammer clause" since it exceeded the Commonwealth's recommendation, and that such action violates the Separation of Powers doctrine. As this Court recently held in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), such sentences are not illegal unless the trial court sentences beyond the statutory penalty range for a given offense. Here, the trial court did not go beyond the penalty range on any of the three counts, and it was within his discretion to run each of the counts consecutively, so long as the aggregate did not exceed 20 years. *See* KRS 532.110(1)(c). As to the general claim that the court erred by negotiating the sentence with the defendant, this Court sees no merit. A court is never bound to accept a plea agreement from the Commonwealth on a sentence, but may sentence to any number of years within the penalty range. *See* RCr 8.10. On such sentencing, the defendant may move to withdraw his guilty plea. But here, the Appellant had no reason to do so, having sought probation which the trial judge was willing to give. There is no error on this constitutional issue. Additionally, this issue is also procedurally defaulted, because it was not raised in the court below, was not appealed when the initial judgment was entered, and palpable error review was not sought at the Court of Appeals.

Id. at 331-33. The reasoning in *Goldsmith* is equally applicable here and steadfastly supports our position. As such, if this issue were preserved for appellate review - which we do not find to be the case - we would find no error.

Council also argues that the circuit court erred in revoking his probation. He maintains that he was not properly brought before the circuit court; that the Order of Probation did not authorize random drug testing; that the court erred in failing to consider certain scientific evidence; and, that the court improperly revoked the probation after relying only upon the hearsay testimony of the probation officer. He contends that these factors, taken individually or collectively, demonstrate that the Final Judgment and Revocation of Probation was improperly rendered. He seeks an order reversing the matter and remanding with instructions that the period of probation be fixed in accordance with the terms of the plea agreement.

On Council's claim that he was improperly brought before the circuit court, we find no error. The circuit court may issue an arrest warrant upon a finding of probable cause to believe that a defendant has failed to comply with a condition of his sentence. KRS 533.050(1)(a). Council's Probation Officer tendered to the court a signed Special Supervision Report which detailed Council's probationary status and the positive methamphetamine test. It was upon the Probation Officer's report and the positive drug screen that the trial court issued the bench warrant, and this adequately satisfied the written notice of the grounds for revocation as required by KRS 533.050(2). Additionally, we are not persuaded by Council's

contention that he was not required to take randomized drug tests. The Order of Probation, which Council signed, expressly provides that "defendant shall submit to random drug testing[.]"

Council next contends that the trial court improperly failed to admit into evidence certain articles which his attorney apparently printed off the internet, and which allegedly supported Council's contention that he inadvertently consumed methamphetamine at a party, or that the drug test may have produced a false positive. The admission of such evidence at a revocation hearing falls within the sound discretion of the trial court, *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982), and except as to privileges the Kentucky Rules of Evidence do not apply at probation revocation hearings. KRE 1101(d)(5). We find no basis for concluding that the trial court abused its discretion on this issue, and as such find no error.

Lastly, Council maintains that the circuit court erred in revoking his probation based on the hearsay testimony of the Probation Officer. While acknowledging that he did not object to the Probation Officer's testimony at the hearing, he now contends that this error is so flagrant and an affront to justice as to rise to the level of palpable error. He argues that there was no way for Judge Langford to determine the accuracy of the test, and that the revocation of his probation may not properly be based on hearsay.

We find no error on this issue for two reasons. First, Council has not alleged, nor is there any reasonable basis for concluding, that the standardized drug

screen conducted by Pharmatech Laboratories and Diagnostics did not return a positive result. In fact, throughout the record, including Council's written argument, the results of the test are uncontested. As such, we may not conclude that the court's reliance on the Probation Officer's testimony and the Special Supervision Report, rather than the drug test itself, was erroneous or rises to the level of palpable error. Additionally, we again note that because a defendant is not subject to additional judgment or sentence at a revocation hearing, but rather the reinstitution of the existing sentence, the Kentucky Rules of Evidence are not applicable at such hearings. KRE 1101(d)(5). We find no error.

For the foregoing reasons, we affirm the Final Judgment and Revocation of Probation of the Ballard Circuit Court.

ACREE, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion on the issue of whether Council's original sentence, imposed after the trial judge became involved in the plea bargaining process and offered an alternative sentence, was proper. I believe such a sentence violated Council's rights because he was not offered an opportunity to withdraw his plea. I write to urge that Kentucky adopt an absolute prohibition against judicial involvement in plea bargains. Additionally, I find the decision to revoke Council's probation without making the required findings of KRS 439.3106 to be in error.

The involvement of the court in the plea bargaining process has been rejected by the federal courts and a majority of states through procedural rules. The federal rule is a bright-line approach and states: "The court must not participate in [plea negotiation] discussions." Fed.R.Crim.P. 11(c)(1). The rule serves three purposes: "it diminishes the possibility of judicial coercion of a guilty plea; it protects against unfairness and partiality in the judicial process; and it eliminates the misleading impression that the judge is an advocate for the agreement rather than a neutral arbiter." *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006) (internal quotations omitted). *See also United States v. Bruce*, 976 F.2d 552, 555-558 (9th Cir. 1992). When a trial court becomes an advocate for a particular plea agreement:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

Bradley, 455 F.3d at 465 (internal quotations omitted).

Most states have adopted this same bright-line prohibition.[1] In states that do not have a complete prohibition against courts participating in the plea bargaining process, typically such participation is very constrained and designed to

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[1] *See e.g. Melby v. State*, 234 N.W.2d 634, 643 (Wis. 1975); *Boyd v. United States*, 703 A.2d 818, 820-822 (D.C. 1997); *State v. Dimmitt*, 665 N.W.2d 692, 696 (N.D. 2003); *State v. Bolger*, 332 N.W. 718, 719 (S.D. 1983); *State v. Jordan*, 672 P.2d 169, 173-174 (Ariz. 1983); *People v. Clark*, 515 P.2d 1242, 1243 (Colo. 1973); *Smith v. State*, 825 S.2d 1055, 1077 (Md. 2003); *State v. Sanders*, 549 S.E.2d 40, 55-56 (W. Va. 2001); *Mississippi Judicial Performance Comm'n v. Hopkins*, 590 So. 2d 857, 865 (Miss. 1991) (sanctioning judge for acting as a plea negotiator).

protect defendants.[2] Other states also allow judicial involvement with specific limits.[3] A few other states allow some carefully controlled judicial involvement under the current ABA standard.[4]

States that allow some exceptions to a complete prohibition treat the situation in which a defendant asks the court to be involved in the plea negotiation differently than the situation where the court becomes involved of its own volition. In the former, the defendant is viewed as having invited what follows and having waived the right to complain later. *See State v. Ditter*, 441 N.W.2d 622, 625 (Neb. 1989) (where defense attorney initiated plea discussions with the court without the defendant present, and the court merely offered possible penalties depending upon the actions he took, the defendant cannot complain that such discussions made his plea involuntary); *Fermo v. State*, 370 So.2d 930, 932-933 (Miss. 1979) (where the

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See e.g. Cripps v. State, 137 P.3d 1187, 1191 (Nev. 2006) (no judicial involvement except judge may state on the record whether judge is inclined to follow the sentencing agreement); *Crumb v. People*, 230 P.3d 726, 730-731 (Colo. 2010) (same); *People v. Cobbs*, 443 Mich. 276, 281-283, 505 N.W.2d 208, 211-212 (1993) (no judicial involvement except a judge may state on the record the length of sentence that based on the information the judge currently has would be appropriate, only if requested by a party); *State v. Barboza*, 558 A.2d 1303, 1307 (N.J. 1989) (no judicial involvement except court can indicate whether it will agree to tentative disposition or, with consent of both counsel, indicate what maximum sentence it would impose).

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See State v. D'Antonio, 877 A.2d 696, 701, 712-718 (Conn. 2005) (trial judge may participate in the negotiation of the plea agreement so long as a different judge presides at trial and sentencing, upon violation defendant must show prejudice); *Wilson v. State*, 845 So.2d 142, 150-152, 156-57 (Fla. 2003) (limited judicial participation in plea dialog if requested, cannot imply sentencing possibilities hinge on whether defendant chooses to go to trial, and record must be made; violation of these give rise to presumption of judicial vindictiveness).

[4] *See Harden v. State*, 277 S.E.2d 692, 694-695 (S.C. 1981) (adopting ABA standard: parties can request judicial involvement, judge will moderate and listen to parties presentation and then can indicate what charge or sentence concessions would be appropriate on the record); *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (adopting ABA standard, considers whether judicial involvement led to involuntary plea); *Ellis v. State*, 744 N.E.2d 425, 428-430 (Ind. 2001).

defense attorney initiated plea discussions with the court, which is obligated not to become involved in plea negotiations, the defendant cannot complain of an error that he invited).

Prior to *Goldsmith v. Commonwealth*, 363 S.W.3d 330, 333 (Ky. 2012), Kentucky rules and case law appeared to reject the involvement of the trial court in a plea negotiation process. Under RCr 8.08 and RCr 8.10 the trial court only had the following options: accept an open plea; accept a plea bargain; reject a plea bargain and sentence to any legal term without limitation, so long as the defendant was given the opportunity to withdraw the guilty plea; or defer accepting or rejecting the plea until after consideration of the presentence report.

Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992), rejected a trial court's authority to *sua sponte* initiate and accept a conditional guilty plea over the Commonwealth's objection:

> A plea under such circumstances can only be construed as abridging the power of the trial court to punish within the limits prescribed in KRS 532.025 or as an invalid guilty plea under RCr 8.08 due to the conditional nature of it. In either event, the plea would be invalid. While RCr 8.10 has many of the same characteristics, the distinction is in the source of the agreement and the absence of any self-imposed limitations by the trial court.

Corey, 826 S.W.2d at 322.

Dicta in *Corey* stated that the 1989 amendment[5] of RCr 8.10 was intended to "validate honest plea bargaining between the Commonwealth and the defendant while reserving unto the trial court the final decision as to sentencing." *Corey*, 826 S.W.2d at 321. It was not intended to "introduce trial judges into the plea bargaining process and supplant the role of the Commonwealth and the defendant in making the tentative agreement." *Id*. The Court confirmed that the Commonwealth Attorney is in charge of the plea bargaining process and that, "[w]hile RCr 8.10 does not expressly state that the plea agreement shall be between the defendant and the Commonwealth's Attorney, such a view is necessarily implied by virtue of the role conferred upon the trial court." *Id.*

In *Goldsmith*, the Kentucky Supreme Court opined that it was permissible for a trial court to negotiate a probationary sentence with a defendant, because the defendant had initiated this plea bargaining by asking the court for probation over the Commonwealth's objection and in contravention of his negotiated plea agreement. *Goldsmith*, 363 S.W.3d at 331, 333. The Court did not discuss or distinguish *Corey*. The Court stated:

> As to the general claim that the court erred by negotiating the sentence with the defendant, this Court sees no merit. A court is never bound to accept a plea agreement from the Commonwealth on a sentence, but may sentence to any number of years within the penalty range.

[5] Previous to the amendment of RCr. 8.10, the Kentucky Supreme Court had criticized judicial involvement in the plea process where the trial court had not expressed a firm commitment to either abide by the terms of the plea agreement or allow withdrawal of the plea. *See Haight v. Commonwealth.*, 760 S.W.2d 84, 89 (Ky. 1988) ("Whenever a trial court becomes deeply involved in the process of plea negotiations, he risks misleading the parties and losing his right to impose sentence contrary to the agreement.").

Id. at 333. I would limit *Goldsmith* to only applying when the defendant has initiated the court's involvement in the plea negotiation process and distinguish the instant situation where the trial court *sua sponte* inserted itself into the plea bargaining process by offering an alternative plea agreement.

I believe that when a trial court proposes an alternative plea bargain and brings the full power of the judiciary to bear on the new bargain, a defendant is at a decided disadvantage in determining whether this new bargain is in his best interests and risks being influenced by a desire to please the court. Accordingly, such a plea may be involuntary and therefore the defendant must be afforded an opportunity to withdraw from the plea.[6] Additionally, *Goldsmith* appears to support withdrawal from a plea negotiated with the trial court under the portion of RCr 8.10 which requires that when a court rejects a plea agreement, the defendant shall be afforded the opportunity to withdraw the plea. *Goldsmith*, 363 S.W.3d at 333. *See Covington v. Commonwealth*, 295 S.W.3d 814, 817 (Ky. 2009). Accordingly, the trial judge should have informed Council that he had the opportunity to withdraw his plea.

Council's situation shows the adverse effects that the trial court's involvement in the plea bargaining process can have for a defendant. Rather than

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[6] Additionally, where the guilty plea has already been accepted, conducting a new hearing pursuant to *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969), would be appropriate to insure that the original plea is still voluntary. A subsequent hearing would ensure that the defendant's counsel had reviewed the new plea agreement with him, explained his rights and the consequences of the plea, that he was satisfied with the advice of legal counsel and was certain about his decision.

serving a shorter fixed term of incarceration negotiated by his counsel before he pled guilty, Council agreed to the court's own proposal of a probated maximum sentence put forth at his sentencing hearing. The placement of this drug addict defendant on probation without appropriate interventions made it unlikely that he would be able to successfully complete his probation. After imposing probation on Council, there was no intervention by the trial court or the probation office to attempt to rehabilitate him by offering recovery programs, intense monitoring and repetitive intervention. Instead, over a year after his guilty plea, Council used drugs again, resulting in a dirty urine test and had his probation revoked.

I urge the Kentucky Supreme Court to carefully consider the implications of allowing trial courts to directly negotiate plea bargains with defendants. I believe that our criminal justice system would be best served by adopting a bright-line, absolute prohibition against judicial involvement in the plea bargaining process equivalent to that in the Federal Rules of Criminal Procedure. Kentucky should adopt clearly articulated safeguards to protect the integrity of the process.

I also find the manner in which Council's probation was revoked to be in contravention of the requirements of KRS 439.3106. In 2011, the Kentucky Legislature enacted comprehensive changes to the criminal justice system through the Public Safety and Offender Accountability Act, also known as House Bill 463. These changes included a new method for determining when it was appropriate to revoke probation under KRS 439.3106.

Although Council's probation was revoked on August 5, 2011, after the effective date of KRS 439.3106, the trial court did not make any findings that Council's failure to abide by the conditions of his probation constituted a significant risk to his prior victims or the community at large or that he could not be appropriately managed in the community as required by KRS 439.3106(1) before revocation and incarceration can be imposed. There is no evidence before this Court that this drug addict defendant who was charged with possession of a pipe with residue, and violated his probation by using drugs again, was a significant risk to the community or could not be appropriately managed in the community.

In the absence of such findings, trial courts are directed to impose alternative sanctions "appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community." KRS 439.3106(2). Even though HB 463 emphasizes that treatment is an appropriate way to reduce recidivism, no attempt was made to follow KRS 439.3106(2) and the spirit of HB 463 to determine whether Council could be rehabilitated through community-based drug treatment. *See* KRS 218A.005, KRS 196.286. The trial court instead focused on punishing Council's violation by sending him to serve his ten-year sentence, the maximum for two class D felonies.

In light of KRS 439.3106, I urge the Kentucky Supreme Court to not allow trial courts to impose a "hammer clause" when placing defendants on probation and then allowing these courts full discretion to revoke probation and impose the statutory maximum for any violation. If we do not focus on rehabilitating drug addicts and instead send them to serve lengthy sentences, we nullify the efforts of these reforms.

For the forgoing reasons I would reverse.

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