

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001353-MR
AND
NO. 2013-CA-001354-MR

GENE AULDIN CANTRELL

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NOS. 03-CR-00004 AND 03-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: Gene Auldin Cantrell appeals from the revocation of his probation by the Letcher Circuit Court. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this case are not contested. Cantrell was indicted in Letcher County for one felony count of receiving stolen property. He was also indicted in Letcher County for one count of burglary in the first degree and two felony counts of theft by unlawful taking. Both cases were resolved by guilty plea. Cantrell pled guilty as charged to the felony of receiving stolen property, in 03-CR-00004, for a five-year sentence probated for five years and to run concurrently with Letcher County case, 03-CR-00005, and consecutively with a Floyd County case, 09-CR-00180. On the same day, Cantrell also pled guilty to the amended charge of burglary in the third degree and two counts of felony theft by unlawful taking in the Letcher County case, 03-CR-00005. Cantrell received a sentence of five years' imprisonment in each count in this indictment which ran concurrently with each other and were probated for five years. This sentence was then run concurrently with the Letcher County case of 03-CR-00004 and consecutively with the Floyd County case, 09-CR-00180. These judgments and orders of probation were entered into the record on March 2, 2010.

Thereafter, on January 23, 2012, the Commonwealth filed a motion to revoke probation in each of the Letcher County cases. The motions alleged that Cantrell had failed to pay costs and restitution as ordered; had improperly left his area of supervision; failed to report to Tennessee authorities after being transferred to that state; was arrested on felony charges in Tennessee for money laundering, among other charges; was being investigated in Tennessee; and was a fugitive from Tennessee.

Hearing dates were continued until Cantrell was arrested in April 2013, and a probation revocation hearing was held before the Letcher Circuit Court on June 12, 2013. Therein, a probation and parole officer testified that Cantrell had his probation revoked in Floyd County on April 26, 2013. The Letcher Circuit Court found that Cantrell had violated his probation as alleged in the motion to revoke probation; accordingly, the court revoked Cantrell's probation and sentenced him to serve the sentence in the judgment. It is from this revocation that Cantrell now appeals.

On appeal Cantrell argues: (1) the court abused its discretion in running the five-year probation sentences consecutively to the Floyd County probation sentence of three years; and (2) because Cantrell is indigent and serving a significant term of years, court costs and fines should be vacated. The Commonwealth argues: (1) the court did not abuse its discretion in sentencing Cantrell; and (2) the costs and fines against Cantrell were properly imposed and should not be vacated. With these arguments in mind, we turn to the first issue presented by the parties, whether the court abused its discretion in running the Letcher County probation consecutively to the Floyd County probation.

First, we note,¹ “In reviewing probation hearings, we review the trial court's findings for abuse of discretion.” *Burke v. Commonwealth*, 342 S.W.3d 296, 297 (Ky. App. 2011), citing *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). 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) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

Cantrell first argues that the court abused its discretion in running the five-year probation sentences consecutive to the Floyd County probation sentence of three years. In support thereof, Cantrell relies upon KRS 533.020(4), which states:

¹ Additionally, neither of Cantrell’s arguments was preserved below. However, we believe it appropriate to address these arguments, nonetheless:

Since *Wellman* in 1985, a substantial body of Kentucky law has developed following the principle that appellate review of a sentencing issue is not waived by the failure to object at the trial court level. RCr [Kentucky Rules of Criminal Procedure] 10.26 provides a standard of review for alleged errors “not sufficiently raised or preserved for [appellate] review.” However, where we have held that certain issues are preserved for appellate review despite there having been no objection in the trial court, it is difficult to conceive a level of inaction that could be regarded as “not sufficiently raised or preserved.” When nothing is required to preserve the issue for appellate review, palpable error review is superfluous. Thus, the palpable error standard of review under RCr 10.26 is not applicable to appellate review of a true “sentencing issue.”

Jones v. Commonwealth, 382 S.W.3d 22, 27-28 (Ky. 2011).

In reaching this conclusion, the *Jones* court relied upon *Ware v. Commonwealth*, 34 S.W.3d 383 (Ky.App.2000) (failure of the trial court to determine whether or not the defendant was eligible for probation, as required by KRS [Kentucky Revised Statutes] 533.010) and *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky.2010) (the sentencing error was the imposition of fines and court costs upon an indigent defendant in violation of KRS 534.030(4) and KRS 23A.205(2)). Thus, we believe it appropriate to address Cantrell’s arguments.

(4) The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.

Further, Cantrell relies upon KRS 533.040(1) which states:

(1) A period of probation or conditional discharge commences on the day it is imposed. Multiple periods, whether imposed at the same or different times, run concurrently.

Ultimately, we decline to opine as to whether the court abused its discretion in setting the Letcher County probation consecutively to the Floyd County probation as Cantrell did not appeal the judgment and sentence which set forth his probation. Instead, Cantrell appealed from the order revoking his probation, which we shall now address.

Of import, KRS 532.040 states:

When a person is convicted of an offense, other than a capital offense or having been designated a violent offender as defined in KRS 439.3401, the court, where authorized by KRS Chapter 533 and where not prohibited

by other provisions of applicable law, may sentence such person to a period of probation or to a period of conditional discharge as provided in that chapter. A sentence to probation or conditional discharge shall be deemed a tentative one to the extent that it may be altered or revoked in accordance with KRS Chapter 533, but for purposes of appeal shall be deemed to be a final judgment of conviction. In any case where the court imposes a sentence of probation or conditional discharge, it may also impose a fine as authorized by KRS Chapter 534.

Indeed, “upon revocation, nothing is left to suspend execution of the term of imprisonment, and the court can only order that the defendant be committed to the Department of Corrections to serve the term of imprisonment.” *Goldsmith v. Commonwealth*, 363 S.W.3d 330, 336 (Ky. 2012). Thus, the court *sub judice* set forth in the probation revocation order that Cantrell’s probation was revoked and he was to serve the sentence ordered in the original judgment. Unlike the situation presented in *Goldsmith*, the judgment herein was not silent; the court ordered the Letcher County cases to run concurrently and both to run consecutively to the Floyd Circuit Case. Given that Cantrell’s probation was revoked well within the five-year probation period, whether calculated consecutively to or concurrently with the Floyd County probation, we cannot say that the court abused its discretion in revoking Cantrell’s probation. Accordingly, we decline to reverse on this ground.

Last, Cantrell argues that the court erred in imposing court costs of \$130.00 and a fine of \$10,000 in each Letcher County case. The Commonwealth argues the court did not err in imposing the original sentence. At the time Cantrell

pled guilty he was represented by private counsel; however, at the time of revocation he was indigent and represented by appointed counsel. Cantrell argues that to so impose fines and court costs on an indigent defendant was error. We disagree as at the time of sentencing (*i.e.*, the time when the fines and court costs were imposed), there was no indication that Cantrell was indigent. *See* KRS 23A.205(3)(discussing costs and fines at the time of sentencing) and *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010) (at the time of trial, defendants were receiving the services of a public defender and were clearly indigent). We do not believe that the court erred in imposing the original sentence, which included fines and costs upon revocation of probation. Accordingly, we decline to reverse on this ground.

Finding no error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda Roberts Horsman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky