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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000786-MR

BRANDON FORD

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 13-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING AS MOOT

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Brandon Ford has directly appealed from the April 3, 2013, judgment of the Campbell Circuit Court adjudging him guilty of first-degree possession of a controlled substance and sentencing him to one year in prison.

Ford contests the circuit court's decision not to grant a period of presumptive probation pursuant to the 2011 amendments to Kentucky Revised Statutes (KRS) Chapter 218A. Because we agree with the Commonwealth that Ford's appeal is

moot and because the circumstances of this case do not support applying the exception to the mootness doctrine, we must dismiss the above-styled appeal.

In January 2013, the Campbell County grand jury returned a two-count indictment, charging Ford with first-degree promoting contraband pursuant to KRS 520.050 and possession of marijuana pursuant to KRS 218A.1422. These charges arose from offenses during the early morning hours of November 21, 2012, when Ford, a front seat passenger during a traffic stop, was found in possession of marijuana. He was arrested and transported to the detention center, where deputies located a baggie containing a substance believed to be heroin in Ford's left shirt sleeve pocket after he had been warned about bringing contraband into the center. In the uniform citation, Officer Day indicated that Ford was "manifestly under the influence of alcohol and was a danger to himself."

At a hearing on February 27, 2013, Ford moved to enter a guilty plea.¹ The court accepted Ford's open plea at the conclusion of the hearing and adjudged him guilty of an amended charge of first degree possession of a controlled substance on Count 1 and dismissed the possession of marijuana charge with prejudice. During the course of the hearing, the court indicated that it did not have the authority to divert his sentence or grant deferred prosecution, but that it did have the authority to grant probation, a prison sentence, or a split sentence. The court also ensured that Ford understood that because he was entering an open plea, rather than one with a recommended sentence from the Commonwealth, he would

¹ The video record indicates that this hearing took place on February 26, 2013, while the documentary record indicates the hearing took place the following day.

not be permitted to withdraw his plea once the court imposed a sentence on him because he was unhappy with the sentence.

The court held a sentencing hearing on March 27, 2013. Ford requested that the court impose a sentence of probation based upon the low threat level of his conviction, his ability to obtain employment, and his family support. The Commonwealth expressed concerns with Ford's prior criminal history and stated that he should receive a split sentence at a minimum. The court went through Ford's criminal history, which included convictions for robbery and possession of a handgun by a convicted felon as well as a probation violation. The court stated that this pattern established that he was not the best candidate for probation, but allowed Ford to argue otherwise. Ultimately, the court concluded that there were substantial and compelling reasons not to grant Ford probation based upon his past convictions, his failure to remain law-abiding when he was released from prison, and his lies to police officers related to his possession of heroin in the present case. The court stated that it was sentencing him to one year in prison.

The court entered a final judgment and sentence on April 3, 2013, memorializing its oral ruling and sentencing Ford to one year in prison. The court stated, "[h]aving given due consideration to the history, character and condition of the defendant; the Court finds that to release defendant on probation or conditional

discharge would unduly depreciate the seriousness of defendant's offense. The Court has considered alternative sentencing herein." This appeal now follows.²

On appeal, Ford contends that the circuit court abused its discretion in denying presumptive probation and, as a result, community-based drug treatment. "Kentucky case law holds that the determination of whether or not to grant probation is left to the discretion of the trial court[.]' *Turner v. Commonwealth*, 914 S.W.2d 343, 347 (Ky. 1996). This continues to be true under the new statutory scheme." *Asberry v. Commonwealth*, 2013 WL 1384902 *1 (2011-CA-001623-MR) (Ky. App. Apr. 5, 2013).³ "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Pursuant to the 2011 Amendments to KRS Chapter 281A addressing the crime of possession of a controlled substance in the first degree, "[i]f a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court

² Although Ford entered an unconditional guilty plea, he is nevertheless entitled to appeal a limited number of issues, including sentencing. *See Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008) ("While an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986), there are some remaining issues that can be raised in an appeal. These include . . . sentencing issues. [*Ware v. Commonwealth*, 34 S.W.3d 383, 385 (Ky. App. 2000); *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994).]").

³ "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." CR 76.28(4)(c).

determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010.” KRS 218A.1415(2)(d). “Presumptive probation” is defined as:

a sentence of probation not to exceed the maximum term specified for the offense, subject to conditions otherwise authorized by law, that is presumed to be the appropriate sentence for certain offenses designated in this chapter, notwithstanding contrary provisions of KRS Chapter 533. That presumption shall only be overcome by a finding on the record by the sentencing court of substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety[.]

KRS 218A.010(37).

In the present case, Ford contends that although the circuit court’s oral findings marginally complied with KRS 218A.010, its written findings did not comply with the statutory requirements, and that its written findings superseded and supplanted its oral findings. He also argues that there was insufficient evidence in the record to support the circuit court’s decision to deny presumptive probation. On the other hand, the Commonwealth argues that the circuit court did not abuse its discretion and that Ford’s appeal is moot because he has completed service of his sentence.

Before we may reach the merits of this case, we must address the Commonwealth’s motion to dismiss, which was passed to the merits panel by a three-judge motion panel. In the motion, the Commonwealth contends that Ford’s appeal is moot because he has served out his sentence, an argument also raised in its brief. After beginning service of his sentence, Ford was granted parole and was

later released from parole in November 2013. Accordingly, the Commonwealth contends that the presumptive probation issue, the only issue Ford raised, is moot because even if he were to be successful on appeal, he could not be placed on probation because his sentence had been completed. Because he had been released and the circuit court no longer had jurisdiction, the issue Ford raised on appeal was not capable of repetition yet evading review.

In response, Ford argues that this issue should be adjudicated because it is capable of repetition yet evading review, citing *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983). While he agrees that his appeal is technically moot, he asserts that it should be adjudicated on the merits because his one-year prison sentence is too short in duration to permit his appeal of the sentence to be fully litigated prior to the completion of his sentence. He also argued that there is a reasonable expectation that he would be subject to the same action again. Ford states that he is still suffering from an untreated drug problem, meaning that there is a reasonable expectation that he will be arrested again, face another charge of possession of a controlled substance, be denied presumptive probation and drug treatment, and serve out his sentence before an appeal may be fully litigated.

In *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992), the Supreme Court of Kentucky addressed the exception to the mootness doctrine:

Whether to apply the exception to the rule that a case will be dismissed when the issues are moot which we have recognized when the issues are “capable of repetition, yet

evading review,” involves more than just an important public question that is difficult to review. Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy. The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the “challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that the same complaining party would be subject to the same action again.” *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988).

In *Philpot*, the Supreme Court declined to extend the doctrine to an appeal related to the constitutionality of Senate Rule 48 of the 1992 General Assembly brought by two Kentucky state senators, who believed the rule at issue would be reenacted. The Court stated,

As predictable as that assumption might seem, it does not have the same certainty as the situation with which we were confronted in *Lexington Herald-Leader Co. v. Meigs*, *supra*. Nor is there the same degree of certainty that two years from now these appellants will have bills similar to the ones presently at issue buried in committee. Thus we hesitate to address the merits of this controversy at this time.

Id. at 494.

In *Meigs*, the Court addressed a situation where the public and press had been excluded from *voir dire* proceedings on the criminal defendant’s request.

The Court applied the exception, holding:

There is little doubt that the controversy now before our Court falls within the standard, “capable of repetition, yet evading review.” Unfortunately, the courts of this Commonwealth are faced with death penalty cases with alarming frequency. The problem of

when to hold individual voir dire in such cases, together with the important questions this raises related to public access, and more particularly news media access, to criminal trials, will likewise be with us.

Meigs, 660 S.W.2d at 661.

While we agree with Ford that his one-year sentence ultimately was too short to permit his appeal to be fully prosecuted, we do not agree that his situation fits into the exception to the mootness doctrine as expressed in *Meigs* and *Philpot*. The Commonwealth correctly states that Ford would not be subject to further action by the circuit court because it had lost jurisdiction over this particular case when he served out his sentence. It is pure speculation on Ford's part that because he was denied the benefit of community-based drug treatment he claimed he would have received had he been probated, he would again be arrested for drug possession, be denied presumptive probation, and serve out a sentence prior to completely litigating an appeal. Furthermore, even if Ford were successful on this appeal, the only result would be that the circuit court would enter a new judgment with the proper findings and language. But Ford would not be subject to another probated sentence in this case because he has already completed his prison sentence. We agree with the Commonwealth that a remand would be a waste of judicial time and resources. Therefore, we hold that the exception to the mootness doctrine does not apply in this case and that the appeal must be dismissed.

For the foregoing reasons, the Commonwealth's motion to dismiss the above-styled appeal as moot is GRANTED.

ALL CONCUR.

ENTERED: August 22, 2014

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

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