

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001154-MR

BARRY N. GRAY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 11-CR-00204

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, KRAMER,¹ AND STUMBO, JUDGES.

KRAMER, JUDGE: Barry N. Gray appeals the Henderson Circuit Court's judgment against him. Following a thorough review of the record, we affirm because Gray was sentenced in accord with his plea agreement and because his motion for pretrial diversion acknowledged that if he violated the terms of his

¹ Judge Joy A. Kramer, formerly Judge Joy A. Moore.

diversion, the circuit court could sentence him to five years of imprisonment, which is what occurred.

Gray was indicted on the charge of theft by deception over \$10,000. The Commonwealth provided an offer on a plea of guilty, in which it offered to recommend a sentence of five years of imprisonment in exchange for Gray's guilty plea to the charge of theft by deception of property valued at \$10,000 or more, and conditioned on Gray paying court costs and restitution in the amount of \$10,000. Gray accepted the plea offer and moved to enter an *Alford*² plea in accord with the offer. The circuit court entered an order on May 8, 2012, accepting Gray's *Alford* plea.

Subsequently, the circuit court entered an order noting that Gray had entered a plea to the charge of theft by deception *over* \$10,000, but that “[n]ow upon motion of the Commonwealth, and without objection by the defendant, the Court orders that the order noting that guilty plea is hereby amended to reflect that the defendant Barry N. Gray is guilty of theft by deception *under* \$10,000, a Class D Felony.” (Capitalization removed and emphasis added).³

² *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). An *Alford* plea “permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence.” *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). “The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary.” *Wilfong*, 175 S.W.3d at 102 (internal quotation marks omitted).

³ There is no explanation in the record for why the Commonwealth would move to amend the charge down after Gray already had entered an *Alford* plea to the charge with which he was indicted.

Gray and the Commonwealth entered into a diversion agreement. The court granted Gray's motion for pretrial diversion. That order included, *inter alia*, a provision that Gray "shall obey all rules and regulations imposed by Probation [and] Parole," as well as a provision that "[a]s required by KRS 533.030(1), [Gray] shall not commit another offense during the period of the Pretrial Diversion. Specifically, Defendant shall have no violation of the Penal Code or the Controlled Substances Act."

Approximately ten months later, an affidavit by a Probation and Parole Officer for Jefferson County was entered into the record. In the affidavit, the parole officer attested that Gray violated the conditions of his diversion as follows:

Leaving area of supervision without permission of Parole Officer.

On March 24, 2013[,] Mr. Gray was arrested in Switzerland County on outstanding warrant from Spencer County, IN. Mr. Gray was arrested at Belterra Casino in Florence, IN. Authorities state that he was also filmed gambling in an Ohio casino in the days previous to this. Mr. Gray did not have permission to leave Jefferson County, KY to gamble in either the state of Indiana or Ohio.

Failure to report arrest within 72 hours to Parole Officer.

Mr. Gray was arrested on March 24, 2013[,] and has failed to report the arrest to this officer. His attorney called on this date to inform this officer of his arrest. Mr. Gray was arrested on an outstanding warrant [which was issued on 2/2/13] from Spencer County, Kentucky on the charge of: Theft by Failure to Make Required Disposition of Property.

The court entered an order voiding the diversion agreement. The court found that, based upon the affidavit filed by Gray's probation officer, Gray had "violated the terms of his Pretrial Diversion Agreement by traveling out of state without the permission of his parole officer and by failing to report an arrest to his probation officer within 72 hours." Thus, the court voided Gray's diversion agreement.

The court subsequently entered its judgment against Gray. In its judgment, the circuit court stated that it found Gray "guilty of the offense of Theft By Deception of Property of Value of \$10,000 or more, committed on or about June 10, 2011, as charged in Count 1 of the indictment, and his/her punishment therefore is fixed at imprisonment for an indeterminate term of five (5) years."⁴ The court also ordered that Gray was "liable to pay the Commonwealth Attorney's Office restitution in the amount of \$10,000, which has been paid in full." The circuit court further ordered that the court costs assessed to Gray were paid in full.

Gray now appeals, contending that the circuit court abused its discretion in sentencing him to prison based upon conduct that occurred before the crime of conviction. Gray acknowledges in his brief that "the allegations leading to [his] removal from diversion were violations of the diversion agreement."

It is important to note that Gray does not challenge the circuit court's decision to revoke his diversion; rather, he merely alleges that the court erred in

⁴ Gray contends in his appellate brief that the judgment was subsequently corrected on September 30, 2013, upon Gray's motion, to reflect that he was convicted of the amended offense of theft by deception *under* \$10,000. However, the corrected judgment is not in the record before us.

sentencing him to prison for five years after his diversion was revoked.

Specifically, he argues that the circuit court

made specific findings on the record as to why [the court] was sending [Gray] to the penitentiary. However, the trial court based those findings that there was “substantial risk” that [Gray] would commit more crimes not on the allegations leading to his removal from diversion, but on (1) a pending civil case on which no testimony was provided; (2) criminal history from 1998, 1999, and 2000; and (3) the fact that another case was pending in Indiana – a case that had been pending from the time of the original diversion agreement.

(Emphasis removed).

As mentioned previously, Gray entered an *Alford* plea to the charges against him.

As a general rule, a voluntary^[5] guilty plea waives all defenses other than that the indictment charges no offense. Thus, there generally is no right to a direct appeal from a plea of guilty. However, a defendant may by direct appeal challenge the legality of a sentence imposed pursuant to a guilty plea because sentencing issues are considered “jurisdictional” and cannot be waived.

Elmore v. Commonwealth, 236 S.W.3d 623, 626 (Ky. App. 2007) (citations omitted). “The parties to a plea agreement are entitled to the benefit of their bargain.” *Commonwealth v. Reed*, 374 S.W.3d 298, 301 (Ky. 2012) (citation omitted).

In the present case, both parties received the benefit of their bargain: The Commonwealth received an *Alford* plea from Gray and, in exchange, Gray

⁵ Gray does not allege that his guilty plea was involuntary.

received a recommended sentence of five years of imprisonment. Because Gray was sentenced in accord with the plea agreement, he cannot now complain of the sentence he received.

Additionally, Gray's motion for pretrial diversion provided as follows: "In return for my plea, the Commonwealth has agreed to recommend a sentence of 5 years. I understand this is the maximum sentence the Court may impose under this plea agreement in the event the Court finds I have failed to successfully complete diversion." Therefore, Gray acknowledged in his motion for pretrial diversion that the court could impose a five-year sentence upon him if he failed to successfully complete diversion. He also admits in his appellate brief that he violated the terms of his pretrial diversion. In sum, Gray failed to successfully complete diversion as evidenced by his admission that he violated the terms of his diversion agreement. He also acknowledged in his motion for pretrial diversion that if he failed to successfully complete diversion, the court could sentence him to five years of imprisonment. Accordingly, he cannot now complain because he received the sentence for which he bargained.

Accordingly, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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