

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000180-MR
AND
NO. 2014-CA-000181-MR

JOHN P. ELY

APPELLANT

v.

APPEALS FROM HARLAN CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NOS. 08-CR-00312 AND 08-CR-00313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: John Ely appeals from the Harlan Circuit Court's order sentencing him to three years' imprisonment after it voided his diversion on two felony counts. Ely alleges that the trial court failed to follow the proper procedure pursuant to Kentucky Revised Statutes (KRS) 533.010(2) and to consider

alternatives to the recommended sentence. The trial court failed to evidence its consideration of probation as required by long-standing statutory law. Therefore, we must reverse and remand.

Background

On August 19, 2008, a Harlan County grand jury indicted Ely on two counts of felony non-support. Ely later entered into a plea agreement whereby the trial court sentenced him to three years on each count, to run concurrently, but diverted for a period of five years given that Ely made restitution totaling \$140.00 per month toward his child support arrearage which then exceeded \$8,200.00.

In April 2010, the Commonwealth filed a motion to set aside Ely's diversion and impose the recommended sentence due to Ely's failure to make consistent restitution. At a hearing on the motion, the trial court continued the matter to January 2011 to allow Ely to obtain employment and make consistent payments. Ely did so, and the Commonwealth withdrew its motion to void his diversion. Three months later, the Commonwealth renewed its motion, alleging that after withdrawal of its motion, Ely stopped making payments. When Ely failed to appear in court on this motion, the trial court issued a warrant for his arrest. Two years passed before authorities arrested Ely on the 2011 warrant.

At an October 2013 hearing on the Commonwealth's motion to void Ely's diversion, Ely admitted his failure to pay consistent restitution. Accordingly, the trial court voided Ely's diversion, but it once again gave Ely two months before formal sentencing to obtain employment and make restitution payments. During

this time, Ely made what both the Commonwealth and Ely's counsel referred to as "significant payments." However, his arrearage still approached \$8,000.

At the sentencing hearing in December 2013, a different judge presided. Ely's counsel informed the trial court that Ely's diversion had already been voided, but that it was Ely's request that his sentence be probated so that he may continue making payments. After Ely's counsel conceded that Ely had violated the terms of the 2008 diversion agreement, the trial court imposed the sentence recommended in the diversion agreement. Ely appeals from the trial court's judgments of sentence.

Standard of Review

On appeal, Ely argues that the trial court improperly placed exclusive emphasis upon the Commonwealth's recommended sentence under the diversion agreement and failed to give sufficient consideration to probation pursuant to KRS 533.010. Whether to grant or deny probation is a matter reserved to the strict discretion of the trial court. *See Turner v. Commonwealth*, 914 S.W.2d 343, 347 (Ky. 1996). Therefore, we will disturb the trial court's holding in Ely's case only upon a finding that the trial court abused its discretion, evidenced by a ruling that was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Analysis

KRS 533.256(1) provides, in part,

[i]f the defendant fails to complete the provisions of the pretrial diversion agreement within the time specified, or is not making satisfactory progress toward the completion of the provisions of the agreement, ... the Commonwealth may apply to the court for a hearing to determine whether or not the pretrial diversion agreement should be voided and the court should proceed on the defendant's plea of guilty in accordance with the law.

If a court voids a defendant's diversion, as in most sentencing proceedings, KRS 533.010(2) requires that court to "give due consideration to the possibility of probation[.]" *Bell v. Commonwealth*, 566 S.W.2d 785, 787 (Ky. App. 1978).¹ Ely alleges that the trial court's statements at the December 2013 hearing indicate that it "ignored" these statutory instructions. Pretrial diversion is an "interruption of prosecution prior to final disposition." *Prather v. Commonwealth*, 301 S.W.3d 20, 22 (Ky. 2009), *quoting Thomas v. Commonwealth*, 95 S.W.3d 828 (Ky. 2003). If a trial court voids diversion, "KRS 533.256(1) contemplates that the trial court will

¹ KRS 533.010(2) reads, in its entirety,

(2) Before imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, after due consideration of the defendant's risk and needs assessment, nature and circumstances of the crime, and the history, character, and condition of the defendant, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

- (a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;
- (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or
- (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

enter final judgment in accordance with the defendant's guilty plea.”

Commonwealth v. Derringer, 386 S.W.3d 123, 126 (Ky. 2012), *citing Flynt v. Commonwealth*, 105 S.W.3d 415, 418 (Ky. 2003). In entering this judgment, under KRS 533.010, the court must choose between a sentence of imprisonment or probation; and it is well-established that the trial court “must place in the record a statement sufficient to show that the necessary consideration [of probation] has been given.” *Bell*, 566 S.W.2d at 787. Though this can be achieved either verbally or in writing, the video and written record clearly show that the trial court unfortunately provided neither. Hence, while we do not agree with Ely's statement that the trial court simply “ignored” its statutory obligation, remand is necessary.

On remand, the trial court shall conduct a new formal sentencing hearing and demonstrate either in or on the record that it considered the requisite factors listed in KRS 533.010(2) and the reasons why probation either is or is not appropriate. In rendering this result, this Court passes no judgment as to the propriety of the trial court's chosen sentence which was consistent with Ely's diversion agreement. We merely state that the trial court, in rendering its sentence, must both consider the possibility of probation and demonstrate its consideration.

Conclusion

While the circumstances of Ely's case and his history of non-compliance tempt us to accept the Commonwealth's invitation to infer the trial court's consideration and rejection of probation, we must err on the side of adherence to long-standing Kentucky law. Accordingly, the December 20, 2013

and December 26, 2013 judgments of sentence on Ely's plea of guilty are reversed and remanded to the Harlan Circuit Court for formal sentencing proceedings consistent with KRS 533.010.

ALL CONCUR.

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